B.E., on behalf of minor child, F.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to suspend F.E. for one year based upon incidents that included cyberbullying and disruption of school activities. Prior to the commencement of the 2018-2019 school year, petitioner withdrew F.E. from Piscataway High School (PHS) and enrolled him in a private school in Edison, New Jersey. The Board filed a motion to dismiss the petition for lack of jurisdiction. Petitioner claimed that he retained standing to challenge the findings of the Board and the discipline imposed, notwithstanding the decision to enroll F.E. in a private school. The Board contended that once F.E. was disenrolled from PHS, the Commissioner and the Office of Administrative Law lost jurisdiction over this matter; therefore, petitioner can no longer challenge the accuracy of F.E.'s disciplinary records using the regulations at *N.J.A.C.* 6A:32-7.7, but instead must rely on the Destruction of Public Records Law, *N.J.S.A.* 47:3-15. Petitioner argued that he has not asked for expungement of F.E.'s records, even though the Board has tried to frame the issue herein as a challenge to their accuracy pursuant to *N.J.A.C.* 6A:32-7.7; rather, petitioner seeks only a review of the merits of the Board's decision which resulted in F.E.'s suspension.

The ALJ found, *inter alia*, that: the only issue to be determined in this case is whether the Commissioner maintained jurisdiction to hear the appeal after F.E. was disenrolled from PHS; though the within dispute began as a challenge to discipline under the school laws, once F.E. was disenrolled from the Piscataway school district, the Commissioner no longer retained jurisdiction over this matter. In so determining, the ALJ relied upon *R.W., on behalf of minor child, A.W. v. Board of Educ. of the Township of Washington, Gloucester County* in support of the position that since F.E. is no longer a student in the respondent's school district, the Commissioner is without jurisdiction to adjudicate the controversy. The ALJ granted the Board's motion to dismiss the petition.

Upon comprehensive review and consideration, the Commissioner found, *inter alia*, that the ALJ erroneously dismissed the petition for lack of jurisdiction and remanded the matter to the OAL for further proceedings. In so finding, the Commissioner noted, *inter alia*, that F.E.'s disenrollment from the District during these proceedings does not void the Commissioner's jurisdiction to review a challenge to the one-year suspension, and petitioner is entitled to a decision on the merits. Accordingly, the matter was remanded to the OAL for further proceedings consistent with these concerns.

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 4, 2019

2-19

OAL DKT. NO. EDU 11838-18
AGENCY DKT. NO. 182-7/18

B.E., on behalf of minor child, F.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, B.E., and the Piscataway Board of Education's (Board) reply thereto. In this matter, the petitioner is challenging the Board's decision to suspend F.E. for one year, as the result of an incident that occurred in March 2018. After the petition was filed in July 2018, the petitioner withdrew F.E. from the District and enrolled him in private school. The Administrative Law Judge (ALJ) found that because F.E. was disenrolled from the District, the Commissioner no longer has jurisdiction over this matter; consequently, the ALJ granted the Board's motion to dismiss.

Upon a comprehensive review of the record, the Commissioner finds that the ALJ erroneously dismissed the petition of appeal for lack of jurisdiction. It is well established that the Commissioner of Education's jurisdiction extends to controversies and disputes arising under New Jersey school law. *N.J.S.A.* 18A:6-9. Further, a challenge to a board of education's decision to impose discipline on a student falls squarely within the Commissioner's jurisdiction. Therefore, the Commissioner has jurisdiction to determine whether the Board's decision to impose a one-year suspension on F.E. was arbitrary, capricious or unreasonable. Importantly, the disenrollment of

F.E. from the District during these proceedings does not void the Commissioner's jurisdiction to review a challenge to the one-year suspension. *See, Destiny Jackson v. Board of Educ. of the Morris School District, Morris County, et al.*, Commissioner Decision No. 462-14, decided November 20, 2014 (Despite the fact that the petitioner had graduated from high school and was no longer a student in the school district, the petitioner was entitled to a hearing to determine whether the board of education's decision to give her a long term suspension was arbitrary, capricious or unreasonable). [1] Moreover, any impact that a final decision may have on the petitioner's ability to seek the modification of F.S.'s student records would likewise not negate the Commissioner's jurisdiction over the suspension decision itself. The petitioner is entitled to a decision on the merits of the Board's imposition of a one-year suspension on F.E.; thus, this matter should not be dismissed on procedural grounds.[2]

Accordingly, the Commissioner hereby remands this matter to the OAL for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/04/19

Date of Mailing: 1/08/19

[1] In the Initial Decision, the ALJ relied on *R.W., on behalf of minor child, A.W. v. Board of Educ. of the Township of Washington, Gloucester County*, EDU 8073-09, Initial Decision, decided October 21, 2009, *affirmed*, Commissioner Decision No. 396-08, decided December 2, 2009, in support of the position that, since F.E. is no longer a student in the District, the Commissioner does not have jurisdiction in this matter. The facts and procedural history in *R.W., supra*, are distinguishable from this matter. The ongoing dispute between R.W. and the Washington Township Board of Education outlined in the Initial Decision indicates that other concerns regarding *res judicata* and the 90-day rule were also a factor that led to the disposition of that case. The Commissioner's decision in *Jackson, supra*, is analogous to the circumstances in this case, and is more appropriately applied to support the remand of this matter for a determination as to whether the Board's disciplinary decision was arbitrary, capricious or unreasonable.

[2] It appears from the record that the decision to disenroll F.E. from the District and to place him in a private school was in direct response to the fact that he was suspended from Piscataway High School for one year. The one-year suspension ends in March 2019, and it is possible that F.E. could be reenrolled in the District at some point thereafter. The potential reenrollment of F.E. in the District also accentuates the need for a decision on the merits.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 11838-18
AGENCY REF. NO. 182-7/18

B.E. O/B/O F.E.,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF PISCATAWAY
SCHOOLS, MIDDLESEX COUNTY,
Respondent.

Chinemerem N. Njoku, Esq., for petitioner (C.N. Njoku, LLC, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: October 29, 2018 Decided: November 20, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE

Petitioner B.E. brings this action on behalf of his son, F.E., to appeal the decision of respondent Board of Education of the Township of Piscataway Schools (BOE) to suspend F.E. for one-year, effective March 29, 2018.

PROCEDURAL HISTORY

On March 16, 2018, Teresa M. Rafferty (Rafferty), Superintendent of the Piscataway Township Schools, sent written notice to petitioner that F.E. was suspended for ten days as a result of an incident that occurred on March 14, 2018. On March 28, 2018, Rafferty sent written notice to petitioner that F.E.'s suspension was extended for one year, through March 13, 2019. Petitioner appealed this decision to the BOE and on April 12 and 26, 2018, the BOE held a hearing to consider Rafferty's recommendation to suspend F.E. for one year. On May 1, 2018, the BOE issued a decision upholding Rafferty's finding that F.E. engaged in disciplinable conduct but modifying the grounds and terms of the suspension.

On July 30, 2018, petitioner filed an appeal of the Board's decision to issue the suspension with the Commissioner of the New Jersey Department of Education (DOE), which was transmitted to the Office of Administrative Law (OAL) and filed as a contested matter on August 16, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. During a prehearing telephone conference on September 24, 2018, the parties acknowledged that prior to the commencement of the 2018-2019 school year, petitioner withdrew F.E. from Piscataway High School and enrolled him in a private school. As directed during the conference on October 11, 2018, the BOE filed the present motion to dismiss the petition for lack of jurisdiction or, alternatively, for failure to state a claim upon which relief may be granted. Petitioner filed a response on October 25, 2018. The BOE filed a reply on October 29, 2018, and the motion is now ripe for consideration.

FACTUAL DISCUSSION AND FINDINGS

The facts in this matter are undisputed. Accordingly, I **FIND** the following **FACTS**:

1. During the 2017-2018 school year, F.E. was enrolled in Piscataway High School (PSH).

2. Due to an incident or series of incidents that occurred on March 14, 2018, Rafferty suspended F.E. from PSH for ten days. On March 29, 2018, Rafferty

sent a letter to petitioner stating that F.E. was guilty of cyberbullying and disruption of school activities and that his suspension was extended for one year, through March 13, 2019.

3. Petitioner appealed Rafferty's decision to the BOE. The BOE modified the grounds and terms of suspension but continued to suspend F.E. from the PSH general education program until the beginning of the third marking period of the 2018-2019 school year.

4. Petitioner appealed the BOE decision to the Commissioner of the DOE.

5. Prior to the commencement of the 2018-2019 school year, petitioner withdrew F.E. from PSH and enrolled him in a private school in Edison, New Jersey.

POSITIONS OF THE PARTIES

The parties agree that petitioner initially appealed the decision of the BOE that F.E. engaged in misconduct and the penalty imposed and sought to have F.E. reinstated at PSH for the 2018-19 school year. Respondent contends, however, that the Commissioner, and the OAL, lost jurisdiction over this matter when F.E. disenrolled from PSH and that petitioner can no longer challenge the accuracy of F.E.'s disciplinary records using the regulations at N.J.A.C. 6A:32-7.7. Respondent states that petitioner must rely on the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq.

Petitioner claims that he retained standing to challenge the findings of the BOE and the discipline imposed, notwithstanding his decision to enroll his son in a private school. Petitioner has not asked for expungement of his records, even though the Board has tried to frame the issue here as a challenge to their accuracy, pursuant to N.J.A.C. 6A:32-7.7. All petitioner is asking for is a review of the merits of the Board's decision in the underlying case, which resulted in the imposition of discipline.

LEGAL ANALYSIS AND CONCLUSION

"To exercise jurisdiction over a dispute, an administrative agency must have specific legislative authority." Dolan v. Centuolo, Nos. A-2470-10T4, A-2710-10T4, at *11 (App. Div. July 9, 2012), <http://njlaw.rutgers.edu/collections/courts/> (citing Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 426 (App. Div. 2002)). Pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education

> shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner . . .
>
> [N.J.S.A. 18A:6-9 (emphasis added).]

Even though this dispute began as a challenge to discipline under the school laws, and despite the arguments made by both parties regarding the legal basis by which petitioner might seek to have F.E.'s records from PSH expunged,[1] the only issue here is whether the Commissioner maintained jurisdiction to hear F.E.'s appeal after F.E. disenrolled from PSH. As the Commissioner succinctly stated in R.W. o/b/o A.W. v. Board of Education of the Township of Washington, Gloucester County, OAL Docket No. EDU 8073-08, Initial Decision (October 21, 2009), affirmed, Commissioner (December 2, 2009):

> As the minor child on whose behalf the case was brought has been disenrolled from respondent's school district, the Commissioner is without jurisdiction to adjudicate the controversy.

Accordingly, I **CONCLUDE** that petitioner's challenge to the decision of the respondent Board is no longer within the jurisdiction of the Commissioner.

---

[1] The Board concedes that its "research has not disclosed any authority that would confer standing on petitioners to seek expungement of their son's disciplinary records . . . now that he has been disenrolled from [PSH]." Letter Br. of Resp't. (October 10, 2018), p. 4. Such authority is arguably not necessary (even were the Commissioner to maintain jurisdiction) given that petitioners are not seeking to expunge their son's records, they are seeking to challenge the decision of the Board memorialized in those records.

ORDER

It is hereby **ORDERED** that respondent's Motion to Dismiss is **GRANTED** and **B.E.'s** petition is **DISMISSED.**

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

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

November 20, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: November 20, 2018

Date Mailed to Parties: November 20, 2018

nd

APPENDIX

EXHIBITS

For Petitioner:

P-1 Petitioner B.E. on behalf of F.E.'s Response to Respondent's Motion to Dismiss, dated October 24, 2018

For Respondent:

R-1 Respondent Township of Piscataway Board of Education, Middlesex County, Motion to Dismiss the Petition of Appeal for Lack of Jurisdiction or, Alternatively, for Failure to State a Claim Upon Which Relief May be Granted, dated October 10, 2018

OAL DKT. NO. EDU 09948-17
AGENCY DKT. NO. 81-4/17

STERLING EDUCATION ASSOCIATION	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/09/19

Date of Mailing: 1/09/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09948-17
AGENCY DKT. NO. 81-4/17

STERLING EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

Amy I. Gillette, Esq. for petitioner (Zeller & Wieliczko, LLC, attorneys)

Jeffrey R. Caccese, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: November 16, 2018 Decided: November 20, 2018

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 17, 2017, 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 filed the executed Stipulation of Settlement and Release, as well as the Board Minutes of the November 1, 2018 meeting approving this settlement, both of which are attached hereto.

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

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

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

I **CONCLUDE** that the Stipulation of Settlement and Release 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 days and unless 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 20, 2018
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 11.27.18

Date Mailed to Parties: 11.27.18

tat/lam

NOV 13 2018

ZELLER & WIELICZKO, LLP
Matthew B. Wieliczko, Esquire
Attorney Identification No. 040831989
Amy L. Gillette, Esquire
Attorney Identification No. 014431998

Attorneys for Petitioners,
Sterling Education Association,
Individually and on behalf of members
Dan Riley and John Greener

120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: (856) 428-6600

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No: EDU 09948-2017 S

STERLING EDUCATION ASSOCIATION,
Individually and on behalf of members
Dan Riley and John Greener,

Petitioner,

vs.

STIPULATION OF SETTLEMENT
AND RELEASE

STERLING REGIONAL BOARD
OF EDUCATION,

Respondent

This settlement is made and entered into by and between Sterling Regional High School Board of Education (hereinafter "Board") and the Sterling Education Association, (hereinafter "Association"), Dan Riley (hereinafter "Mr. Riley"), and John Greener (hereinafter "Mr. Greener"). Please note that this settlement will not serve as precedent in any other matter.

WHEREAS, the Association is the exclusive negotiation representative of certain employees employed by the Board; and

WHEREAS, the Board and the Association are parties to a collective negotiation agreement (hereinafter "the CNA"); and

WHEREAS, Mr. Greener and Mr. Riley both applied to the Superintendent for their tuition to be reimbursed by the Board for master's level courses for Spring 2017 courses; and

WHEREAS, Mr. Greener and Mr. Rileys' respective request for tuition reimbursement were denied by the Board; and

WHEREAS, the Board has at all times denied that any tuition reimbursement was owed to Mr. Greener or Mr. Riley;

WHEREAS, the Board, the Association, Mr. Riley, and Mr. Greener wish to avoid the expense and uncertainty of any further proceedings and desire to fully settle any and all claims and issues that were raised or could have been raised in the instant appeal.

NOW, THEREFORE, in consideration of the promises hereinafter set forth, the Board, the Association, Mr. Riley, and Mr. Greener hereby agree to settle this controversy upon the following terms and conditions:

1. The respondent Sterling Regional Board of Education will issue a payment of $1,000.00 to petitioner Dan Riley. Petitioners take the position that this payment represents the tuition reimbursement for master's level courses, which Mr. Riley sought approval and reimbursement for during the Spring 2017 semester, and completed during the Spring 2017 semester. The Board takes no position as to whether the payment represents reimbursement available to Mr. Riley in any particular semester/year. The Board

only represents that it is making the payment in full and final settlement of the instant dispute.

2. The respondent Sterling Regional Board of Education will issue a payment of $1,000.00 to petitioner John Greener. Petitioners take the position that this payment represents the tuition reimbursement for master's level courses taken at Wilmington University, which Mr. Greener sought approval and reimbursement for during the Spring 2017 semester, and completed between the Spring 2017 semester and Summer 2018 semester. The Board takes no position as to whether the payment represents reimbursement available to Mr. Greener in any particular semester/year. The Board only represents that it is making the payment in full and final settlement of the instant dispute.

3. Each party hereby releases the other from any and all claims, grievances, causes of action, suits, actions at law and in equity, administrative proceedings and judicial or quasi-judicial proceedings of any kind whatsoever, which have been or could have been brought, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the actions giving rise to the within controversy, except as may be necessary to enforce the terms of this Stipulation.

4. This Stipulation shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose. Each party shall be responsible for his or its own attorney fees and costs.

5. This Stipulation of Settlement and Release contains the entire agreement between the parties, and all terms of this Stipulation are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

6. Petitioners, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of these matters hereby agree to a dismissal, with prejudice, of their Petition of Appeal in this matter.

7. This Agreement shall be incorporated into an Initial Decision by the Honorable Judge Dorothy Incaravito-Garrabrant, ALJ, which shall be subject to approval and adoption by the Commissioner of Education.

8. The parties to this Settlement Agreement agree not to file Exceptions.

9. The parties agree that this Settlement Agreement shall be deemed non-precedential and may not be used in any future proceedings.

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates set forth below.

PETITIONER

Date: _____

DAN RILEY

PETITIONER

Date: 10/30/18

JOHN GREENER

STERLING EDUCATION ASSOCATION

Date: 10/31/18 BY:

JIM BLUMENSTEIN, SEA PRESIDENT

STERLING REGIONAL BOARD OF EDUCATION

Date: 11/1/18 BY:

Paul Simms, Board President

NOV 16 2018

WINTER SPORTS SCHEDULES

c. Approve the 2018-2019 Winter Sports Schedules.

BOYS BASKETBALL DONATION

d. Rescind the approval to accept a $150 donation from Just Glass & Mirror Inc. to the Sterling Boys Basketball Team (10/18/18 BOE meeting). The donation was given to the Boys Basketball Booster Association.

ARC OF NJ PLANNING FOR ADULT LIFE PROJECT

e. Approve the Arc of NJ Planning for Adult Life Project for Individual Educatio students at Sterling HS during the 2018-2019 school year. There is no cost to the district for this program.

EARLY GRADUATION

f. Approve Early Graduation for student #8309762868 during the 2018-2019 school year based on the condition that all graduation requirements are met by the end of the 1st semester.

OCCUPATIONAL & PHYSICAL THERAPY SERVICES

g. Approve Occupational & Physical Therapy services from Virtua Health Inc. during the 2018-2019 school year, as needed, at a cost of $76/hr.

ADDENDUM TO SUPERINTENDENT'S REPORT

Motion by CONDELL seconded by OKESON-BRANDT that the Board of Education approve the following Education recommendations of the Superintendent.

Roll Call Vote: Badey, Carman, Condell, Hiltner, Miller, Okeson-Brandt, Radcliff, Tolomeo, and Sims voting YES.

MOTION CARRIED

NANCY LEBANO

a. Authorize staff member, Nancy Lebano, to attend the SLPs: Enhance Therapy Effectiveness for Auditory Processing Disorder, Memory Deficits, Attention Deficit Disorder, and Language Processing Workshop on January 9, 2019 in Cherry Hill, NJ at a cost of $269 for the registration fee plus reimbursement for travel/mileage expenses in accordance with district policy/guidelines.

LEAVE REPLACEMENT SUBSTITUTE SCIENCE TEACHER

b. Approve the following individual as a Leave Replacement Substitute Science Teacher effective on/about November 5th, 2018 through January 11th, 2019 at a per diem rate based on Step 1 of the BA salary guide pending completion of all necessary paperwork.

Mary Ann Sandlin

SEA SETTLEMENT AGREEMENT – TUITION REIMBURSEMENT

c. Approve the attached settlement agreement with the SEA regarding Tuition Reimbursement.

SEA AGREEMENT

d. Approve the attached agreement with the Sterling Education Association effective July 1, 2018 through June 30, 2021.

I hereby certify this to be a true and correct copy of minutes from the November 1, 2018 meeting of the Sterling High School Board of Education.

Joanne G. Augustine, Board Secretary

OAL DKT. NO. EDU 16998-18
(EDU 12931-18 ON REMAND)
AGENCY DKT. NO. 206-8/18

L.I.S., ON BEHALF OF MINOR CHILD, J.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, proposed 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 – mindful of the Commissioner's November 8, 2018 determination that the settlement agreement previously submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement. Since there is now a Board resolution approving the settlement, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/09/19

Date of Mailing: 1/09/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16998-18

AGENCY DKT. NO. 206-8/18

ON REMAND

OAL DKT. NO. EDU 12931-18

L.I.S. ON BEHALF OF MINIOR CHILD, J.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

Respondent.

Jessica Weinberg, Esq., for petitioner (Manes & Weinberg, attorneys)

Amy Canning, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: September 24, 2018 Decided: November 29, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 30, 2018 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. A copy of the Stipulation of Settlement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

November 29, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 12/05/2018

Mailed to Parties:
sej

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Facsimile
Attorneys for Respondent,
Pequannock Township Board of Education
Our File No.: 8/161

L.I.S. o/b/o J.S.,	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF THE
Petitioner	:	STATE OF NEW JERSEY
	:	
v.	:	
	:	OAL Dkt. No.: EDU 129-31-18
Pequannock Township	:	Agency Ref. No.: 206-8/18
Board of Education,	:	
	:	**SETTLEMENT AGREEMENT**
Respondent	:	
	:	
	:	

This Settlement Agreement (the "Agreement") is entered into by and between the Pequannock Township Board of Education, which has offices located at 538 Newark Pompton Turnpike, Pompton Plains, NJ 07444 (the "Board"), and L.I.S. on behalf of her minor child, J.S., who are domiciled at 24 West Sunset Road, Pompton Plains, New Jersey 07444 (the "Petitioner") (collectively, the "Parties"); and

WHEREAS, Petitioner owns a home within the Pequannock Township School District (the "District"), which Petitioner considers to be her "domicile," as that term is understood under the New Jersey regulations governing school attendance (*N.J.A.C.* 6A: 22-1 *et seq.*), and which the Board does not challenge or dispute; and

WHEREAS, J.S. is presently enrolled in the District and eligible to attend Pequannock Township High School as a general education tenth grader; and

WHEREAS, Petitioner recently advised the District that Petitioner and J.S. temporarily relocated to New Orleans, Louisiana on or around August 28, 2018 for approximately three months, in connection with Petitioner's work responsibilities. However, Petitioner further advised that Petitioner and J.S. have every intention of returning to their Pequannock Township home and the Pequannock Township High School during the 2018-2019 school year; and

WHEREAS, Petitioner requested that the Board arrange for and provide online instruction to J.S. during their temporary stay in New Orleans; or, in the alternative, and if Petitioner paid for such online services, that the Board agree to release to the online provider all relevant assessment materials, and subsequently to accept all of the online course work completed by J.S. upon her return to the District; and

WHEREAS, the Board declined to pay for the online services or to release its assessment materials, but advised Petitioner that J.S. remained eligible to attend Pequannock Township High School, and further advised Petitioner that any course work completed through a public school district in New Orleans would be reviewed upon J.S.'s return to the District, with credit assigned accordingly; and

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education, together with an Application for Emergent Relief, which were assigned Agency Reference No. 206-8/18 and OAL Docket No. EDU 129-31-18; and

WHEREAS, the Parties are desirous of resolving this matter without the time and expense associated with litigation.

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

1. J.S. will be withdrawn from the District effective upon the execution of this Agreement by Petitioner because she is temporarily residing in New Orleans, Louisiana, without prejudice to Petitioner's right to re-enroll J.S. in the District after their return to their Pequannock residence. It is expressly understood by the Parties that once J.S. is withdrawn from the District, and until such time as she is re-enrolled by Petitioner, the Board will have no educational responsibility for J.S.

2. Petitioner has advised the Board that she intends to independently contract with the FlexSchool, a private school located in Berkeley Heights, New Jersey that also provides online instruction to qualified students where necessary and appropriate. Petitioner has agreed to assume all financial responsibility for the courses completed by J.S. through the FlexSchool, and the Board will not be required or expected to oversee this program, or to release to Petitioner or the FlexSchool any of its assessment materials, such as tests, quizzes, homework assignments, PowerPoints, etc.

3. However, assuming Petitioner and J.S. return to Pequannock Township and J.S. is re-enrolled in the District, the District expressly agrees to accept all credits completed through the FlexSchool in the same manner it would otherwise accept the online and/or transfer credits of any student entering the District in the middle of a school year. Namely, the credits will be reviewed and, assuming the courses and related work were completed and that the District offers a corresponding course in District, the credits will be accepted. It is understood that if J.S. elects to take any online courses for which the District does not have a corresponding course (such as cooking), the District will be unable to accept or convert the credit.

4. It is expressly acknowledged by the Parties for purposes of this Agreement that the online courses offered by the FlexSchool and delineated in Paragraph 6 below align with the New Jersey Core Curriculum content standards, such that they are consistent with the curriculum of Pequannock Township High School. To

that end, should the FlexSchool contact the Board to inquire whether the Board intends to accept the credits J.S. earns for those online courses through the FlexSchool, the Board agrees to confirm that: (1) the credits will be reviewed and, assuming the courses and related work are completed and the District offers a corresponding course in District, the credits will be accepted; and (2) the courses delineated in Paragraph 6, which are to be taken by J.S. during the first semester of the 2018-2019 school year, align with the New Jersey Core Curriculum content standards such that they are consistent with the curriculum of Pequannock Township High School.

5. In addition to accepting the credit for all courses completed through the FlexSchool, the Parties also agree that the District will review the coursework completed by J.S. in order to issue grades for each completed course. It is expressly understood, however, that the grades awarded by the FlexSchool will not necessarily be the grades provided by the District once the credit is reviewed and converted. This means that if J.S. receive an "A" in American Literature from the FlexSchool, there is no guarantee that the District would also award J.S. an "A." However, the District will not unreasonably withhold awarding J.S. an "A" simply because the work was not completed at Pequannock Township High School and will review the coursework completed by J.S. through the FlexSchool in the same manner in which the District would typically review the online coursework of any student entering the District in the middle of a school year. It is expressly understood that Petitioner's right to challenge any converted grade awarded by the District is governed by the procedures set forth in Board Policy 2624, Grading System, which provides that "the final decision on any contested grade will be the responsibility of the Principal."

6. It is understood and agreed by the Parties that J.S. will complete the entire first semester of tenth grade online through the FlexSchool, even if Petitioner and J.S. return to their Pequannock residence during the first semester. Assuming J.S. and

Petitioner return to Pequannock Township, J.S. will be re-enrolled in order to begin the second semester of tenth grade on Monday, January 28, 2019. In order to ensure that J.S.'s online credits and grades from the FlexSchool for the first semester will be timely accepted by the District, and in order to facilitate her transition back into Pequannock Township High School for the second semester, it is anticipated that J.S. will complete the following courses online through the FlexSchool:

- First semester of Spanish 3 (2.5 credits)
- First semester of Algebra 2 (2.5 credits)
- First semester of American Literature (2.5 credits)
- First semester of American History 1 (2.5 credits)
- First semester of Chemistry (2.5 credits)
- Health & Physical Education, including Driver's Education (2.5 credits)
- Digital Arts (2.5 credits)
- First semester of Psychology (2.5 credits)

7. Assuming J.S. completes the courses listed in Paragraph 6 above through FlexSchool and is re-enrolled in the District to begin the second semester of tenth grade on January 28, 2019, J.S. will take the following second semester courses at Pequannock Township High School.

- Second semester of Spanish 3 (2.5 credits)
- Second semester of Algebra 2 (2.5 credits)
- Second semester of English 2 (2.5 credits)
- Second semester of U.S. History 1 (2.5 credits)
- Second Semester of Chemistry (2.5 credits)
- Health & P.E. and/or Physical Education (2.5 credits)
- Elective 1 that fits into schedule: Financial Literacy or Criminal Law (2.5 credits)
- Elective 2 that fits into schedule: The District agrees to place J.S. in its second semester Psychology class *only if* the class fits into her schedule. As the course is only offered to juniors and seniors, there is no guarantee that the District will be able to make the placement work for J.S. If J.S. cannot be placed in Psychology, she will take Financial Literacy, Criminal Law or History of Sports in American Society.

8. It is expressly understood by the Parties that J.S. is required to take Financial Literacy as a sophomore. Therefore, if J.S. elects not to take Financial Literacy through the FlexSchool, she will be required to take it during her second semester at Pequannock Township High School. This may impact her ability to be placed in a Psychology class in the District.

9. It is also expressly understood that if J.S. is unable to complete any of the first semester courses listed in Paragraph 6 above through FlexSchool for any reason, she will be ineligible to proceed into the second semester of any related or corresponding course at Pequannock Township High School.

10. It is also expressly understood that J.S. will not be eligible to take the AP Capstone course, in which she had previously been enrolled at Pequannock Township High School during the 2018-2019 school year, because AP Capstone is a year-long course that is not offered through FlexSchool.

11. Petitioner's signature on this Agreement shall serve as her request to withdraw with prejudice her Petition of Appeal to the Commissioner, and her Application for Emergent Relief, which were assigned Agency Reference No. 206-8/18 and OAL Docket No. EDU 129-31-18. Any Party may submit a fully executed copy of this Agreement to the Commissioner of Education and/or the Office of Administrative Law as notification in accordance with *N.J.A.C.* 1:1-10.2 that Petitioner withdrew with prejudice her petition of appeal and related emergent relief application. It is expressly understood, however, that the Parties retain the right to enforce any provision of this Agreement, and Petitioner retains the right to challenge any grade awarded to J.S. by the District that differs from the grade awarded to J.S. by FlexSchool, in accordance with Board Policy 2624. Additionally, the parties will submit a fully executed copy of this Agreement to an Administrative Law Judge ("ALJ") for approval, but the parties will

perform, implement and adhere to this Agreement immediately upon execution and in advance of ALJ approval.

12. It is understood and agreed that all Parties shall bear their own attorneys' fees and costs in connection with this matter, except that in the event an action is brought to enforce this Agreement, the prevailing Party in the enforcement action shall be entitled to attorneys' fees and costs in connection therewith.

13. The terms of this Agreement represent the compromise of disputed claims between the Parties. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any Party.

14. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

15. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective Party.

16. The Parties may execute this Agreement via electronic signature and in counterparts, each of which is deemed an original and all of which only constitute one original.

17. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. The Parties acknowledge and agree that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

18. The terms of this Agreement shall remain strictly confidential and shall not be divulged to any third party, except the Parties' attorneys, unless such disclosure is required under applicable law and/or legal process. In response to any direct inquiry

about the outcome of the above-described action, the Parties shall indicate only that the matter has been concluded.

19. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

20. The Parties recognize that each had the opportunity to be represented by legal counsel if they so choose, that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. The Parties further state that if represented by counsel they are fully satisfied with the legal representation provided.

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

WITNESS:

Kateryna H. Bechtel

KATERYNA BECHTEL
Business Administrator

DATED: 9/24/18

WITNESS:

Kathleen M Gillis

DATED: 9-21-18

O/B/O PEQUANNOCK TOWNSHIP
BOARD OF EDUCATION

BY: Brett Charleston

DR. BRETT CHARLESTON
Superintendent of Schools

DATED: 9/24/18

J.S., Parent of J.S.

DATED: 9-21-18

PEQUANNOCK TOWNSHIP BOARD OF EDUCATION
Pompton Plains, New Jersey

EXTRACT OF MEETING MINUTES

TYPE OF MEETING: (x) Regular ( ) Workshop ( ) Special ( ) Other

DATE OF MEETING: November 26, 2018 CALLED TO ORDER AT: 7:00 pm

PLACE OF MEETING: Pequannock Township High School Auditorium
85 Sunset Road
Pompton Plains, NJ 07444

PRESENT:

Mr. Sam Ciresi	Mrs. Ann Maier
Mrs. Tiffany Osmanski	Mr. Richard Prezioso
Mrs. Cara Shenton	Mr. Leonard Smith
Dr. Richard Thumann	Mr. Vincent Siracusa
Mrs. Kimberley Quigley	

AT THE MEETING IDENTIFIED ABOVE, THE FOLLOWING ACTION TRANSPIRED TO WIT:

RESOLUTION NO. CIS-50-19
APPROVAL OF SETTLEMENT AGREEMENT

BE IT RESOLVED by the Pequannock Township Board of Education (the "Board") that the terms, stipulations and conditions as established in the Settlement Agreement between the Board and the Parents of a student whose identification number ends in 8476, which Agreement is located in the student's file, is hereby adopted and approved by the Board. The Superintendent of Schools and Business Administrator are hereby authorized and directed to execute the Settlement Agreement, and any other documents necessary to effectuate the settlement.

Motion by: Osmanski	Second by: Siracusa	Roll Call Vote: 9-0-0

CERTIFICATION

The foregoing information is hereby certified to be a true copy of the official records of the Pequannock Township Board of Education, having been extracted from and compared with the contents of the official minutes of the subject meeting.

November 28, 2018
Date

Kateryna W. Bechtel
Kateryna W. Bechtel, CPA
School Business Administrator/Board Secretary

OAL DKT. NOS. EDU 13509-18 and EDU 15231-18 (CONSOLIDATED)
AGENCY DKT. NOS. 199-8/18 and 226-9/18

A.R., ON BEHALF OF MINOR CHILDREN, J.R., D.R., D.R., AND T.R.,	:	
PETITIONER	:	
V.	:	
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	
G.W., ON BEHALF OF MINOR CHILDREN [1], J.R., D.J.R., D.R.R., AND T.E.R.,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner is in accord with the ALJ's conclusion that this matter is no longer a contested case before the Commissioner. The Board advised that the

[1] The Initial Decision in this matter incorrectly identified respondent in the second consolidated case, EDU 15231-18, as "A.R." A.R. is the father of the minor children whose residence was at issue in this case; the correct respondent in EDU 15231-18 is G.W., the mother of the minor children.

minor children are permitted to continue attending school in the District based upon a modified custody order, and withdrew its claim for tuition.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/09/19

Date of Mailing: 1/09/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13509-18
AGENCY DKT. NO. 199-8/-18

A.R. ON BEHALF OF MINOR CHILDREN
J.R., D.R., D.R, & T.R.,
Petitioners,
v.
TOWNSHIP OF MORRISTOWN BOARD
OF EDUCATION, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 15231-18
AGENCY DKT. NO. 226-9/18

TOWNSHIP OF MORRISTOWN BOARD
OF EDUCATION, MORRIS COUNTY.,
Petitioner,
v.
A.R. ON BEHALF OF MINOR CHILDREN
J.R., D.R., D.R, & T.R.,
Respondents.

(CONSOLIDATED)

A.R., on behalf of minor children J.R., D.R., D.R. and T.R.

France L. Febres, Esq. for Morristown Board of Education, Morris County

Record Closed: November 7, 2018 Decided: November 27, 2018

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

A.R. on behalf of minor children J.R., D.R., D.R, and T.R. challenges the residency determination made by the Township of Morristown Board of Education ("Board"). The matter was transmitted to the Office of Administrative Law (OAL) under OAL Dkt. No. EDU 13509-18 on September 12, 2018. The Board filed a counterclaim seeking tuition which was transmitted to OAL on October 19, 2018, under OAL Dkt. No. EDU 15231-18. The matters were consolidated by Prehearing Order dated October 26, 2018. A hearing was scheduled for December 12, 2018. Prior to the hearing date, the Board's attorney sent correspondence stating:

> ". . . . Please be advised that the Board has approved the students' continued attendance based upon a modified custody order that was recently provided to the Board. . . ."
>
> [Said letter is attached hereto for reference.]

Accordingly, I **CONCLUDE** that these matters are no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

November 27 2018
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: Nov. 27, 2018

Date Mailed to Parties: 11/27/2018

ljb

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

FRANCES L. FEBRES, Partner
ffebres@cgajlaw.com

Reply to: Oakland Office

November 7, 2018

Via Facsimile (973) 648-6124) and Regular Mail
Honorable Joann LaSalla Candido, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: A.R. o/b/o minor children, J.R., D.J.R., D.R.R. and T.E.R. v. Morris Board of Education, Morris County
DKT NO.: EDU 13509-18

and

Morris Board of Education v. G.W.
Agency Reference No. 226-9/18 / OAL DKT No. 15231-18

Dear Judge LaSalla Candido:

Please be reminded that this firm represents the Morris Board of Education ("Board" or "Respondent") in the above-referenced matters. Please be advised that the Board has approved the students' continued attendance based upon a modified custody order that was recently provided to the Board. As such, the Respondent is respectfully withdrawing its Petition for Tuition Assessment in the matter associated with Agency Reference No. 226-9/18.

Thank you for your attention and courtesies.

Respectfully submitted,

Frances L. Febres, Esq.

C: Debora Engelfried, Supervisor of Strategic Planning and Student Information Management (by email)
Mackey Pendergrast, Superintendent of Schools (by email)
G.W. (by email (gwendowski@gmail.com))

sent 12/12

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Mine Hill Board of Education (Mine Hill) sought a limited severance of its sending-receiving relationship with the respondent Dover Board of Education (Dover), such that petitioner's seventh and eighth grade students would be educated in the Mine Hill school district. Petitioner proposed a two-year phase out program, beginning with the seventh grade class in the 2017-2018 school year, followed by the eighth grade class in the 2018-2019 school year. The petitioning Board did not seek any change to the sending-receiving relationship for Mine Hill students in the ninth through twelfth grades. Subsequent to the transmittal of this matter to the OAL, the parties proposed a settlement agreement in which they agreed that petitioner would educate its seventh and eighth grade students in Mine Hill beginning in the 2018-2019 school year; the settlement agreement, however, eliminated the two-year phase out program included in the original proposal. In February 2018, the Commissioner rejected the OAL's Initial Decision approving the settlement, finding that the parties had failed to follow statutory criteria for adjudicating the termination of sending-receiving relationships, which are set forth in *N.J.S.A.* 18A:38-13, and the procedural requirements for same, which are set forth in *N.J.A.C.* 6A:3-6.1.

The Commissioner ordered further proceedings in accordance with the procedural rules governing uncontested applications for severance. Subsequently, in accordance with the regulatory provisions, interested parties were given the opportunity to submit written comments for consideration by the Commissioner in determining whether the proposed severance met the statutory standard. Seventeen public comments were received and considered by the Commissioner, along with the proposed settlement agreement, the feasibility study, the parties' submissions, and updated enrollment information.

Upon review, the Commissioner denied the petitioner's application for limited severance of the sending-receiving relationship with Dover as set forth in the parties' proposed settlement agreement. In so doing, the Commissioner found, *inter alia*, that: the settlement agreement did not include a transitional plan, which would result in a substantial negative impact on the education received by students at Mine Hill, as it would hinder the continuity of education for the affected students; and the proposed limited severance would have a substantial negative effect on the racial composition of Dover.

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 14, 2019

AGENCY DKT. NO. 60-3/17

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

In this matter, petitioner Mine Hill Board of Education filed a petition seeking a limited severance of the sending-receiving relationship with respondent Dover Board of Education, such that petitioner's seventh and eighth grade students would be educated in Mine Hill. Petitioner proposed a two-year phase out program beginning with the seventh grade class in the 2017-18 school year, followed by the eighth grade class in the 2018-19 school year. Petitioner did not seek to terminate the parties' sending-receiving relationship for Mine Hill's ninth through twelfth grade classes, which would continue to attend school in Dover. After the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, the parties proposed a settlement agreement in which the parties agreed that petitioner would educate its seventh and eighth grade students in Mine Hill beginning in the 2018-19 school year. In February 2018, the Commissioner rejected the OAL's Initial Decision approving the settlement, thereby declining to permit the proposed severance of the sending-receiving agreement to move forward at that time. The Commissioner based his determination upon the parties' failure to follow the procedural requirements for uncontested severance of a sending-receiving agreement, set forth at *N.J.A.C.* 6A:3-6.1. The Commissioner directed that if the parties still wished to pursue the proposed limited severance plan, they must meet the established statutory criteria for adjudicating the termination of sending-receiving relationships as enumerated in *N.J.S.A.* 18A:38-13, and must follow the procedural requirements in *N.J.A.C.* 6A:3-6.1. *Board of Education of the Township of Mine Hill, Morris County v. Board of*

Education of the Town of Dover, Morris County, Commissioner's Decision No. 27-18, decided February 9, 2018.

Subsequently, the Commissioner received seventeen comments from the public regarding the proposed settlement – fourteen opposing the partial severance of the sending-receiving relationship and three in favor. The opponents primarily argue that the agreed upon transition plan no longer provides a two-year phase out approach, and instead requires all seventh and eighth graders to transition back to Mine Hill for the 2018-19 school year. Consequently, the then-current 2017-18 seventh grade class, which was being educated in Dover, would return to Mine Hill to attend eighth grade, before going back to Dover for ninth grade. Several additional comments opposing the proposed settlement agreement – including some submitted by affected students – argue that Dover offers more educational opportunities, as well as sports and extracurricular activities, which are not available at Mine Hill. The Mine Hill Education Association, although in favor of returning the seventh and eighth grades to Mine Hill, also opposes the transition plan agreed to by the parties in the settlement agreement.

In response, petitioner challenges the merits of the comments opposing the limited severance of the sending-receiving agreement. Petitioner contends that as a whole, citizens overwhelmingly support educating Mine Hill's students in Mine Hill. Petitioner does, however, agree with the comments that a two-year phased transition would be in the best interest of the students. In a second submission, petitioner urges the Commissioner to delay implementation of the settlement agreement until September 2019, rather than September 2018, given that it would not be able to effectively transition prior to the start of the 2018-19 school year.

In its response, respondent points out that most of the comments opposing the plan do not address whether the proposed partial severance will have a substantial negative impact on the districts, as required by *N.J.A.C.* 6A:3-6.1(c)(1), and instead seek to modify the terms of the settlement with regard to the transition period. Respondent argues that there is no basis upon which to modify the settlement terms, which were the result of negotiations between the parties and counsel.

The record of this matter has been reviewed, including the proposed settlement agreement, the public comments, the parties' submissions, the feasibility study, and the updated enrollment information jointly submitted by the parties at the Commissioner's request.

Pursuant to *N.J.S.A.* 18A:38-8, school districts at the elementary school level that do not have sufficient accommodations may send students to another school district as part of a sending-receiving relationship. In order to withdraw from a sending-receiving relationship, the Commissioner has determined that "the appropriate standards for evaluating requests for withdrawals at the elementary school level are the same standards which are applicable at the high school level." *Board of Education of the Township of Mine Hill, Morris County v. Board of Education of the Town of Dover, Morris County,* Commissioner's Decision No. 510-04, decided December 15, 2004, at 9, *aff'd* State Board May 4, 2005. The criteria for withdrawal from a sending-receiving relationship at the high school level is set forth at *N.J.S.A.* 18A:38-13, and establishes that prior to severance of a relationship, the Commissioner will make an equitable determination based on the circumstances, "including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." If there is no substantial negative impact, the Commissioner will grant the requested severance. *N.J.S.A.* 18A:38-13.

Upon review, the Commissioner is satisfied at the outset that the feasibility study established that the withdrawal of Mine Hill's seventh and eighth grade classes from Dover would cause no substantial negative impact on the financial conditions of the two school districts. However, the Commissioner finds that the transition proposed in the settlement agreement, which does not contain a two-year phased approach, would result in a substantial negative impact on the education received by the students at Mine Hill. The original petition of appeal proposed a two-year transition period, but with the abandonment of this approach during settlement negotiations, the agreement now asks the Commissioner to approve a scenario in which Mine Hill seventh graders would be educated in Dover for seventh grade, then return to Mine Hill for eighth grade, before transitioning back to Dover a second time for high school. Such a plan is impractical and would hinder the continuity of education for the affected students.

As such, the Commissioner cannot approve the withdrawal of Mine Hill's seventh and eighth grade classes from Dover as presently set forth in the settlement agreement.

Additionally, the Commissioner cannot approve the limited severance of the sending-receiving agreement because removal of Mine Hill's seventh and eighth grade classes would have a substantial negative effect on the racial composition of Dover. In 2001, the Commissioner denied a previous request from Mine Hill to sever its sending-receiving relationship with Dover in regard to its seventh and eighth grade students, which would have resulted in a 7 to 8 percent reduction in white students attending Dover Middle School. The Commissioner found that "the changes in minority composition which would inure from severance here cannot be termed insignificant from either a statistical or an educational viewpoint. Rather, it is quite evident that permitting severance here would, at a minimum, serve to exacerbate disparity in the national origin/minority groupings in Dover's student population." *Board of Education of the Township of Mine Hill, Morris County v. Board of Education of the Town of Dover, Morris County,* Commissioner's Decision No. 58-01, decided February 15, 2001, at 81.

In *Board of Education of the Borough of Englewood Cliffs, Bergen County v. Board of Education of the City of Englewood, Bergen County*, 257 *N.J. Super.* 413 (App. Div. 1992), severance of Englewood Cliffs' sending-receiving relationship with Englewood – in which Englewood Cliffs sent its high school students to Englewood's high school – was denied because of the substantial negative impact on racial balance and educational quality. *Ibid.* Had severance been granted in that case, the percentage of white students at Englewood's high school would have decreased by only 1.6 percent – arguably a negligible or *de minimis* effect on the racial population at Englewood. *Id.* at 439. However, the loss of those 15 white Englewood Cliffs students – considering that Englewood had only 94 white students in total – represented a 16 percent reduction in the overall white population at Englewood, resulting in a significant impact on the racial balance of Englewood's high school. *Ibid.* Additionally, given the trend toward a rapid decline in white student enrollment, withdrawal of the Englewood Cliffs students would

have a substantial negative impact on the quality of education because it would be seen as a symbolic loss. *Id.* at 430.

On the other hand, in *Board of Education of the Borough of Longport, Atlantic City v. Board of Education of the City of Atlantic City, Atlantic County and Board of Education of the City of Ocean City, Cape May County*, Commissioner's Decision No. 238-14, dated June 5, 2014, at 7, the withdrawal of 9 white Longport students from Atlantic City's high school represented a proportional change of 0.4 percent. Those 9 students, in the overall context of Atlantic City's 442 white students, represented a 2 percent change in the gross population of white students in Atlantic City. *Id.* at 7-8. Considering the circumstances, the Commissioner granted permission for Longport to sever its sending-receiving relationship with Atlantic City, finding that severance would not have a substantial negative impact on the racial composition of Atlantic City's high school. *Id.* at 8-9.

In the current application, the updated enrollment information provided by the parties shows that if severance of the sending-receiving relationship were granted, the loss of Mine Hill students from Dover would result in a proportional change of only 3 percent in the white population at Dover for the 2017-18 school year, and only 2.6 percent for the 2018-19 school year. Nevertheless, the gross population of white students at Dover would be reduced by 45 percent – a loss of 17 of 38 white students in the 2017-18 school year, and 14 of 31 in 2018-19.[1]

Given that Dover would lose nearly half of the gross population of white students at its middle school if severance were granted, a substantial negative effect on the racial composition of Dover certainly exists. A loss of 45 percent of the white population at Dover is significantly higher in magnitude than the 16 percent loss in the gross population of white students in *Englewood Cliffs* that resulted in the denial of severance of the sending-receiving relationship. It is also considerably more than the 2 percent gross population loss of white students in *Longport* that was found to be *de minimis*. Although the approximately 3 percent proportional reduction in white students at Dover is considerably

[1] When the application was initially filed, the feasibility study only included enrollment information for the 2015-16 school year. With respect to that school year, the loss of Mine Hill students from Dover would result in a proportional change of 4.2 percent in the white population in Dover and a 52 percent reduction in the gross population of white students in Dover.

lower than the 7 to 8 percent reduction when the Commissioner first denied severance of the sending-receiving relationship between Mine Hill and Dover in 2001, the significant impact on the gross population of white students cannot be ignored. As such, the Commissioner cannot approve severance of the sending-receiving agreement.

Accordingly, petitioner's application for limited severance of the sending-receiving relationship with Dover, as set forth in the parties' proposed settlement agreement, is denied due to the substantial negative impact severance would have on the racial composition of Dover, and the substantial negative impact that the transition plan would have on the quality of education for Mine Hill's seventh grade class.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19
Date of Mailing: 1/15/19

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

10-19SEC

AGENCY DKT. NO. 288-11/18

IN THE MATTER OF ANDREA HYATT,	:	
BURCH CHARTER SCHOOL OF EXCELLENCE,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 30, 2018 Order to Show Cause, but prior to the SEC's November 27, 2018 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the SEC's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19
Date of Mailing: 1/15/19

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ANDREA HYATT	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
BURCH CHARTER SCHOOL OF EXCELLENCE, **ESSEX COUNTY**	:	**DOCKET NO.: T08-18**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 30, 2018, and mailed on October 31, 2018, via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on October 31, 2018, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Irvington, County of Essex. Pursuant to N.J.S.A. 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of her position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by June 30, 2018.

On July 2, 2018, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2018, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on March 14, 2018, Respondent was registered to take Governance 4 and an e-mail with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on June 12, 2018, July 11, 2018, August 13, 2018, August 16, 2018, August 23, 2018 and August 29, 2018, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent reminder communications to Respondent's Charter Lead on August 20, 2018, and August 29, 2018. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in September 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2018. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 22, 2018, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on October 31, 2018.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2018, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2018. Importantly, Respondent did not deny that she did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, as well as N.J.A.C. 6A:28-4.1 and N.J.A.C. 6A:11-3.1(a). Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file

exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 28, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ANDREA HYATT	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***BURCH CHARTER SCHOOL OF EXCELLENCE*, ESSEX COUNTY**	:	
	:	**DOCKET NO.: T08-18**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Andrea Hyatt, Respondent, is a charter school trustee of Burch Charter School of Excellence; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by June 30, 2018; and

WHEREAS, at its meeting on October 30, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2018 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2018; and

WHEREAS, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on November 27, 2018, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on November 27, 2018, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director

AGENCY DKT. NO. 285-11/18

IN THE MATTER OF LUNEDAR GIRAULT ALBERT, KIPP TEAM ACADEMY CHARTER SCHOOL, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 30, 2018 Order to Show Cause, but prior to the SEC's November 27, 2018 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the SEC's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19

Date of Mailing: 1/15/19

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
LUNEDAR GIRAULT ALBERT	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
KIPP TEAM ACADEMY CHARTER SCHOOL, **ESSEX COUNTY**	:	
	:	**DOCKET NO.: T03-18**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 30, 2018, and mailed on October 31, 2018, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on October 31, 2018, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. Pursuant to N.J.S.A. 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2018.

On July 2, 2018, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2018, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically, on June 13, 2018, Respondent was registered to take Governance 2 and an e-mail with the link to

complete the training was sent to Respondent's registered e-mail address. In addition, on June 12, 2018, July 11, 2018, August 13, 2018, August 16, 2018, August 23, 2018 and August 29, 2018, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent reminder communications to Respondent's Charter Lead on August 20, 2018, and August 29, 2018. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2018. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 22, 2018, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on October 31, 2018.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2018, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC, indicating he has "recently been suffering from disabling migraines," one of the symptoms is "sensitivity to light and computer glare," and he "attempted several times to complete [training] before the deadline." Importantly, Respondent did not deny that he did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 27, 2018, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, as well as N.J.A.C. 6A:28-4.1 and N.J.A.C. 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file

exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 28, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
LUNEDAR GIRAULT ALBERT	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***KIPP TEAM ACADEMY CHARTER SCHOOL*, ESSEX COUNTY**	:	
	:	**DOCKET NO.: T03-18**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Lunedar Girault Albert, Respondent, is a charter school trustee of KIPP Team Academy Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 2 training program by June 30, 2018; and

WHEREAS, at its meeting on October 30, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2018, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

WHEREAS, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 27, 2018, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on November 27, 2018, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director

12-19SEC

AGENCY DKT. NO. 289-11/18

IN THE MATTER OF DANIEL BERLIN,	:	
DISCOVERY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act (SEA) for failure to complete his Governance 3 training program, in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that as of the date of its decision, respondent had not completed the training as directed. Respondent has not filed exceptions to the recommended penalty, nor has he instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly – effective from the date of this decision – respondent is hereby removed as a school official found to have violated the SEA, for failure to complete required training.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19

Date of Mailing: 1/15/19

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DANIEL BERLIN	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
DISCOVERY CHARTER SCHOOL, **ESSEX COUNTY**	:	
	:	**DOCKET NO.: T06-18**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 30, 2018, and mailed on October 31, 2018, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on October 31, 2018, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. Pursuant to N.J.S.A. 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by June 30, 2018.

On July 2, 2018, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2018, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on June 13, 2018, Respondent was registered to take Governance 3 and an e-mail with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on June 12, 2018, July 11, 2018, August 13, 2018, August 16, 2018, August 23, 2018 and August 29, 2018, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent reminder communications to Respondent's Charter Lead on August 20, 2018, and August 29, 2018. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2018. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 22, 2018, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on October 31, 2018.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2018, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2018, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, as well as N.J.A.C. 6A:28-4.1 and N.J.A.C. 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of

Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 28, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DANIEL BERLIN	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
DISCOVERY CHARTER SCHOOL, **ESSEX COUNTY**	:	
	:	**DOCKET NO.: T06-18**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Daniel Berlin, Respondent, is a charter school trustee of Discovery Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 3 training program by June 30, 2018; and

WHEREAS, at its meeting on October 30, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2018 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2018, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 27, 2018, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, at its meeting on November 27, 2018, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on November 27, 2018.

Kathryn A. Whalen, Director

13-19SEC

AGENCY DKT. NO. 287-11/18

IN THE MATTER OF MICHAEL STASI,	:	
RED BANK CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 30, 2018 Order to Show Cause, but prior to the SEC's November 27, 2018 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent filed exceptions to the recommended penalty, apologizing for disregarding the SEC's notices, and explaining that his recent move out of state was likely the reason the SEC's notices went unanswered. Respondent did not institute an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the SEC's underlying finding of violation.

Upon review, the Commissioner does not find respondent's exceptions to be persuasive. Instead, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19

Date of Mailing: 1/15/19

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
MICHAEL STASI	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY**
RED BANK CHARTER SCHOOL, **MONMOUTH COUNTY**	:	**TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T10-18**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 30, 2018, and mailed on October 31, 2018, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on October 31, 2018, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Red Bank, County of Monmouth. Pursuant to N.J.S.A. 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by June 30, 2018.

On July 2, 2018, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2018, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More specifically,

on May 14, 2018, Respondent was registered to take Governance 2, and an e-mail with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on June 12, 2018, July 11, 2018, August 13, 2018, August 16, 2018, August 23, 2018 and August 29, 2018, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent reminder communications to Respondent's Charter Lead on August 20, 2018, and August 29, 2018. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2018. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 22, 2018, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on October 31, 2018.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2018, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2018. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 27, 2018, the Commission discussed finding that Respondent violated N.J.S.A. 18A:12-33, as well as N.J.A.C. 6A:28-4.1 and N.J.A.C. 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file

exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 28, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
MICHAEL STASI	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
RED BANK CHARTER SCHOOL, **MONMOUTH COUNTY**	:	
	:	**DOCKET NO.: T10-18**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Michael Stasi, Respondent, is a charter school trustee of Red Bank Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 2 training program by June 30, 2018; and

WHEREAS, at its meeting on October 30, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2018, as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2018; and

WHEREAS, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 27, 2018, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on November 27, 2018, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen

Kathryn A. Whalen, Director

ASKIAA NASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In December 2016, the New Jersey State Board of Examiners (Board) denied the petitioner's application for a Standard Educational Services Certificate of Eligibility with an Associate School Library Media Specialist (ASLMS) endorsement. Petitioner's application was denied because he had not completed the coherent college program outlined under *N.J.A.C* 6A:9B-14.15(e)(2), and had not completed a year-long school-based residency program in a school library media center, as required under *N.J.A.C* 6A:9B-14.15(e)(3). Petitioner argued that the Board should have awarded him the certificate he sought because he completed the required coursework under the prior regulations and was incarcerated when the regulations governing the issuance of the ASLMS endorsement changed. The Board contended that even if petitioner had applied for the ASLMS endorsement when he completed course requirements, he still would not have been eligible for the endorsement under the prior regulations because he did not possess a standard New Jersey teacher's certificate at the time.

The ALJ found, *inter alia*, that: the petitioner received an Alternate Route Provisional Teacher Certificate of Eligibility in 1993, and was hired by the Newark Public Schools as an education media specialist under emergency certificates from September 1993 to September 2000; petitioner completed coursework for his college degree from Montclair State University by August 1995, but never applied for his standard New Jersey teacher's certificate; in January 2001, petitioner was tried and sentenced to twenty-two years in prison, which sentence was overturned in 2013 and his record expunged; subsequently, in 2016, petitioner applied for a Standard Educational Services Certificate of Eligibility with an ASLM endorsement, having previously never applied for this certificate; petitioner's argument that he should have been awarded the Standard Certificate with an ASLMS because he had completed the required college courses under the regulations in effect prior to his incarceration, and therefore the requirement should be waived, is without merit. The ALJ concluded that petitioner is ineligible for a Standard Educational Services Certificate of Eligibility with an ASLMS under both *N.J.A.C* 6A:9B-14.15(e)(2) and *N.J.A.C* 6A:9B-14.15(e)(3), and accordingly dismissed the matter.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

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

January 14, 2019

OAL DKT. NO. EDU 01135-18
AGENCY DKT. NO. 271-11/17

ASKIAA NASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.[1]

Upon review, the Commissioner agrees with the Administrative Law Judge that petitioner does not meet the regulatory requirements for a Standard Educational Services Certificate of Eligibility with an Associate School Library Media Specialist endorsement. As such, respondent did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons thoroughly expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: ~~1/14/19~~

Date of Mailing: 1/15/19

[1] The Commissioner was not provided with a copy of the transcript of the October 10, 2018 hearing at the OAL.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01135-18
AGENCY DKT. NO. 271-11/17

ASKIAA NASH,
Petitioner,
v.
NEW JERSEY BOARD OF EXAMINERS,
Respondent.

Askiaa Nash, petitioner, pro se

Geoffrey N. Stark, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2018 Decided: November 29, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On December 15, 2016, the State Board of Examiners denied Askiaa Nash's application for a Standard Educational Services Certificate of Eligibility with an Associate School Library Media Specialist (ASLMS) Endorsement. Nash argues that the prior regulations apply and that their certification requirements should be waived. If the prior

regulations are applied, can the certification requirements be waived? No. Under N.J.A.C. 6A:5-1.3(a)(1)(i), certification requirements cannot be waived.

PROCEDURAL HISTORY

On November 1, 2016, Nash applied to the State Board of Examiners for a Standard Educational Services Certificate of Eligibility with an ASLMS Endorsement under N.J.A.C. 6A:9B-14.15(e).

On December 15, 2016, the Board denied the application because Nash had not completed "a coherent college program at a regionally accredited college or university that includes a minimum of nine semester-hour credits in educational theory, curriculum design and integration, teaching methodology, student/learning development, and behavior management" under N.J.A.C. 6A:9B-14.15(e)(2), and he had not completed "a year-long school-based residency program in a school library media center" under N.J.A.C. 6A:9B-14.15(e)(3).

On October 23, 2017, Nash appealed the determination.

On January 22, 2018, the Department of Education transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted and my assessment of their sufficiency, I **FIND** the following as **FACT**:

In 1993, Nash applied for and received an Alternate Route Provisional Teacher Certificate of Eligibility.

On September 1, 1993, Nash was hired by the Newark Public Schools as an education media specialist. He was issued emergency certificates from September 1993 to September 2000. By August 1, 1995, Nash had completed his coursework at Montclair State University.

Nash, however, never applied for his standard New Jersey teacher's certificate.

Meanwhile, on January 1, 2001, Nash was tried and sentenced to twenty-two years in prison. On January 23, 2013, his conviction was overturned. On May 1, 2013, his record was expunged.

In 2016, Nash applied for but was denied a Standard Educational Services Certificate of Eligibility with an ASLMS Endorsement.

Parenthetically, Nash had never applied for a Standard Educational Services Certificate of Eligibility with an ASLMS Endorsement before 2016.

CONCLUSIONS OF LAW

Nash argues that the Board should have awarded him the Standard Educational Services Certificate of Eligibility with an ASLMS Endorsement because he completed the required courses at Montclair under the prior regulations and was incarcerated when the regulations governing the issuance of the ASLMS endorsement changed.

The Board argues that even if Nash had applied for an ASLMS endorsement when he completed the required courses at Montclair, he still would have been ineligible for the endorsement under the prior regulations because he did not possess a standard New Jersey teacher's certificate at the time.

At that time, the regulations governing the ASLMS endorsement required (1) a bachelor's degree from an accredited college, (2) a standard New Jersey teacher's certificate, and (3) successful completion of a college curriculum approved by the New

Jersey Department of Education for issuing the endorsement or a minimum of eighteen semester-hour credits of undergraduate or graduate study in educational media. See N.J.A.C. 6:11-11.18.

As the parties stipulated at the hearing, Nash had a bachelor's degree from an accredited college, and had successfully completed a minimum of eighteen semester-hour credits of undergraduate or graduate study in educational media, but he did not have a standard New Jersey teacher's certificate.

Nash argues that this requirement should be waived. Such waiver, however, is unavailable. As the Board notes, the regulation governing waiver expressly states that certification requirements cannot be waived. See N.J.A.C. 6A:5-1.3(a)(1)(i).

Given this brief discussion, I **CONCLUDE** that Nash is ineligible for a Standard Educational Services Certificate of Eligibility with an ASLMS endorsement under both N.J.A.C. 6A:9B-14.15(e) and N.J.A.C. 6:11-11.18.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case be **DISMISSED**.

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

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

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

11/29/18
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 11/29/18

Date Mailed to Parties:

dr

APPENDIX

Witnesses

For Petitioner:

Askiaa Nash

For Respondent:

Robert Higgins

Documents

For Petitioner:

P-1 Board Decision, dated December 15, 2016

P-2 Not in Evidence

P-3 Excerpt from Course Catalog, undated

For Respondent:

R-1 Printout from Teacher Certification Information System, undated

R-2 Prior regulations, dated September 17, 1996

R-3 Transcript from Bloomfield College, undated

R-4 Transcript from Montclair State University, undated

R-5 Current regulations, undated

15-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

January 11, 2019

Isabel Machado, Esq.
Machado Law Group
1 Cleveland Place
Springfield, NJ 07081

John Berger
48 Johnson Avenue
Matawan, NJ 07747

Re: *In the Matter of the Tenure Hearing of John Berger, Board of Education for the City of Perth Amboy, Middlesex County, Agency Dkt. No. 281-11/18.*

Dear Parties:

I have reviewed the record in the contested case entitled *In the Matter of the Tenure Hearing of John Berger, Board of Education for the City of Perth Amboy, Middlesex County, Agency Dkt. No. 281-11/18.* The record includes the District's request to withdraw the tenure charges filed in this matter due to Respondent's retirement from his teaching position, filed with the District on December 1, 2018 and accepted by the Board on January 3, 2019. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

LOR/SLP

16-19

BOROUGH OF SEA BRIGHT, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

This case arose out of a dispute between the Shore Regional Board of Education (Board) and one of its constituent members, the Borough of Sea Bright (Sea Bright), over the formula used to apportion the tax burden supporting the regional school district. Sea Bright challenged the action of the Board in declining to place a referendum on the ballot to modify the apportionment method. Specifically, a Sea Bright representative to the Shore Regional school board made a motion to include a referendum on the ballot at its November 2015 meeting, which motion died without a vote after not receiving a second on the motion. Sea Bright alleged that the failure to place the referendum on the ballot was arbitrary, capricious and unreasonable. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the Shore Regional School District was established in the 1960s on a per-pupil funding basis; subsequently, the funding formula changed in 1975 to equalized valuation, but allowed the voters of each municipality to approve an apportionment method based upon (a) equalized valuation, (b) per pupil basis, or (c) a combination of the two; in April 2015, Sea Bright sought to raise its concerns over the apportionment method with the Board due to a disparity between the percentage of Shore Regional's budget provided by Sea Bright and the percentage of students Sea Bright sent to the regional school district; in November 2015, a Sea Bright Board member made a motion at a public meeting to submit a change to the apportionment method to voters in the next election; no other Board member seconded the motion, and no further vote was taken regarding the request; the decision to place a change to the apportionment method on the ballot is discretionary and, as a result, the Board's decision not to place a referendum on the ballot – in the absence of a second to the motion – was not arbitrary, capricious or unreasonable. Accordingly, the ALJ granted summary decision in favor of the Board.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board is entitled to summary decision. In so determining, the Commissioner found, *inter alia*, that this matter is limited to a determination as to whether the Board acted in an arbitrary, capricious or unreasonable manner by failing to place a referendum on the ballot; as the motion in question was never seconded, the Commissioner cannot find that the Board was arbitrary, capricious or unreasonable. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

January 14, 2019

16-19

OAL DKT. NO. EDU 4004-16
AGENCY DKT. NO. 25-2/16

BOROUGH OF SEA BRIGHT, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed – as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, the Borough of Sea Bright (Sea Bright), and the Board of Education of the Shore Regional High School District's (Board) reply thereto. In this case, Sea Bright is challenging the Board's failure to place on the ballot a referendum to modify the method by which taxes are apportioned among the constituent members of the Shore Regional High School District. Sea Bright's representative to the Board made a motion to include a referendum on the ballot to change the apportionment method at its November 2015 meeting; however, the motion was not seconded by any other member of the Board, resulting in no further action. The Administrative Law Judge (ALJ) found that a decision to place such a change on the ballot is discretionary, and as a result, the Board's decision not to place a referendum on the ballot in the absence of a second to the motion was not arbitrary, capricious or unreasonable. Therefore, the ALJ granted summary decision in favor of the Board.

In its exceptions, Sea Bright maintains that the Initial Decision must be rejected because its holding would thwart the Legislature's explicit intent to have voters determine the tax allocation method for regional school districts. Under *N.J.S.A.* 18A:13-23, the tax levy for regional school districts "shall be apportioned among the municipalities included with the regional district, as may be approved by the voters for each municipality at the annual election or a special school election." Therefore, Sea Bright argues that upon receiving a request from one of the constituent members to revise the tax apportionment method, the Board was required to designate and submit the public question to be voted upon by the constituents of the district. Sea Bright also contends that equitable and remedial principles should be applied in this case to allow the voters of Sea Bright, Monmouth Beach, Oceanport and West Long Branch to weigh in on the allocation method.

Sea Bright also suggests that the Initial Decision is flawed because the ALJ found that an arbitrary, capricious or unreasonable analysis was not necessary since the Board's decision was discretionary, and no formal action was taken. Almost every decision made by a board of education involves some form of discretion; further, a public entity's inaction can be challenged as arbitrary, capricious or unreasonable in the same manner as formal action. Despite clear case law to the contrary, the Initial Decision wrongfully upheld the Board's refusal to certify the referendum and determined that no analysis of whether the decision was arbitrary, capricious or unreasonable was necessary.

Moreover, Sea Bright contends that the only way to determine whether a public entity's decision was arbitrary, capricious or unreasonable is for the public entity to provide an explanation for its decision. *Caporusso v. New Jersey Dep't of Health and Senior Services*, 434 *N.J. Super* 88, 109 (App. Div 2014). For years, the Board has continuously refused to provide

Sea Bright's taxpayers, and the taxpayers from the other constituent municipalities, with an explanation of how it reached its determination not to certify the referendum. Importantly, the Board did not have any public discussion or deliberation on placing the referendum on the ballot. Finally, there is no legitimate reason for the Board to deny a constituent's formal request to place a referendum on the ballot as the tax allocation method has no impact on the educational services provided to Shore Regional's students, and there also would be no additional cost to the Board. Each year the Board approves its annual budget based on a myriad of factors that allow it to provide the appropriate educational services to its students. After the budget is formally adopted, the total amount to be collected through local taxes is determined. The tax levy is then divided among the constituent municipalities, and – whether it is calculated through pupil enrollment, equalized property value or some combination thereof – does not affect the Board's annual budget or the amount of taxes it receives. Therefore, the Board's failure to place a referendum to modify the school funding formula on the ballot must be overturned as arbitrary, capricious or unreasonable.

In reply, the Board argues that the statutory scheme and the record on appeal does not support the modification of the Initial Decision. Nowhere in *N.J.S.A.* 18A:13-23, nor in the case law, is there any suggestion that the Legislature ever contemplated that the placing of such a question on the ballot was automatic. Instead, school law and election law should control regarding how this matter is placed on the ballot. Additionally, the motion made by Sea Bright's representative to the Board was extremely vague, simply stating "...to have a vote on conducting a referendum to change the State funding." (Respondent's Exceptions at 2) There was no indication as to what the proposed change to the tax collection method would be based on the ambiguous motion.

Additionally, in its exceptions, Sea Bright wrongfully contends that the Board was arbitrary, capricious or unreasonable because it failed to offer a reasonable explanation for why the motion died for lack of a second. There is no case law to suggest that any individual board member must discuss his or her reasons for not seconding a motion. Further, there is no case law that would compel the Commissioner to find that every motion made by a board member must be seconded and discussed, or that any request for a public question under the applicable statute must be debated. Therefore, the Initial Decision should be adopted as the final decision in this matter.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board is entitled to summary decision. Although there may be a longstanding disagreement between the parties regarding the funding formula,[1] this matter is limited to a determination as to whether the Board acted in an arbitrary, capricious or unreasonable manner by failing to place a referendum on the ballot. To that end, Sea Bright has the burden to prove that the Board's inaction was arbitrary, capricious or unreasonable. *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960). The Commissioner cannot find that the Board was arbitrary, capricious or unreasonable in the absence of the motion being seconded. Further, *N.J.S.A.* 18A:13-23 does not address the Board's obligation to place a referendum on the ballot based on a request by one municipality; rather, it simply states that the tax levy for regional school districts shall be apportioned among the municipalities and approved by the voters for each municipality. Moreover, despite Sea Bright's characterization of the Initial Decision, the ALJ did evaluate the Board's inaction under the arbitrary, capricious or unreasonable standard.

[1] The Initial Decision outlines previous efforts made by Sea Bright to explore the possibility of modifying the funding formula, beginning in 2015.

Finally, the Commissioner is also in accord with the ALJ's determination concerning Sea Bright's claim that the Board violated the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.*[2]

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19

Date of Mailing: 1/16/19

[2] Although claims against local school boards that do not arise under school laws are typically adjudicated in Superior Court, it is well established that the Commissioner has additional incidental jurisdiction to determine claims arising under the OPMA as they relate to school law controversies. *Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184, 197 (App. Div. 1979). Here, the incident jurisdiction is broad enough to encompass the claims made by Sea Bright in connection with the Board's decision not to place a referendum on the ballot.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.: EDU 04004-16
AGENCY NO.: 25-2/16

BOROUGH OF SEA BRIGHT,
MONMOUTH COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

Vito A. Gagliardi, Jr., Esq. and **Kerri A. Wright,** Esq., for petitioner (Porzio Bromberg and Newman, P.C., attorneys)

Dennis A. Collins, Esq., for respondent (Collins Vella and Casello, LLC, attorneys)

Record Closed: September 6, 2018 Decision: October 15, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF CASE

This case arises out of a dispute between the Shore Regional Board of Education (Shore Regional or Board) and one of its constituent members, the Borough of Sea Bright (Sea Bright) over the funding formula used to allocate the final burden supporting the regional school district. Sea Bright challenges the action of Shore

Regional in declining to place a referendum on the ballot to modify the school funding formula. A Sea Bright board member made a motion to include such a referendum on the ballot at its November 2015, meeting. No member of the Board seconded the motion, and thus, it died without a vote. There was no discussion regarding the motion and/or the reason why no one chose to second the motion.

The petitioner filed the instant action challenging the Board's failure to put the proposed referendum on the ballot. The allege that the decision was arbitrary, capricious and unreasonable. The matter was filed with the Commissioner of Education, who transmitted the matter to the Office of Administrative Law as a contested matter on March 11, 2016. On April 11, 2018, the respondent filed a motion for summary decision. On April 16, 2018, the petitioner filed a cross motion for summary decision. Opposition was filed by the petitioner to the motion of respondent on May 16, 2018. Opposition was filed by the respondent to the petitioner's motion on May 16, 2018. Reply briefs were filed by both parties and oral argument conducted on September 6, 2018, and the record closed at that time.

Issue:

Whether the failure of the Shore Regional Board of Education to place a change in the funding formula for its constituent districts on the ballot was arbitrary, capricious or unreasonable where a Sea Bright's Board member introduced a motion to place that question on the ballot, no other member seconded the motion, and consequently the motion failed?

FACTUAL BACKGROUND

A brief history of the funding mechanism for regional school districts is helpful to contextualize this dispute. Originally, in "1931 the Legislature authorized the establishment of regionalized school districts" with a "per pupil" funding mechanism. Borough of Seaside Park v. Comm'r of New Jersey Dept. of Educ., 432 N.J. Super. 167, 177 (App. Div. 2013). However, the New Jersey Supreme Court "[i]n a series of

decisions in the 1970s . . . held the existing system of public school funding in New Jersey unconstitutional[.]" Ibid.

"In response, the Legislature passed an amendment . . . in 1975 that altered the [funding formula] from a per pupil basis to an equalized value of real estate situated in each district[.]" Ibid. "The Legislature also adopted procedures for initiating withdrawal from a limited purpose regional school district[.]" "In 1993, the Legislature again passed an amendment to allow regional districts to choose among equalized valuation, per pupil enrollment, or a combination of the two through voter approval at an annual or special election. Id. at 178. The Legislature also created a procedure allowing regional school districts to dissolve themselves as an alternative to withdrawal.

Shore Regional School District was established in the 1960s on a per-pupil funding basis. The members of Shore Regional are Sea Bright, West Long Branch, Oceanport and Monmouth Beach. Subsequently, Shore Regional's funding formula changed in 1975 to equalized valuation and has not been amended since.[1] In April 2015, Sea Bright sought to raise its concerns over the funding formula with the Board due to a disparity between the percentage of Shore Regional's budget provided by Sea Bright and the percentage of students Sea Bright sent to the regional school district. While the disparity varies somewhat from year to year, the disparity amounts to approximately twenty percent of the budget compared to five percent of the student body.[2]

On July 23, 2015, the Mayor of Sea Bright submitted a letter to Shore Regional requesting that the Board "explore the possibility of modification of the school budget apportionment method." The letter specifically requested an update on the status of the request. On November 19, 2015, the Sea Bright Board member made a motion at the public meeting of the Board to submit a funding formula change to the voters in the next

[1] Sea Bright unsuccessfully challenged the validity of the 1975 amendment. See Borough of Sea Bright v. State, Dep't of Educ., 242 N.J. Super. 225 (App. Div. 1990) (affirming constitutionality of the regional school district funding formula under the New Jersey Constitution).

[2] Monmouth Beach, similarly, sends roughly 15% of the total pupils enrolled at Shore Regional but pays around 25% of the total appropriations. See Pet. Brief, p. 17.

election. Sea Bright, Exh. L, p. 95. It is undisputed that no other Board member seconded the motion. Consequently, no further vote was taken regarding the request to place the funding formula on the ballot, and there was no discussion regarding same.

The minutes reflect that the Board went into closed executive session to discuss its response to the Mayor of Sea Bright's July 23, 2015, letter regarding the issue of the funding formula. Ultimately, a response was sent to Sea Bright indicating that Shore Regional Board of Education decided not to explore the possibility of a change in apportionment formula of the Shore Regional High School District. Long Cert., Exh. B. Sea Bright has also argued that the executive session was in violation of the Open Public Meetings Act. However, there was no action taken in the meeting, and even assuming there was a violation, it has no bearing on the failure of the motion for a referendum to carry.

The above facts are undisputed and are, thus, **FOUND** as **FACT**.

LEGAL ANALYSIS

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

Shore Regional argues that placing the funding formula on the ballot is a discretionary act. Moreover, the Board entertained a motion in an open pubic meeting and no one seconded the motion. There was no discussion on this motion and that after there was no second, the motion died. Sea Bright argues that a discussion regarding the reasons for not seconding the motion were required, and the absence of such a discussion is arbitrary, capricious and unreasonable as a matter of law. The Board maintains that there was no need for any discussion, and assuming a reason is

required, there are legitimate non-arbitrary reasons for the Board's rejection of the motion, which are entitled to deference.

Sea Bright argues that a "regional board, upon receipt of [a request to change the funding apportionment], has a duty to submit the question to the voters . . ." Sea Bright Brief, p. 15. However, the statute does not mandate any such action. Moreover, N.J.S.A. 18A:13-23 provides three options for regional school districts to apportion the appropriations from its constituent members. First, a district may utilize a "equalized valuation" method based on property values. N.J.S.A. 18A:13-23(a). Second, a district may now elect to apportion appropriations based on the "proportional number of pupils enrolled." N.J.S.A. 18A:13-23(b). Last, a district may opt for "any combination of apportionment" between equalized valuation and per pupil contribution. N.J.S.A. 18A:13-23(c). In addition, N.J.S.A. 18A:13-23.3 provides that a "regional district may modify [how appropriations] are apportioned" as long as a qualifying event has occurred. Ibid. There is nothing in the statute that mandates the Board to put the referendum on the ballot, in the absence of a vote by the Board.

It is well settled that a modification of the funding formula is a discretionary act by the Board. Moreover, the plain language of N.J.S.A. 18A:13-17 and N.J.S.A. 18A:13-23 to 23.3, reflect that such an act is permissive not mandatory. The School Elections law sets a deadline for the submission of public questions but does not impose additional procedural requirements on the Board's conduct. Under N.J.S.A. 18A:13-23 the role of the voting public is to approve or disapprove of the apportionment method placed on the ballot by the Board. Nothing mandates that a district place such a referendum on the ballot.

The foregoing interpretation is consistent with the provisions concerning withdrawal and dissolution of regional school districts. N.J.S.A. 18A:13-51 provides that the board of education of any . . . district constituting part of a limited purpose regional school district or the governing body of the [district's] municipality . . . may, by resolution, apply to the superintendent . . . [for] an investigation as to the advisability of withdrawal." N.J.S.A. 18A:13-51.

The Legislature also gives individual constituent municipalities the power to begin the withdrawal process. The Executive County Superintendent must then produce a report pursuant to N.J.S.A. 18A:13-52 and, within thirty days of the issuance of that report, the "municipal governing body or the board of education of the withdrawing district . . . may . . . petition the commissioner [to place the issue on the ballot]." N.J.S.A. 18A:13-23 to 23.3, in contrast, does not require the regional board of education or commissioner to conduct an impact study for modification of the funding formula. Nor does the statute set timelines or other decisional factors for consideration. Essentially, not only is the decision to place a funding formula change on the ballot discretionary, the Legislature did not place limitations on that discretion beyond the qualifying events listed under N.J.S.A. 18A:13-23.3—unlike for withdrawal and dissolution.

In conclusion, a decision to hold a referendum to change the funding formula is a discretionary act within the powers of the regional school board. Moreover, there was no need for a discussion of the reasons for the failure of the motion to receive event a second. Finally, since there was no second on the motion, it clearly failed. There was nothing substantively or procedurally improper regarding the decision of the Board not to place a referendum on the ballot. As to the allegation of a violation of the Open Public Meetings Act, the Board argues that no decision or vote occurred in the closed executive session because no further vote was required after the Sea Bright apportionment motion failed. Board Reply, p. 14. Finally, the Board's closed executive session was entirely proper under the Open Public Meetings Act because the Board was aware of the likelihood of litigation resulting from their decision and went into Executive Session to discuss a response to the letter from the Mayor only. There was no formal action taken in the executive session, as there was no formal action taken on the motion which failed to carry.

CONCLUSION

For the foregoing reasons, I **GRANT** the Board's motion for summary decision and **DENY** Sea Bright's motion for summary decision for the following reasons:

ORDER

I hereby **ORDER** that the Motion of Sea Bright is hereby **DENIED,** and the cross-motion of Shore Regional is **GRANTED**, and the petition of Sea Bright 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.

October 15, 2018
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: October 15, 2018 (emailed)

Date Mailed to Parties: October 15, 2018 (emailed)

/mel

AGENCY DKT. NO. 286-11/18

IN THE MATTER OF CRAIG WOOLRIDGE,	:	
COLLEGE ACHIEVE PATERSON CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, PASSAIC COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately completed the training after the issuance of its October 30, 2018 Order to Show Cause, but prior to the SEC's November 27, 2018 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the SEC's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19
Date of Mailing: 1/17/19

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
CRAIG WOOLRIDGE	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***COLLEGE ACHIEVE PATERSON CHARTER SCHOOL*, PASSAIC COUNTY**	:	
	:	**DOCKET NO.: T14-18**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on October 30, 2018, and mailed on October 31, 2018, via regular and electronic mail directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on October 31, 2018, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.1, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of a charter school located in the City of Paterson, County of Passaic. Pursuant to N.J.S.A. 18A:12-23.1, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school As a result of his position as a charter school trustee, Respondent is required, pursuant to N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2018.

On July 2, 2018, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2018, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on May 4, 2018, Respondent was registered to take Governance 1 and an e-mail with the link to complete the training was sent to Respondent's registered e-mail address. In addition, on June 12, 2018, July 11, 2018, August 11, 2018, and August 16, 2018, additional e-mail notices were sent through the Weekly Program Update to all charter school trustees who had not yet completed training, including Respondent. NJSBA also sent reminder communications to Respondent's Charter Lead on August 20, 2018, and August 29, 2018. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in September 2018, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2018. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated October 22, 2018, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions to Respondent on how to complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on October 31, 2018.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2018, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2018. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, as well as N.J.A.C. 6A:28-4.1 and N.J.A.C. 6A:11-3.1(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file

exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 28, 2018

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
CRAIG WOOLRIDGE	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
COLLEGE ACHIEVE PATERSON CHARTER SCHOOL, **PASSAIC COUNTY**	:	
	:	**DOCKET NO.: T14-18**

WHEREAS, pursuant to N.J.S.A. 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.; and

WHEREAS, Craig Woolridge, Respondent, is a charter school trustee of College Achieve Paterson Charter School; and

WHEREAS, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2018; and

WHEREAS, at its meeting on October 30, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2018 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2018; and

WHEREAS, at its meeting on November 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on November 27, 2018, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on November 27, 2018, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director

18-19SEC

AGENCY DKT. NO. 290-11/18
SEC DKT. NO. C08-15

IN THE MATTER OF OBDULIA GONZALEZ, ISRAEL VARELA, MILADY TEJEDA, SAMUEL LEBREAULT, AND KENNETH PUCCIO, BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission have been reviewed. The Commission found that respondents Gonzalez, Varela and Tejeda[1] violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act for voting to approve a settlement agreement that resulted in a personal benefit to each respondent – specifically, the dismissal of ethics charges against them – and recommended a 60-day suspension or, to the extent that any of the respondents no longer serve as a board member, the Commission recommended a penalty of censure. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. Respondents did not file exceptions to the recommended penalty, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4. Counsel for the respondents did, however, inform the Commissioner that all three respondents had resigned from the Board, so they would only be subject to a censure rather than a suspension.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Accordingly, respondents Gonzalez, Varela and Tejeda shall each be censured as school officials found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/19
Date of Mailing: 1/17/19

[1] Respondent Puccio was dismissed from this matter, and Respondent Lebreault accepted a penalty of censure as part of a settlement agreement. Accordingly, this decision only involves respondents Gonzalez, Varela and Tejeda.

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

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OBDULIA GONZALEZ, ISRAEL VARELA, MILADY TEJEDA, SAMUEL LEBREAULT, AND KENNETH PUCCIO,	:	**SEC DKT. NO.: C08-15**
	:	**OAL DKT. NO.: EEC-19282-15**
***PERTH AMBOY BOARD OF EDUCATION,* MIDDLESEX COUNTY**	:	**FINAL DECISION**

I. PROCEDURAL HISTORY

This matter arises from a Complaint filed on February 11, 2015, by Charles Simmons alleging that Obdulia Gonzalez ("Respondent Gonzalez"), Israel Varela ("Respondent Varela"), Milady Tejada ("Respondent Tejada"), Samuel Lebreault ("Respondent Lebreault"), and Kenneth Puccio ("Respondent Puccio") (collectively referred to as "Respondents"), members of the Perth Amboy Board of Education (Board), violated the School Ethics Act (the "Act"), N.J.S.A. 18A:12-21 et seq. By correspondence dated February 27, 2015, and March 26, 2015, Mr. Simmons was notified that his Complaint was deficient, and required amendment before the School Ethics Commission (the "Commission") could accept his filing. On April 15, 2015, Mr. Simmons cured all defects, and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in N.J.A.C. 6A:28-6.3. The Complaint alleged that Respondents violated N.J.S.A. 18A:12-22(a), N.J.S.A. 18A:12-24(a), N.J.S.A. 18A:12-24(c), N.J.S.A. 18A:12-24(e), and N.J.S.A. 18A:12-24(f).

On April 21, 2015, the Complaint was served on Respondents, via regular and certified mail, notifying them that charges had been filed against them with the Commission, and advising that they had twenty (20) days to file a responsive pleading. On June 1, 2015, and after receiving an extension, Respondents filed a Motion to Dismiss in Lieu of Answer ("Motion to Dismiss"). On June 5, 2015, Mr. Simmons filed a Response to the Motion to Dismiss.

By correspondence dated June 3, 2015, the parties were advised that this matter would be placed on the Commission's agenda for its meeting on June 30, 2015, to make a determination regarding the Motion to Dismiss. At its meeting on June 30, 2015, the Commission discussed this matter, and at its meeting on July 28, 2015, the Commission voted to grant the Motion to Dismiss as to the alleged violations of N.J.S.A. 18A:12-22(a) and N.J.S.A. 18A:12-24(a); to deny the Motion to Dismiss as to the alleged violations of N.J.S.A. 18A:12-24(c), N.J.S.A. 18A:12-24(e), and N.J.S.A. 18A:12-24(f); and to direct Respondents to file an Answer to the remaining allegations in the Complaint.

On August 28, 2015, and after receiving an extension, Respondents filed an Answer as directed. Following receipt of the Answer, the parties were advised, by correspondence dated September 1, 2015, that this matter would be placed on the Commission's agenda for its meeting on September 22, 2015, to make a determination regarding probable cause on the remaining

allegations. At its meeting on September 22, 2015, the Commission discussed this matter, and at its meeting on October 27, 2015, the Commission voted to find probable cause for the alleged violation of N.J.S.A. 18A:12-24(c); to find no probable cause for the alleged violation of N.J.S.A. 18A:12-24(e) or the alleged violation of N.J.S.A. 18A:12-24(f); and to transmit the matter to the Office of Administrative Law ("OAL") pursuant to N.J.A.C. 6A:28-10.7(c)(2).

At the OAL, Respondent Puccio was dismissed from the above-captioned matter with prejudice, and Respondent Lebreault agreed to accept the penalty of a censure as part of a settlement agreement; with the dismissal of Respondent Puccio and the settlement of Respondent Lebreault, only Respondent Gonzalez, Respondent Varela, and Respondent Tejada remain as named Respondents. After stipulating to a set of facts, both parties filed cross-motions for summary decision. Following review of the parties' submissions, on September 11, 2018, Administrative Law Judge Barry E. Moscowitz, ("ALJ Moscowitz") issued an Initial Decision. He concluded that by discussing and then voting to approve a settlement agreement that resulted in a personal benefit(s) to Respondents, they violated N.J.S.A. 18A:12-24(c). Based on this legal conclusion, ALJ Moscowitz recommended that the Respondents "be suspended from their positions as members of the" Board.

The Commission acknowledged receipt of ALJ Moscowitz's Initial Decision on September 11, 2018; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was October 26, 2018. Prior to October 26, 2018, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions. Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, and for good cause shown, the Commission was granted an extension until December 10, 2018. Respondents filed Exceptions on October 8, 2018, and Complainant filed a Reply to Respondents' Exceptions on October 12, 2018.

The Commission considered the full record in this matter, including the exceptions filed by the parties, at its meeting on October 30, 2018. At its meeting on November 27, 2018, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Moscowitz's findings of fact; to adopt the legal conclusion that Respondents violated N.J.S.A. 18A:12-24(c) when they discussed and then voted to approve a settlement agreement that resulted in a personal benefit(s) to each Respondent; to modify the recommended penalty for Respondents from "suspension" to suspension for sixty (60) days; to modify the recommended penalty for any Respondent who is no longer a currently seated Board member from "suspension" to censure; and, in order to avoid disruption of the Perth Amboy School District's operations, and in recognition of the fact that the suspension of multiple Board members may cause hardship to the Board for quorum purposes, to recommend that the Commissioner of Education ("Commissioner") stagger the imposition of the penalties for the remaining Respondents, with Respondent Tejeda serving her suspension first, Respondent Gonzalez serving her suspension second, and Respondent Varela serving his suspension last.

II. INITIAL DECISION

As set forth in ALJ Moscowitz's Initial Decision, the parties stipulated to the following set of facts:

1. In February 2015, the Commission received a complaint alleging that five (5) members of the Board, specifically, Respondents, violated the Act.

2. The Commission subsequently found probable cause to credit the allegation that Respondents violated N.J.S.A. 18A:12-24(c), which prohibits school officials from acting in any matter where they have an interest or direct or indirect financial involvement or where they have a personal involvement that is or creates some benefit to themselves. On November 16, 2016, the Commission transferred the matter to the OAL for a hearing, pursuant to N.J.A.C. 6A:28-10.7(c)(2).

3. In 2014, Respondents were potential Defendants in a civil action contemplated by former Perth Amboy Superintendent Janine Caffrey ("Caffrey"). Additionally, Caffrey had brought school-ethics complaints against Respondent Varela (C30-12); Respondents Varela, Lebreault, Gonzalez, and Tejeda (C02-13); and Respondent Varela (C35-13) (collectively referred to as the "Caffrey litigation").

4. Board members are school officials pursuant to N.J.S.A. 18A:12-23.

5. N.J.S.A. 18A:12-24(c) prohibits any school official from acting "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 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."

6. The Board held a regularly scheduled meeting on June 19, 2014, which lasted until the early morning hours of June 20, 2014 ("June 2014 Meeting").

7. As reflected in its minutes, the Board went into executive session twice during the June 2014 Meeting, with the second session taking place between the hours of 12:00 a.m. and 12:55 a.m.

8. Respondent Gonzalez, Respondent Varela, Respondent Tejeda, and Respondent Lebreault all participated in the second executive session.

9. As reflected in the Board minutes, upon the return to regular session, the Board attorney read a resolution to approve the settlement of the Caffrey litigation.

10. Although not specified in the resolution, the settlement included payment of $184,000 to Caffrey, as well as the withdrawal of the pending ethics charges she had filed

against Respondent Varela (C30-12); Respondents Varela, Lebreault, Gonzalez, and Tejeda (C02-13); and Respondent Varela (C35-13).

11. Respondent Gonzalez, Respondent Varela, Respondent Tejeda, and Respondent Lebreault all participated in a discussion of the proposed settlement during the second executive session.

12. Respondent Gonzalez, Respondent Varela, Respondent Tejeda, and Respondent Lebreault all voted in favor of the resolution.

13. The Board did not invoke the doctrine of necessity to approve the resolution.

14. Respondent Gonzalez, Respondent Varela, Respondent Tejeda, and Respondent Lebreault attended the next Board meeting, which was on July 24, 2014, and voted to accept the minutes of the June 19, 2014, meeting.

15. Respondent Gonzalez, Respondent Varela, Respondent Tejeda, and Respondent Lebreault did not contribute any personal funds toward the $184,000 settlement.

16. Respondent Puccio was dismissed from this matter with prejudice on or about January 3, 2017.

17. Respondent Lebreault acknowledged that his conduct violated N.J.S.A. 18A:12-24(c) and accepted a censure on February 17, 2018.

18. On April 18, 2018, then Acting Commissioner Lamont O. Repollet executed a Consent Order to effectuate the settlement with Respondent Lebreault.

Based on the stipulated set of facts as set forth above, and following the filing of cross-motions for summary decision, ALJ Moscowitz concluded that Respondents violated N.J.S.A. 18A:12-24(c). Initial Decision at 6-7. As noted by ALJ Moscowitz, Respondents "all but acknowledge" they violated the public trust, as they stipulated that they acted in their official capacity when they discussed the settlement agreement regarding the Caffrey litigation and then approved the settlement agreement. *Id.* at 6. Respondents also stipulated to the terms of the settlement agreement, which, as reasoned by ALJ Moscowitz, "reveals just how [R]espondents violated the public trust." *Id.* at 6-7. Pursuant to the terms of the settlement agreement, Caffrey agreed not to sue Respondents, not to testify against them, to withdraw the then-pending ethics complaints (C30-12, C02-13, and C35-13), and "never discuss them in any way, shape, or form." *Id.* at 7. In exchange for the dismissal of her claims and complaints, Caffrey was "to receive $184,000, leave town, and never come back." *Id.* at 7. Based on these facts, ALJ Moscowitz concluded that Respondents "acted in their official capacity in a matter in which they had personal involvement and in violation of N.J.S.A. 18A:12-24(c). *Id.* at 7.

ALJ Moscowitz did not find persuasive Respondents' argument that they did not violate N.J.S.A. 18A:12-24(c) because Caffrey "voluntarily" agreed to dismiss the ethics charges against them, and "it was in the personal interest of Caffrey to do so." Initial Decision at 7. To conclude

otherwise would be, according to ALJ Moscowitz, "to lose 'the respect and confidence of the people,' and to create a 'justifiable impression among the public' that their trust had been violated." *Id.* at 7. By first discussing and then approving a settlement agreement that "would end and forever bar the ethical charges against them," Respondents received a benefit that created a justifiable impression among the public that their trust had been violated." *Id.* at 7.

Respondents argued that they sought legal advice as to whether they could discuss and then vote on the settlement agreement, and that Board counsel advised them that they could do so. Initial Decision at 7. However, ALJ Moscowitz found that, "[t]he minutes of the meeting...do not document this exchange" and, therefore, "this advice is not a fact...upon which either [R]espondents or [he] could rely." *Id.* at 7. Even if such advice was given, however, ALJ Moscowitz reasoned that it would not change his conclusion and, instead, would only serve to mitigate the penalty. *Id.* at 7-8 (citing I/M/O Garcia, Hoboken Board of Education, C41-05). The only advice that could have shielded Respondents from liability for violating N.J.S.A. 18A:12-24(c) would have been "the invocation of the doctrine of necessity"; however, ALJ Moscowitz found that although the doctrine of necessity was invoked in connection with another agenda item, "the minutes of the meeting do not indicate that this advice was given [relative to the discussion and vote on Caffrey's settlement agreement], and the parties stipulate[d] this doctrine [of necessity] was not invoked." *Id.* at 8. There is also nothing in the minutes to corroborate that any Respondent expressed concern with discussing and/or voting on the settlement agreement, either before or after the vote occurred. *Id.* at 8.

Having found that the Respondents violated N.J.S.A. 18A:12-24(c), ALJ Moscowitz recommended the penalty of suspension. Initial Decision at 10. He based that recommendation on the following factors: (1) Respondents did not seek or receive legal advice from counsel as to whether they could participate in the discussion and vote on the settlement agreement; (2) they knew of the doctrine of necessity and did not invoke it; (3) they were not new board members; and (4) they twice discussed and then twice voted on a matter with which they had an extremely close connection. In recommending the penalty of suspension, which was for an unspecified duration, ALJ Moscowitz noted that Respondents' involvement in the discussion and vote on a matter involving ethics charges "make this case more disturbing than ironic." *Id.* at 10.

III. EXCEPTIONS

On October 8, 2018, Respondents filed Exceptions, arguing that ALJ Moscowitz inaccurately focused on the text of the statute and should have considered "interpretative case law" that makes it clear that the Board members' vote in favor of the Caffrey settlement is not actionable under the Act. In support of their argument, Respondents cite I/M/O Rhonda Williams Bembry, Hackensack Board of Education, C49-12 ("Bembry") (quoting Friends Retirement Concepts v. Board of Education of the Borough of Somerville, 356 N.J. Super. 203, 214 (Law Div. 2002) ("Friends"), which states that the question turns on "whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." In addition, a conflict of interest arises when "the public official has an interest not shared in common with the other members of the public." As applied here, Respondents argue that Caffrey's settlement offer did not tempt them to "depart from their sworn public duties," and that they voted for it because the Board attorney advised

them that doing so was in the District's best interest. By approving the settlement agreement, Respondents contend they avoided expensive and protracted litigation with Caffrey, as well as public attention and outcry. Respondents also assert that while they received an incidental benefit, namely dismissal of ethics charges, the dismissal of those charges is insufficient to warrant a finding that they violated N.J.S.A. 18A:12-24(c). Finally, Respondents argue that even if the Board members violated the Act, the recommended suspension is "grossly disproportionate" to the violation, as they did not act "outrageously, out of unadulterated selfishness, and with stark disregard for the school district." Instead, Respondents argue that they acted in the best interest of the Perth Amboy School District.

In reply to Respondents' Exceptions filed on October 12, 2018, Complainant argues that ALJ Moscowitz correctly found that the dismissal of personal ethical charges against Respondents (as part of a settlement agreement) resulted in a benefit to them; correctly applied the law in determining that the Respondents took action in a matter where they had a personal involvement that created some benefit to them; and correctly found that school administrators must avoid conduct that creates a justifiable impression among the public that their trust is being violated. Complainant also contends that reliance on Bembry and Friends is misplaced because neither case can be reasonably interpreted to mean what Respondents construe it to mean.

Moreover, Complainant agrees with the recommended penalty of suspension because Respondents were not new board members; they participated in and then voted on a matter with which they were closely connected without invoking the doctrine of necessity; and, most importantly, they received a personal benefit(s) by accepting the settlement agreement, namely the dismissal of multiple ethics complaints. Complainant asserts that Respondents' actions demonstrate a "flagrant disregard" for the public trust and their obligation as Board members to preserve that trust; therefore, their conduct warrants the penalty of suspension.

IV. ANALYSIS

Upon careful and independent review of the record, the Commission adopts ALJ Moscowitz's findings of fact, and also adopts the legal conclusion that Respondents violated N.J.S.A. 18A:12-24(c) when they discussed and then voted to approve a settlement agreement that resulted in a personal benefit(s) to Respondents. In adopting ALJ Moscowitz's legal conclusion, the Commission finds wholly unpersuasive any argument that Respondents' involvement in the discussion and vote on the settlement agreement was, somehow, in the best interest of the school district and/or the public. Even if the settlement agreement did avoid protracted, expensive, and potential unsavory or embarrassing litigation between the Board and Caffrey, Respondents conveniently ignore the fact that the approval of the settlement agreement also dismissed multiple ethics charges against each of them – specifically, three (3) cases against Respondent Varela, one case (1) against Respondent Gonzalez, and one (1) case against Respondent Tejeda. The purpose of the Act was to ensure and preserve public confidence in the conduct of school officials, and by voting to approve an agreement that undermined these very principles, Respondents acted in a way that is the antithesis of ethical conduct, and the definition of self-serving behavior. Moreover, by characterizing the dismissal of the ethics charges as "incidental," it is clear that Respondents fail to fully appreciate the importance of the standards

to which their conduct as school officials must adhere, or the penalties that can be imposed for failure to comply.

In addition, and as noted by ALJ Moscowitz, there is nothing in the Board's minutes to indicate that Respondents sought, obtained, or relied upon legal advice when they chose to discuss, and then vote upon, the settlement agreement that resulted in the dismissal of ethics charges against each of them. Therefore, the Commission finds this argument equally unpersuasive.

V. DECISION

The Commission determines to adopt the ALJ's Initial Decision finding that Respondents violated N.J.S.A. 18A:12-24(c) when they discussed and then voted to approve a settlement agreement that resulted in a personal benefit(s) to each Respondent, namely the dismissal of ethics charges against each Respondent.

VI. PENALTY

Based upon the conclusion that Respondents violated N.J.S.A. 18A:12-24(c) when they discussed and then voted to approve a settlement agreement that resulted in a personal benefit(s) to each Respondent, the Commission concurs with ALJ Moscowitz that suspension is the appropriate penalty. As noted by ALJ Moscowitz, this penalty is appropriate because Respondents did not seek or receive legal advice from counsel as to whether they could participate in the discussion and vote on the settlement agreement; they knew of the doctrine of necessity (which would have permitted them to vote) but did not invoke it; they were not new board members; they twice discussed and then twice voted on a matter with which they had an extremely close connection; and they received a personal, and direct, benefit as a result of the settlement agreement.

Notwithstanding its agreement with the recommended penalty of suspension, the Commission **modifies** the recommended penalty to clarify that **the duration of the suspension shall be for sixty (60) days.** The Commission further modifies the recommended penalty to note that, to the extent a remaining Respondent may no longer serve as a board member, his or her suspension shall be reduced to a censure, the maximum penalty authorized for individuals who no longer serve as board members. Finally, and in order to avoid disruption of the Perth Amboy School District's operations, and in recognition of the fact that the suspension of multiple Board members may cause hardship to the Board for quorum purposes, the Commission recommends that the Commissioner stagger the imposition of the penalties for the remaining Respondents, with Respondent Tejeda serving her suspension first, Respondent Gonzalez serving her suspension second, and Respondent Varela serving his suspension last.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4, et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: November 28, 2018

RESOLUTION ADOPTING DECISION IN CONNECTION WITH C08-15

WHEREAS, pursuant to N.J.A.C. 6A:28-10.7(c)(2), the School Ethics Commission ("Commission") voted to transmit the above matter to the Office of Administrative Law for a hearing; and

WHEREAS, Barry E. Moscowitz, Administrative Law Judge ("ALJ Moscowitz") issued his Initial Decision on September 11, 2018; and

WHEREAS, in his Initial Decision, ALJ Moscowitz noted that the parties stipulated to a set of facts which, ultimately, served as the basis for each party's motion for summary decision; and

WHEREAS, in his Initial Decision, ALJ Moscowitz found that Respondents violated N.J.S.A. 18A:12-24(c) when they discussed and then voted to approve a settlement agreement that resulted in a personal benefit(s) to each Respondent, and recommended that Respondents "be suspended from their positions as members of the" Perth Amboy Board of Education; and

WHEREAS, on October 8, 2018, Respondents filed Exceptions to ALJ Moscowitz's Initial Decision; and

WHEREAS, on October 12, 2018, Complainant filed a Reply to Respondents' Exceptions; and

WHEREAS, at its meeting on October 30, 2018, the Commission reviewed and discussed the record, including the Initial Decision, Respondents' Exceptions, and Complainant's Reply to Respondent's Exceptions, and

WHEREAS, at its meeting on October 30, 2018, the Commission discussed adopting the findings of fact from the Initial Decision; adopting the legal conclusion that Respondents violated N.J.S.A. 18A:12-24(c) when they discussed and then voted to approve a settlement agreement that resulted in a personal benefit(s) to each Respondent; modifying the recommended penalty for Respondents from "suspension" to suspension for sixty (60) days; modifying the recommended penalty for any Respondent who is no longer a currently seated Board member from "suspension" to censure; and recommending that that the Commissioner of Education stagger the imposition of the suspensions, with Respondent Tejeda serving her suspension first, Respondent Gonzalez serving her suspension second, and Respondent Varela serving his suspension last; and

WHEREAS, at its meeting on November 27, 2018, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from October 30, 2018; and

NOW THEREFORE BE IT RESOLVED, the Commission hereby adopts the within decision as a Final Decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly
was duly adopted by the School Ethics Commission
at its public meeting on November 27, 2018.

Kathryn A. Whalen, Director
School Ethics Commission

IN THE MATTER OF THE TENURE HEARING :
OF SUSAN JOHNSON, BOARD OF EDUCATION :
OF THE CITY OF TRENTON, MERCER COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board certified tenure charges of excessive absenteeism, incapacity, conduct unbecoming, abandonment, and other just cause against respondent – a tenured secretary employed by the Board – and sought to terminate her employment with the district. Respondent was provided notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, she had 15 days from the date that the charges were filed with the Commissioner to file a written response to the charges, and that – absent the granting of an extension for good cause – failure to do so would result in the charges being deemed admitted. No reply to the charges was received from or on behalf of the respondent.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, and dismissed the respondent from her tenured position in petitioner's school district.

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

January 17, 2019

AGENCY DKT NO. 291-12/18

IN THE MATTER OF THE TENURE HEARING :
OF SUSAN JOHNSON, BOARD OF EDUCATION :
OF THE CITY OF TRENTON, MERCER COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Adam S. Herman, Esq.
No appearance by or on behalf of Respondent, Susan Johnson

This matter was opened before the Commissioner of Education on December 3, 2018 through tenure charges of excessive absenteeism, incapacity, conduct unbecoming, abandonment, and other just cause certified by Dr. Shelley Jallow, Chief Schools Officer, Secondary, of the Trenton School District, together with supporting evidence against respondent, Susan Johnson, a tenured secretary in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address – via certified mail, return receipt requested, and regular mail – on October 10, 2018.

On December 3, 2018, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner*," and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from, or on behalf of, respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has engaged in conduct that is unbecoming of a support staff member, including excessive absenteeism, failing to follow basic District procedures and protocols, causing disruption in the work environment, and abandonment of her position. Respondent was out of the office for 27.5 days during the 2010-2011 school year, 16.0 days during

the 2011-2012 school year, 60.0 days during the 2012-2013 school year, 62.0 days during the 2013-2014 school year, 113.5 days during the 2014-2015 school year, 121.5 days during the 2015-2016 school year, 38.5 days during the 2016-2017 school year (after utilizing 59.0 accident days), and 112.5 days during the 2017-2018 school year (after utilizing 57 accident days). The respondent has failed to report to work during the 2018-2019 school year and has not attempted to contact the District in any way to discuss her absence. The evidence reflects that respondent's conduct resulted in disruption in the work environment.

Deeming the allegations to be admitted – and noting that respondent has failed to answer the charges certified against her – the Commissioner finds that petitioner's charges of conduct unbecoming have been proven, and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 1/17/19

Date of Mailing: 1/17/19

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

20-19

OAL DKT. NO. EDU 4373-14
AGENCY DKT. NO. 69-3/14

SANDRA LOPEZ-DONOVAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/17/19

Date of Mailing: 1/17/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04373-14
AGENCY DKT. NO. 69-3/14

SANDRA LOPEZ-DONOVAN,
Petitioner,
v.
BOARD OF EDUATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent.

Flavio L. Komuves, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Phillip Stern, Esq. for respondent (DiFranceso Bateman, attorneys)

Record Closed: December 12, 2018 Decided: December 13, 2018

BEFORE **JEFFREY A. GERSON**, ALJ (Ret., on recall):

On April 11, 2018 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 a telephone conference on November 1, 2018 and during that time, the parties advised the undersigned that the matter was settled.

A signed copy of the Settlement Agreement indicating the terms of settlement was signed by the parties and is attached hereto.

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

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

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

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

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

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

December 13, 2018

DATE

JEFFREY A. GERSON, ALJ (Ret., on recall)

Date Received at Agency: 12/18/2018

Date Mailed to Parties: 12/14/2018

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2018 DEC 13 A 1:20
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is made and entered into this 7th day of December, 2018 by and between the **BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,** with administrative offices located at 1200 Myrtle Avenue, Plainfield, NJ 07063 (hereinafter referred to as "the Board"), and **MS. SANDRA JACOME,** residing in the State of New Jersey (hereinafter referred to as "Ms. Jacome").

WITNESSETH:

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

WHEREAS, Ms. Jacome is employed by the Board as a teacher; and

WHEREAS, on or about February 12, 2013, Ms. Jacome sustained injuries from a work-related accident while in the course of her employment with the Board; and

WHEREAS, on or about May 2018, Ms. Jacome received a Settlement for her accident and injuries through the State of New Jersey, Division of Workers' Compensation; and

WHEREAS, the Board is obligated pursuant to the Workers' Compensation Laws, and the Education Laws, N.J.S.A. 18A:30-2.1(a) to pay Ms. Jacome for up to one calendar year from the date of her injury without charging her absences to her annual sick leave allotment; and

WHEREAS, the Board charged Ms. Jacome for thirty-one (31) sick days during her leave period arising out of the aforementioned accident; and

WHEREAS, Ms. Jacome filed a Petition of Appeal to the Commissioner of Education seeking restoration of said thirty-one (31) sick days and retroactive salary payments, captioned ***Sandra Lopez-Donovan v. Plainfield Board of Education***, Agency Docket No. 69-3/14 ("the Litigation"); and

WHEREAS, the Board and Ms. Jacome desire to settle the Litigation;

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. **Restoration of Sick Days**

The Board agrees to restore thirty-one (31) sick days to Ms. Jacome's sick leave bank.

2. **Pension Service Credit**

The Board agrees to remit to Ms. Jacome's PERS account all sums due for service credit earned between March 2013 to September 2014. Proof of this remittance shall be simultaneously sent to Ms. Jacome's counsel. Implementation of this section means that Ms. Jacome will have twenty-one years of service credit arising from service with the Board effective June 30, 2018.

3. **Payment**

In consideration for the Release set forth below, the Board shall pay Ms. Jacome a total of Thirty-Six Thousand, Four Hundred ($36,400) Dollars. Payment shall be made no earlier than January 1, 2019 and no later than February 1, 2019.

4. Release

In exchange for the above consideration, Ms. Jacome, her heirs and assigns, hereby irrevocably and unconditionally waive, release and forever discharge the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, from any and all claims and rights of any kind that she may have, whether now known or unknown, suspected or unsuspected, relating to the Litigation.

5. Withdrawal of the Litigation

Upon proof of the Board's restoration of her thirty-one (31) sick days, Ms. Jacome will withdraw the Litigation, with prejudice.

6. Assent to Terms

Ms. Jacome hereby acknowledges that she entered into this Agreement with a full understanding of her rights and that she was fully informed of the implications of this Agreement by her attorneys, Flavio L. Komuves, Esq. and Alvina Swati, Esq., and she does so without duress of her own free will and volition.

7. Entire Agreement

This Agreement represents the entire understanding of the parties concerning the settlement of the litigation, and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind concerning the settlement of the Litigation shall be binding upon the parties.

8. Severability

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.

9. 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:

SANDRA JACOME Date: 12/10/18

WITNESS:

ALVINA SWATI, ESQ. Date: 12/10/18

FOR THE BOARD OF EDUCATION OF THE CITY OF PLAINFIELD:

RICHARD WYATT, BOARD PRESIDENT Date: 12/7/18

J.A., ON BEHALF OF MINOR CHILDREN, A.A. AND T.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pro se petitioner appealed the determination of the respondent Board that her child, A.A., was not entitled to a free public education in Hamilton Township schools. The matter concerning petitioner's other minor child, T.A., was resolved prior to hearing, and is not included herein. Petitioner contended that she is domiciled with her children in Hamilton and is separated from T.A., the children's father, who lives in Trenton. The Board argued that a residency investigation indicated that J.A. is not domiciled in Hamilton Township. Petitioner asserted that she and the children are legally domiciled in Hamilton, but because of her work schedule, she often relies on T.A. to assist with childcare. Petitioner sometimes works night shifts, during which the children sleep at their father's home in Trenton. A hearing in this matter was held in October 2018, and an Initial Decision was issued thereafter.

The ALJ found, *inter alia*, that: petitioner produced substantial evidence of her residence in Hamilton, including government-issued identification and court records; petitioner credibly testified that she relies upon T.A.'s assistance with child care, and during the times that T.A. is caring for his children, they are at T.A.'s house in Trenton; otherwise, J.A. is the primary caretaker of the children; there is no evidence that this child care arrangement alters the domicile of J.A. and her children; the Board's argument that the residency investigation establishes that A.A. resides at the Trenton address rather than the Hamilton address is without merit, as A.A. was seen exiting T.A.'s Trenton house only eleven times over a period of sixty-three school days, and the Hamilton address was surveilled on only two occasions; the evidence is insufficient to support a finding that A.A. resided in Trenton. The ALJ concluded that the petitioner and her children are domiciled in Hamilton Township. Accordingly, A.A. was entitled to a free public education in the District's schools, and ordered that the respondent Board's residency determination in this matter be reversed.

Upon review of the record of this matter, as well as the ALJ's decision, the Commissioner concurred that A.A. was entitled to attend school in Hamilton Township. According, the Initial Decision was adopted as the final decision in this matter, and the Board's counterclaim for tuition was dismissed.

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

January 17, 2019

OAL DKT. NO. EDU 13235-18
AGENCY DKT. NO. 201-8/18

J.A., ON BEHALF OF MINOR CHILDREN, A.A. AND T.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) that petitioner sustained her burden of demonstrating that she was a domiciliary of Hamilton from February 13, 2018 through the end of the 2017-18 school year. Accordingly, the minor child A.A. was entitled to a free public education in the in the District's schools during that time.[2]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's counterpetition for tuition is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/17/19
Date of Mailing: 1/17/19

[1] The Commissioner was not provided with a transcript of the October 22, 2018 hearing at the OAL.

[2] The matter concerning the minor child T.A. was resolved prior to the hearing. Accordingly, this matter only involves A.A.'s enrollment in the District's schools.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13235-18
AGENCY DKT. NO. 201-8/18

J.A., ON BEHALF OF MINOR CHILDREN, A.A. AND T.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

J.A., on behalf of minor children, A.A. and T.A., petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, attorneys)

Record Closed: October 22, 2018 Decided: December 6, 2018

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.A., appealed the decision of the Hamilton Township Board of Education (Board or respondent) that her children were ineligible to attend school in Hamilton, New

Jersey. The petitioner also appealed the Board's determination that she is responsible for the payment of tuition for the period her children attended school in Hamilton, New Jersey, while they were ineligible.

PROCEDURAL HISTORY

On July 25, 2018, the Board issued a second notice of ineligibility, for attendance commencing February 13, 2018. The petitioner filed a timely appeal on August 20, 2018. The Board filed an Answer and Counterpetition for an Order Assessing Tuition on September 6, 2018. The Department of Education, Office of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), where it was filed September 11, 2018, 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 matter was heard on October 22, 2018. During the hearing, counsel for the Board advised that the only issue to be decided was the petitioner's residency from February 13, 2018, though the end of the 2017-2018 calendar year, with respect to only A.A.'s enrollment. The matter concerning child T.A. had been resolved prior to the hearing date. The record closed October 22, 2018.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed and I, therefore, find the following as **FACT**:

1. Petitioner, J.A., had a daughter, A.A., who was registered to attend kindergarten at Greenwood Elementary School (Greenwood) in Hamilton, New Jersey.

2. On February 6, 2017, the Board Residency Committee (Committee) conducted a residency hearing concerning A.A.

3. The Committee determined A.A. resided in Trenton and not in Hamilton.[1] She was therefore ineligible to attend school in Hamilton from November 15, 2016, through December 15, 2016, twenty school days.

4. The Committee determined the petitioner was responsible for the tuition for the twenty school days, at the per diem rate of $64.19. The total amount owed was $1,283.80.

5. The Board subsequently determined that A.A. resided primarily at the Hamilton address.

6. The Board initiated a second investigation on April 6, 2018. It found A.A. resided in Trenton, not Hamilton.

7. A residency hearing was conducted June 21, 2018.

8. On August 3, 2018, the Board determined A.A. resided in Trenton and was ineligible to attend school in the Hamilton Township School District.

Testimony

For the respondent

Michael Celentana, a residency investigator for the respondent, testified an investigation was initiated in response to a call from a "tipster", a private citizen who made a complaint. (R-3 at 5.) A.A., who was in first grade, was registered to attend Greenwood, with the Hamilton address listed as her home address. Celentana testified that A.A.'s parents resided at the Trenton address. The Hamilton and Trenton residences were approximately one-half mile apart.

[1] For ease of reference, the two addresses at issue will be referred to as the "Hamilton address" and "Trenton address" throughout this decision.

As part of his investigation, Celentana surveilled the Hamilton and Trenton addresses. Because school started at 8:50 a.m., he surveilled the residences between 8:00 a.m. and 9:00 a.m. Celentana recorded his observations in an April 6, 2018, "Residency Investigation" report. (R-3 at 2-4.)

Celentana surveilled the Hamilton address on February 13, 2018, between 8:00 a.m. and 9:00 a.m. He did not see A.A. exit the residence. He confirmed that she attended school that day. He was not advised that she arrived late that day.[2]

On February 15, 2018, he surveilled the Trenton address, starting at 7:55 a.m. At approximately 8:32 a.m., he observed A.A. leave the residence and enter a red Cadillac car driven by her mother, J.A. They drove to Greenwood and A.A. exited the car and entered the school building. He confirmed that A.A. attended school that day.

On February 21, 2018, he surveilled the Trenton address, starting at 8:00 a.m. At approximately 8:34 a.m., he observed A.A. exit the residence and she entered the same Cadillac. The petitioner drove the car to Greenwood. A.A. exited the car and entered the school. He confirmed that A.A. attended school that day.

On February 22, 2018, Celentana surveilled the Trenton address, starting at approximately 8:05 a.m. At approximately 8:35 a.m., A.A. exited the residence and entered the Cadillac. The petitioner drove the car to Greenwood; A.A. exited the car and entered the school. Celentana confirmed that A.A. attended school that day.

On February 23, 2018, he surveilled the Hamilton address from 8:05 a.m. to 9:00 a.m. He did not observe A.A. exit the residence. He later confirmed A.A. reported to school late.

On February 26, 2018, he surveilled the Trenton address, starting at approximately 8:06 a.m. A.A. exited the residence at approximately 8:34 a.m. and entered a white

[2] He would have been advised if A.A. had arrived late to school.

Dodge van driven by T.A., her father. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On March 14, 2018, he surveilled the Trenton address, starting at approximately 8:05 a.m. A.A. exited the residence at approximately 8:25 a.m. and entered the white van, which was driven by T.A. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On March 15, 2018, he surveilled the Trenton address, starting at approximately 8:05 a.m. A.A. exited the residence at approximately 8:30 a.m. and entered the white van. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On March 23, 2018, he surveilled the Trenton address, starting at approximately 8:05 a.m. A.A. exited the residence at approximately 8:35 a.m. and entered the red Cadillac, which was driven by J.A. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On March 27, 2018, he surveilled the Trenton address, starting at approximately 8:05 a.m. A.A. exited the residence at approximately 8:35 a.m. and entered the red Cadillac, which was driven by J.A. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On March 28, 2018, he surveilled the Trenton address, starting at approximately 8:05 a.m. A.A. exited the residence at approximately 8:35 a.m. and entered the red Cadillac, which was driven by J.A. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On April 5, 2018, he surveilled the Trenton address, starting at approximately 8:20 a.m. A.A. exited the residence at approximately 8:37 a.m. and entered the white van, which was driven by T.A. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

On April 6, 2018, he surveilled the Trenton address, starting at approximately 8:15 a.m. A.A. exited the residence at approximately 8:28 a.m. and entered the white van. Celentana followed the van to Greenwood. A.A. exited the van and entered the school. He confirmed she attended school that day.

The Trenton address was approximately two miles from Greenwood. A person leaving the Trenton address at 8:35 a.m. could arrive to Greenwood on time. Celentana did not observe A.A. leave the Hamilton address during his investigation.

Donald Ellison was the Supervisor of Central Registration for the Board since February 2018. He was responsible for supervising investigative staff and overseeing and reviewing cases and investigative reports. He was previously a detective with the Mercer County Prosecutor's Office for twenty-nine years and Mercer County Undersheriff for five years. Ellison spoke with J.A. after he received Celentana's investigation report. He wanted to provide her an opportunity to challenge the observations and ask any questions she might have. She "acknowledged" that A.A. exited the Trenton address and referenced her child care needs. She also stated that her mother owns both properties and paid taxes on both.

Ellison directed investigator Clarence Stockton to investigate, to provide a "fresh" review of the facts. Stockton surveilled the Trenton address and prepared a Residency Investigation report. (R-3 at 15-28.) He wrote that he arrived at the Trenton address on May 16, 2018 "after the . . . family entered a red Cadillac [license plate number], I was unable to get a photograph of them entering or exiting but have one of the vehicle leaving the school[.]" (R-3 at 15.)

On May 18, 2018, he surveilled the Trenton address at 8:00 a.m. At approximately 8:27 a.m., he observed the petitioner, A.A., and a juvenile male exit the residence and get into a red Cadillac with the same license plate as on May 16, 2018. He followed the car to Greenwood. They entered the school. Ibid.

Stockton surveilled the Trenton address on June 5, 2018, June 13, 2018, June 15, 2018, and June 20, 2018. He did not see the petitioner or A.A. exit the home. He learned that A.A. did not attend school those days. Ibid.

Stockton appended to his report photographs taken May 16, 2018, May 18, 2018, June 5, 2018, June 13, 2018, June 15, 2018, and June 20, 2018. (R-3 at 16-28.) Ellison testified that the photographs were compelling evidence that A.A. did not reside in the Hamilton School District. Ellison did not testify concerning the substance of the photographs.

Ellison referenced Stockton's testimony during a June 21, 2018, residency eligibility hearing before a committee of the Board of Education. The petitioner was present during the hearing. Ellison did not refer to specific portions of Stockton's testimony or discuss the contents of the photographs. (P-4.)

Ellison concluded, based on the two investigative reports, that A.A. did not reside in Hamilton Township. He noted there was no evidence of a custody agreement that would impact his assessment. The respondent determined the petitioner owed $14,034 for the 2017-2018 school year.

For the petitioner:

J.A. testified that her children resided with her. Their father, T.A., from whom she was separated, helped her by watching the children when J.A.'s work schedule prevented her from getting them to school. Her job required her to work late nights during its peak seasons.[3]

J.A. and T.A. are not divorced and there was not a consent order governing custody of their children. A restraining order prohibited T.A. from going to J.A.'s home in Hamilton. (P-7.) However, the order permitted him to "have contact with his children at

[3] At the time of the hearing, she was not working late nights but expected that she would be required to do so in November, when the holiday season began.

any time at his place of residence." Ibid. T.A. previously owed over $12,000 in child support. Despite this, he had begun to address his problems with addiction and mental health, and "started stepping up" with respect to helping with the children. J.A. reasoned that it would work to her advantage to allow T.A. to provide child care when she needed it, rather than paying a considerable sum of money to a stranger. In exchange, she relinquished her entitlement to the past due child support payments, which T.A. had not paid. (P-4.) She noted that, in addition to providing her with necessary child care, this arrangement helped "keep the drama down" between her and T.A.

J.A.'s mother owned the homes at the Hamilton and Trenton addresses. (P-3, 10, 12.) J.A. rented the Hamilton house from her mother. T.A. and two roommates[4], all of whom were listed on the lease, rented the Trenton house from J.A.'s mother. Ibid.

In addition to both leases, J.A. produced multiple records to document that she resided in Hamilton and T.A. resided in Trenton. They included:

J.A.'s records

- Driver's license
- Medicare Card
- Vehicle registration[5]
- Car insurance
- Car loan
- Banking statements

[4] J.A. produced records documenting that the two roommates resided at the Trenton address. (P-13, 15.)

[5] The registration indicated the vehicle was a Cadillac with same license plate as observed by investigator Celentana.

- Income tax records
- Credit card records
- Investment account statement[6]
  (P-2.)

T.A.'s records

- Court documents
- Board of Social Service records
- Tax records
- Motor Vehicle Commission records
- Utility bills
- Credit card bills
- Employment records
  (P-6, 7, 8, 11, 14, 16-22.)

J.A. produced a September 13, 2018, letter written by T.A. (P-9.) He wrote that he moved to the Trenton address in 2014, after he and J.A. separated. He acknowledged difficulties in their marriage and that law enforcement had become involved and that he is not permitted to visit the Hamilton home. He wrote that the Board "is insisting that I am

[6] The above records concern only J.A.; there is no indication that T.A. is registered or otherwise affiliated with these accounts. The records bear varied dates. The driver's license and Medicaid card were issued March 24, 2017, and May 1, 2008, respectively. The other documents are dated from February 22, 2018, through July 13, 2018.

not allowed to spend parenting time with my children because I reside in the City of Trenton." Ibid.

J.A. did not dispute that her children left the Trenton home some mornings. She stressed, however, that they did not live there. Rather, their caretaker, who happened to be their father, watched the children when J.A.'s job required her to work night shifts. She noted that she does not work a regular "9:00 to 5:00 job" and does not have the freedom to make her own work schedule. She must accept the work hours she is assigned, including overnight hours. On those occasions, she would need assistance with child care and her children, including A.A., who would sleep at the Trenton address. She would drive them to school, if she got out of work in time, and then go to her home in Hamilton. Otherwise, T.A. would drive them.

Additional Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. 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).

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of the petitioner during the hearing. She testified calmly and clearly throughout the hearing, while expressing appropriate concern about her circumstances. Her explanation was consistent and comported with the realities associated with having a job that creates child care challenges. Her testimony concerning her difficult history with her

spouse and their efforts to improve the relationship bolsters her account further. It is reasonable that she would seek to resolve her child care needs while attempting to improve her relationship. Further, the petitioner provided numerous records documenting that she and T.A. resided separately. T.A,'s letter, although hearsay, corroborated J.A.'s account. He explained that he lived separately from J.A., was prohibited from visiting the Hamilton house, but wanted to spend time with his children. His time with them was necessarily spent in the Trenton house.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following as **FACT:**

1. J.A. resided at the Hamilton address with her children, including A.A., during the months at issue.

2. T.A. resided at the Trenton address during the time at issue.

3. The children did not live with T.A.

4. The children stayed with T.A. when J.A. was unable to be with them due to her work schedule.

5. The two Board investigators conducted their investigations over a period of sixty-three school days.[7]

6. Celentana surveilled the Hamilton house twice. A.A. did not exit the house either time. She reported to school late one of those days and was absent the other day.

7. Stockton did not surveil the Hamilton house.

[7] Celentana's investigation was conducted from February 16, 2018, through April 6, 2018. Judicial notice is taken that there were thirty-seven school days during this period, not considering holidays. Stockton's investigation began May 16, 2018, and ended June 20, 2018, during which there were twenty-six school days, not considering holidays. Thus, their combined investigations spanned sixty-three school days.

8. Celentana observed A.A. exit the Trenton house and be driven to Greenwood eleven times.

9. Stockton observed A.A. exit the Trenton house and be driven to Greenwood twice. A.A. did not exit the Trenton house the four other times he observed the house. A.A. did not attend school those days.

10. A.A. exited the Trenton house and was driven to Greenwood a total of thirteen times during the sixty-three-day investigation.

LEGAL ANALYSIS AND CONCLUSIONS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). The question of domicile is one of fact and must be determined on a case-by-case basis. Lea v. Lea, 18 N.J. 1, 7 (1955). A person may have multiple residences but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Ibid.

The regulations contemplate that parents may not reside in the same school district. N.J.A.C. 6A:22-3.1(a)1.i provides, "When a student's parents are domiciled in different school districts, and there is no court order or written agreement between the

parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody." The regulations also contemplate that a student may live with both of his parents an equal amount of time. N.J.A.C. 6A:22-3.1(a)1.ii provides:

> When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to the October 16 preceding the application date.

Here, the petitioner produced substantial evidence of her residence, including government-issued identification and court records. There is not a consent order or other written agreement designating A.A.'s school district and there is neither an assertion nor evidence suggesting that T.A. shared equal custody or responsibility for A.A. Rather, J.A. credibly testified that she avails herself of T.A.'s assistance with child care. The children are with T.A. at those times. Otherwise, J.A. is their primary caretaker. There is no evidence that this child care arrangement alters their domicile.

The Board argued that the investigators' findings establish that A.A. was not merely visiting the Trenton house but, rather, that she resided there. A.A. exited the house eleven times over a period of sixty-three school days. They surveilled the Hamilton address only two times. The substance of the photographs taken by Stockton was not discussed during the hearing and was not self-explanatory. Given the petitioner's credible testimony about her family needs and caretaking arrangement, I **FIND** the evidence is insufficient to support a finding that A.A. resided in Trenton.

DECISION AND ORDER

Based on the foregoing, I conclude that the petitioner established that she and her daughter, A.A. were domiciled in Hamilton and that A.A. is eligible to attend school there.

Accordingly, I hereby **ORDER** that: (1) A.A. was properly enrolled in the Hamilton Township School District for the period commencing February 13, 2018, through the end of the 2017-2018 school year; and (2) the Board's Counterpetition for tuition reimbursement be dismissed.

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

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

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

December 6, 2018
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 12/6/18

Date Mailed to Parties: 12/6/18

/vj

APPENDIX

Witnesses

For petitioner:

J.A.

For respondent:

Michael Celentana

Donald Ellison

Exhibits

For petitioner:

P-1 Letter from petitioner to Commissioner of Department of Education

P-2 Copies of petitioner's driver's license, Medicare card, vehicle registration, car insurance, car loan statements, banking statements, income tax records, credit card records, investment account statement

P-3 Rental agreement

P-4 – 8 Court orders

P-9 Letter from T.A.

P-10 Rental agreement

P-13 – 22 Copies of T.A.'s records reflecting his address

For respondent:

R-1 -2 None

R-3 Board investigatory file, including Residency Investigation reports

R-4 Transcript of June 21, 2018 Residency Hearing before Board Committee

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

JAMELLE HOSKINS-NNAKWE

and

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

Agency Docket #125-6/17

Walt De Treux, Esq., Arbitrator

Hearing Dates: 11/14/17, 3/1/18, 5/10/18, 10/23/18
Briefs Received: 12/7/18
Decision Date: 1/20/19

Appearances: For the School District – Michelle M. Schott, Esq., *PURCELL MULCAHY FLANAGAN*
For the Respondent – Nicholas Poberezhsky, Esq., *CARUSO SMITH PICINI*

Introduction and Statement of Relevant Facts

Jamelle Hoskins-Nnakwe has been a teacher in the City of Newark School District since 2001. During the 2015-16 school year, she taught English as a Second Language (ESL) at Barringer High School. In early February 2016, several students in Respondent's Block 2 class complained to school administration that Hoskins-Nnakwe yelled at them after Principal Crystal Breedlove had visited the classroom. They more generally complained about her teaching style and methods. The administration obtained written statements from 9 students in the class, but took no further action at the time.

On March 30, 2016, Larisa Shambaugh, the District's Chief Talent Officer, visited the high school as part of an audit of teacher certifications. Hoskins-Nnakwe was one of the teachers randomly selected for verification. Shambaugh visited Hoskins-Nnakwe's classroom and noticed on the wall Black History Month posters created by the students. Upon closer

inspection, she saw that derogatory terms had been written in Spanish on the posters. The writings included terms such as "pendejo", "bobito", "feo," "tonto", and "ugly no bella" -- translated in English, *stupid, little fool, ugly, dumb,* and *ugly not beautiful.* At the conclusion of the visit, Principal Breedlove informed Shambaugh that students had complained about the environment in Hoskins-Nnakwe's classroom. At Shambaugh's instruction, Breedlove emailed her the students' written statements as well as written statements on other incidents involving students, staff, and parents. Based on this information, Shambaugh assigned Michelle Takyi, Manager of Compliance and Tenure, to investigate.

During her investigation, Takyi reviewed the written statements submitted to school administration by students, a parent, and a staff member. She interviewed 4 students, three staff members, and Hoskins-Nnakwe. Takyi concluded her investigation with a written report dated January 6, 2017. In that report, she recommended that the District process tenure charges against Hoskins-Nnakwe, based on her finding that "the evidence supports that Ms. Nnakwe, on more than one occasion, made disparaging and hurtful comments to students...used derogatory words like "stupid" while referring to different students, yelled at students, and spoke negatively about their ability to speak English fluently."

Soon after the start of the investigation, the District removed Hoskins-Nnakwe from the classroom and reassigned her to the Virtual Learning Center, derisively referred to as "the rubber room." During her reassignment, Norma Diaz, Coordinator of Human Resources, reported that Hoskins-Nnakwe had been rude and behaved inappropriately with building security and custodial staff.

Based on Hoskins-Nnakwe's alleged conduct in her ESL class, with staff, and in the District building after reassignment, the District filed tenure charges against Respondent seeking her dismissal from employment for Conduct Unbecoming a Teacher. The tenure charges were certified by the NJ Commissioner of Education and referred to this Arbitrator for hearing.

On November 14, 2017, March 1, 2018, May 10, 2018, and October 23, 2018, hearings were held at the District's main offices in Newark, New Jersey, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs, and the matter was submitted to the Arbitrator for a decision.

Issue

Has the State-Operated School District of the City of Newark established the allegations of conduct unbecoming against Respondent Jamelle Hoskins-Nnakwe as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

The School District has cited to numerous incidents of alleged misconduct by Hoskins-Nnakwe in support of the tenure charge of Conduct Unbecoming a Teacher. At hearing, the District relied primarily on hearsay evidence to carry its burden of proving the charges. It noted in its brief that in arbitration, "conformity to legal rules of evidence shall not be necessary." (*citing Rule 27 of the Labor Arbitration Rules of the American Arbitration Association)* While the legal rules of evidence need not be strictly applied, evidence in arbitration is not freely admitted and accepted as true. The issues of relevancy, competency, and reliability that form the basis for many of the rules of evidence remain present and paramount in labor arbitration. The District can rest its case on hearsay evidence, but that evidence is only of value if it is deemed relevant, reliable, and competent. Each incident that was alleged in support of the tenure charges will be examined separately, but it will become quickly apparent that the District's dependence on inherently unreliable hearsay evidence worked to its detriment.

Derogatory Words on Posters

The investigation into Hoskins-Nnakwe's conduct began when Shambaugh found derogatory terms written on student's art work hanging in the classroom during the March 30,

2016 audit. The District does not accuse Respondent of writing the comments on the posters, but it faults her for failing to notice the added words and failing to remove the posters.

The District's emphasis at hearing on the marked-up posters is overplayed. Takyi acknowledged that the presence of the posters was not a significant factor in her recommendation of tenure charges and, standing alone, would not warrant tenure charges. Further, Shambaugh saw the posters on March 30, 2016 and made no effort to have them taken down. She did not bring the graffiti to Hoskins-Nnakwe's attention. Respondent did not learn of the posters until after she had been reassigned. The posters remained up at least through Takyi's April 14, 2016 visit to the school. The District's expressed concern about the posters was apparently not shared by those administrators who found or knew of the posters and left them hanging. Further, another teacher shared the classroom with Hoskins-Nnakwe, and he was not disciplined for not noticing the derogatory terms and not removing the posters.

For these reasons, I find that the District has failed to establish the charge of conduct unbecoming against Respondent as it relates to the marked-up posters in her classroom.

February 10, 2016 Principal Visit

Principal Breedlove observed Respondents' classroom on February 10, 2016. According to the students' written statements, Hoskins-Nnakwe was showing a film about Hurricane Katrina. When the principal entered the room, she switched to a lesson she taught the day before and asked the students questions from that lesson. Thinking that their teacher was trying to make herself look good in front of the principal, the students refused to answer. When Breedlove left, Hoskins-Nnakwe allegedly yelled at the students for not responding.

When the students challenged her, she accused them of harassment, threatened to call their parents, and contacted security in an attempt to give the students Saturday detention.

After students complained to the principal that same day, Breedlove had 8 students[1] give written statements. Takyi reviewed those statements as part of her investigation and interviewed two of the students who had given written statements that day and a third who gave a written statement approximately 7 weeks later. The District's reliance on those statements to prove Hoskins-Nnakwe's conduct on February 10, 2016 clearly illustrates the inherent unreliability of hearsay evidence.

Respondent should have the opportunity to cross-examine the students to test the credibility of their statements. The District did not explain why the students were unavailable to testify. If they stayed in the Newark School District, they would have been in their junior year at the time of the first two hearings and presumably available to testify. But in the absence of the students, Respondent should at least have the opportunity to explore how the students came to give the statements and under what conditions. Principal Breedlove instructed the students write statements, but she did not testify. Prior to the hearings, she had resigned her employment, but the District did not explain why she was unavailable to testify. Breedlove's testimony is crucial in determining how the statements were obtained. Did the students write the statements individually or in a group? Were they allowed to consult with each other? Did Breedlove ask them questions or otherwise guide the writing of the statements? These questions and others allow Respondent (and this Arbitrator) to determine

[1] Another student, DL, gave a written statement on the incident on March 31, 2016. Her testimony on this and other issues will be discussed in the next section.

the reliability of the statements. DL testified that many of the students had shared with each other their concerns about Hoskins-Nnakwe's classes. That prior conversation raises a question as to whether the students' statements were their own product or the result of a collaborative process. As evidence of that collaboration, DL included in her statement a recounting of the February 10, 2016 incident that occurred in a class that she was not enrolled. She was clearly just repeating what she had been told. Respondent was denied the opportunity to question whether any of the other students were doing the same.

Takyi interviewed two of the students who gave statements that day. She reported those interviews in her investigative report, but again, the hearsay concerns remain. Takyi summarized the students' responses in her report. There is no indication of whether she asked them questions or allowed them to narrate their complaints. Takyi indicated that Breedlove selected the students to be interviewed. Again, Breedlove did not testify and could not be asked the basis for her selection or the nature of any conversations she may have had with the students prior to the interview. Exploration of those issues through cross-examination of the students or Breedlove is necessary to determine the reliability of their statements.

The students' written statements are unreliable hearsay insufficient to prove allegations of Hoskins-Nnakwe's conduct on February 10, 2016.

Compounding the investigatory and evidentiary problems, Breedlove took no action at the time of the incident. She did not talk with Respondent or impose any disciplinary measures. She sat on the allegations for 7 weeks until Shambaugh visited the school. Takyi waited until June 1, 2016 to interview Hoskins-Nnakwe, nearly four months after the alleged occurrence, prejudicing her ability to recall or accurately relate her version of the incident.

It is also noteworthy that the District has filed a tenure charge of conduct unbecoming, not a charge of inefficiency or incapacity. Even if the District's evidence was found credible as to the February 10, 2016 incident, the students' complaints from that day focus mainly on their perception that Hoskins-Nnakwe is an incompetent and unprofessional teacher who does not adequately instruct them or explain the lessons and often loses her composure with the students. Those concerns speak more to alleged inefficiency or incapacity than to conduct unbecoming.

For all these reasons, I find that the District has failed to establish the charge of conduct unbecoming against Respondent as it relates to the February 10, 2016 principal visit.

DL Allegations

Unlike other students who addressed the February 10 incident the same day, DL gave a statement to Breedlove on March 31, 2016, a day after Breedlove expressed concern about Hoskins-Nnakwe to Shambaugh. The timing of DL's statement is suspect, but it is the content that makes her statement and testimony not credible.

DL attributed some egregious and offensive comments to Hoskins-Nnakwe. She claimed that Respondent told her and other students, "You are in my country so you have to learn English" and "You are stupid guys, you don't deserve an A, you are crazy, you need to go to the psychologist." Although these comments were allegedly made in class, no other student reported similar comments except MT.[2] MT was a student selected by Breedlove to be

[2] The District also submitted an undated, handwritten statement from an unidentified "representative" of another student. The statement alleges that Hoskins-Nnakwe was "motivating racism" by making reference to voting for Trump and getting rid of all the immigrants." This unidentified "representative is presumably an adult, who

interviewed by Takyi. MT had not given a written statement, and it is unclear how or why she was even brought to Takyi's attention. She did not testify at hearing. Takyi's summary of her interview indicates that MT made the shocking charge that Hoskins-Nnakwe, an African-American, "is racist" and tells the class, "If it was for her, she would vote for Donald Trump" so Donald Trump would send them back to their country.

The District did not explain why MT could not testify, and it did not question Takyi on the MT interview during her direct examination. Such serious allegations deserve to be fully explored at hearing. I find MT's responses to Takyi to be both unreliable hearsay and uncredible.

In Takyi's interview of DL, DL went further than her statement. DL told Takyi that Respondent told a student at the classroom door, "Get out of the fucking door" and called him "a son of a bitch." No other student reported hearing such comments.

At hearing, DL testified at length about Hoskins-Nnakwe's conduct on February 10, 2016 after Breedlove's visit. She had not described that conduct in her written statement or her interview with Takyi. During the course of her testimony, it was established that DL was not in that particular class. The Breedlove visit occurred during Block 2. DL was in Block 4. She was testifying to alleged conduct that she had not witnessed.

DL conceded that she was unhappy with Hoskins-Nnakwe's class because she was getting a "C" and thought she deserved an "A." She wanted to transfer to another classroom.

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learned this information from a student. Unreliable hearsay abounds with this statement -- a student reportedly told this adult, who told someone in the school, who evidently told Takyi. The adult was not interviewed, he/she did not testify, and the circumstances of his/her production of the statement was not addressed. The statement is unreliable hearsay insufficient to prove the charge of conduct unbecoming.

Whether or not DL fabricated her testimony to force that transfer, the fact is her testimony on the whole is not credible. No other students corroborated her testimony as to the very offensive comments she attributed to Respondent, and she did not witness an incident for which she attempted to give eyewitness testimony. She admitted to discussing with other students some concerns about Hoskins-Nnakwe, further suggesting that she and those students may have collaborated in their complaints to the school administration.

For these reasons, I find that the District has failed to establish the charge of conduct unbecoming against Respondent as it relates to the allegations made by DL regarding use of profanity and other offensive and arguably racist comments.

Breedlove allegations

In her interview with Takyi, Principal Breedlove reported that she observed Respondent yelling at students, that she had received multiple complaints from parents about Respondents' conduct in the classroom, and that she had concerns with Hoskins-Nnakwe's classroom management and performance. Breedlove also reported to Shambaugh by email on a meeting between her, Respondent, and a parent. Breedlove alleged that Hoskins-Nnakwe made several generalizations about Hispanics in the meeting (e.g., "they don't want to learn English") and ignored Breedlove's instructions to cease making such comments.

Breedlove did not testify. Respondent did not have the opportunity to question the veracity of her statements, the context and circumstances of her reported observations, and her overall credibility. Moreover, it does not appear that Takyi interviewed Breedlove on the meeting with the parent. She apparently accepted the complaint as it was reported in the

email to Shambaugh. Finally, some of Breedlove's concerns, if accepted as true, relate to classroom management and performance and are more suited to a charge of inefficiency or incapacity than to conduct unbecoming.

For these reasons, I find that Breedlove's statements to Takyi are unreliable hearsay insufficient to support the charge of conduct unbecoming against Respondent.

Nhemi Theodore

Takyi interviewed Nhemi Theodore, the high school's Operations Manager in charge of student discipline. He told Takyi that Hoskins-Nnakwe frequently removes students from her classroom, "seems very unstable," and accuses students and his colleague Jose Diaz of conspiring against her.

Theodore did not testify at hearing, and the District offered no explanation for his absence. As such, the basis for his statements and his observations and the circumstances by which he came to be interviewed by Takyi could not be explored at hearing or evaluated for credibility.

For these reasons, I find that his statements to Takyi constitute unreliable hearsay insufficient to support the tenure charge of conduct unbecoming against Respondent.

Altercation with Another Staff Member

The statement of tenure charges included allegations that Hoskins-Nnakwe had a physical altercation on April 21, 2016 with another staff member regarding remarks to an aide

who was crying over the death of another aide. The charges indicate that Principal Deneen Washington completed a report on the incident.

At hearing, neither Washington or any other staff member testified to the incident. The District took no disciplinary action against Respondent at the time of the incident. The incident report without testimony or other additional evidence is insufficient to prove the underlying conduct.

For these reasons, I find that the District failed to establish the charge of unbecoming conduct against Respondent as it relates to this alleged physical altercation.

Norma Diaz

Norma Diaz is the Coordinator of Human Resources at the District's Cedar Street office, the site of Respondent's assignment during the disciplinary investigation. Diaz gave a written statement and reported to Takyi that Hoskins-Nnakwe was involved in two incidents in which she mistreated staff.

On her first day on reassignment, Hoskins-Nnakwe did not have the required Newark School District identification card. Diaz observed Respondents engage in a verbal altercation with the security guards. During the altercation, Diaz heard her call the guards "devils." Hoskins-Nnakwe does not recall using the term "devils." She admits that she was frustrated and upset with her reassignment and her inability to get into the building because of her lack of proper identification. Diaz later assisted Hoskins-Nnakwe in obtaining the proper ID card.

Inexplicably, the District did not interview the security guards as part of their investigation. Nonetheless, I credit Diaz' testimony. She observed the incident and candidly

reported her observations. The incident, however, does not warrant Hoskins-Nnakwe's dismissal from employment. At most, it warranted a reprimand for her discourteous treatment of another District employee at the time it occurred. But such discourteous treatment does not equate to conduct unbecoming, a more serious charge signifying conduct that would negatively impact the teacher's ability to perform her job and undermine the public's confidence in the teacher and the District. An argument with security guards on the first day of her reassignment to "the rubber room" does not impact her ability to perform her job or undermine public confidence. It was an unfortunate moment at the start of a bad day for a frustrated and upset teacher.

For these reasons, I find that the District has not established the charge of conduct unbecoming against Respondent as it relates to her encounter with the security guards.

On April 21, 2016, Diaz found a custodial worker, "Ms. Suzette," upset because she felt disrespected by Hoskins-Nnakwe. Ms. Suzette told Diaz that Respondent had entered the restroom on three separate occasions as Ms. Suzette was cleaning it. Diaz witnessed one of those occasions and heard Ms. Suzette and Hoskins-Nnakwe arguing in the bathroom.

Hoskins-Nnakwe testified that she entered the bathroom because she was sick and was pleading with Ms. Suzette to let her use the bathroom. Hoskins-Nnakwe was hospitalized later that day with high blood pressure.

Again, the District inexplicably did not call Ms. Suzette to testify. The allegation that Hoskins-Nnakwe entered the bathroom on three occasions is based on Ms. Suzette's recounting

to Diaz. Her statements during her conversation with Diaz are unreliable hearsay because they could not be explored or tested during cross-examination.

As to the occasion witnessed by Diaz, the District has failed to prove any misconduct. Hoskins-Nnakwe did enter a bathroom that was closed for cleaning and was confronted by Ms. Suzette. But Hoskins-Nnakwe was sick and presumably had an urgent need to be in the bathroom. (Diaz confirmed that Respondent sought medical treatment soon after the incident.) Ms. Suzette may have felt disrespected, but she may also have been unaware of Hoskins-Nnakwe's condition. Respondent and Ms. Suzette may have had a disagreement, but Hoskins-Nnakwe's actions were understandable given her illness.

For these reasons, I find that the District failed to establish the charge of conduct unbecoming against Respondent as it relates to the bathroom incident.

Jose Diaz

Jose Diaz works as a School Operations Assistant handling student discipline. On October 27, 2015, he wrote a statement about an encounter he had with Hoskins-Nnakwe in the hallway outside her classroom. He testified at hearing that she was raising her voice to a student and he asked her to lower her voice. Hoskins-Nnakwe refused and loudly challenged his authority to give her such an instruction. Respondent does not recall the incident, but noted that she and Diaz did not have a good rapport.

I credit Diaz' testimony, but the incident is too dated in time to be properly considered for a conduct unbecoming charge. The incident happened on October 27, 2015, yet the school administration and the District took no action to investigate or discipline Hoskins-Nnakwe. The

report of the incident presumably was filed away until five months later when the District initiated a broad investigation into Hoskins-Nnakwe's conduct. If the purpose of discipline is to correct unwanted behavior, the District cannot decline to take disciplinary action at the time of an occurrence only to resurrect the incident to build a case for dismissal from employment. Moreover, the incident – a brief tense exchange between co-workers, even if attributable primarily to Hoskins-Nnakwe – would at most warrant a low level of discipline, such as a reprimand.

For these reasons, I find that the District has failed to establish the charge of conduct unbecoming against Respondent as it relates to the incident with Jose Diaz.

Award and Remedy

The District has failed to establish the charge of unbecoming conduct against Respondent for all allegations included in the Statement of Charges. Accordingly, the tenure charges are dismissed.

As a remedy, the District is ordered to remove the dismissal from Hoskins-Nnakwe's record. It is further ordered to immediately reinstate her to her former position, or to a comparable position mutually agreeable to the parties, without loss of seniority. It is further ordered to make Hoskins-Nnakwe whole for losses, if any, incurred as a result of her dismissal.

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

Walt De TReux

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

JAMELLE HOSKINS-NNAKWE

Agency Docket #125-6/17

and

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

Affirmation

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

Walt De Treux

WALT De TREUX 1/20/19

25-19

OAL DKT. NO. EDU 1162-17
AGENCY DKT. NO. 10-1/17

DAVID CILIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION 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 review pursuant to *N.J.A.C.* 1:1-19.1.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/19

Date of Mailing: 1/23/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01162-17N
AGENCY DOCKET NO. 10-1/17

DAVIS CILIO,

Petitioners,

v.

SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, BOARD OF EDUCATION, UNION COUNTY,

Respondent.

Randi Doner April, Esq. on behalf of petitioner (Oxfeld Cohen, LLC)

Casper P. Boehm,Jr., Esq., on behalf of respondent

Deborah S. Saridaki, Board Secretary, on behalf of respondent

Record Closed: December 20, 2018 Decided: December 20, 2018

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was initially transmitted to the Office of Administrative Law (OAL) on January 17, 2018, 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. The matter was initially assigned to ALJ Antoniewicz but

reassigned to the undersigned on or about October 1, 2018. Several telephone conferences were scheduled, the last conference being December 3, 2018. Prior to that date respondent's counsel advised that the Board approved the settlement agreement and will be signed by the Board Secretary.

On December 7, 2018, respondent's counsel forwarded a copy of the Settlement Agreement and Board Resolution, which is attached hereto for reference. On December 20, 2018 a letter was submitted authorizing the Board Secretary to sign the agreement.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

December 20, 2018
DATE

/s/ JoAnn Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: December 21, 2018

Date Mailed to Parties: December 24, 2018

ljb

RECEIVED
2018 DEC -7 P 7:12
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, New Jersey 07102-5504
973-642-0161
Attorneys for Petitioner

DAVID CILIO, Petitioner, SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, BOARD OF EDUCATION, UNION COUNTY Respondent	: : : : : : : :	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDU 01162-2017 AGENCY REF NO. 10-1/17 STIPULATION OF SETTLEMENT AND RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between petitioner, David Cilio ("Cilio") and respondent, Scotch Plains-Fanwood School District, Board of Education ("Board") for full settlement of all claims,

WHEREAS, on or about January 12, 2017 Cilio filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), captioned *Cilio v. Board of Education of the Scotch-Plains-Fanwood School District*, OAL Docket No. EDU 01162-2017, for the return of one year of salary guide credit for active military service;

WHEREAS, this matter is currently pending before the Honorable Joann LaSala, A.L.J.; and

WHEREAS, the parties to this Agreement desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability.

2. In exchange for the valuable consideration set forth herein, the Parties mutually release and give up any and all claims and rights they may have against each other for any damages or injuries claims that could have been alleged by either party in connection with this matter.

The Parties specifically release the following claims as to each other

(a) Any and all claims and. counterclaims that were brought and that could have been brought in the Petition of Appeal bearing OAL Docket No. EDU 01162-2017; and

(b) Any and all claims for attorneys' fees and expert costs, and any other fees and costs.

3. In total and complete settlement of any and all potential claims referred to above, the Board shall:

(a) Provide an additional year of employment credit to Cilio for his military service in compliance with N.J.S.A. 18A:29-11.

(b) Provide monetary credit to Cilio for the period October 12, 2016 through June 30, 2017. The salary adjustment is from BA+30 step 14 ($68,431) to BA+30 step 15 ($70,486), pro-rated.

(c) Confirm that at the conclusion of the 2018-2019 school year Cilio will have 18 years of employment credit in the District.

(d) Confirm that Cilio's salary will increase to the new amount for Step 15 (the top step on the guide) if such an increase is negotiated.

4. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

PETITIONER

David J. Cilio

David Cilio

Dated: 11/7/2018

RESPONDENT

Deborah S Saridakis

Board Secretary/Business Administrator
Scotch Plains-Fanwood Board of Education
Dated:

Scotch Plains-Fanwood Public Schools

Evergreen Avenue and Cedar Street
SCOTCH PLAINS, NEW JERSEY 07076

Deborah S. Saridaki
Business Administrator
Board Secretary

Phone: (908) 232-6161 ext 4013
Fax: (908) 889-0258

December 3, 2018

To Whom It May Concern:

The following resolution was adopted by the Scotch Plains-Fanwood Board of Education at its board meeting on November 29, 2018:

Employee Settlement	Motion by Mr. Murray, seconded by Ms. Brody, that the Board of Education approves the mediated employee settlement agreement between employee #4179 and the Scotch Plains-Fanwood Public School District whereby employee receives an additional year of employment credit and retroactive pay for October 12, 2016 through June 30, 2017.

Carried 9-0-0

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I, Deborah S. Saridaki, Board Secretary, certify that the information submitted herewith is correct and true to the best of my knowledge.

Casper P. Boehm, Jr.

Counsellor at Law

Phone: 732-257-3339
609-298-3339
FAX: 609-298-3318

Mailing Address and Courier Address: : 155 Harrison Road, Jacobstown, NJ 08562 1913 **e-mail: Boehmlaw@live.com**
(GPS: North Hanover Township 08562 or Wrightstown, NJ 08562)

December 14, 2018

RECEIVED
2018 DEC 20 A 2:59
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Attn: Latoya J. Bryant
Judicial Assistant
Office of Administrative Law
33 Washington Street, 7th floor
Newark, NJ 07102

Re: David Cilio v. Scotch Plains-Fanwood School District
Docket NO: EDU 01162-2017 N

Dear Ms. Bryant:

As you know, I represent the respondent in the above matter.

I write this letter at your request to state that Deborah S. Saridaki was authorized by the respondent to sign the settlement agreement on behalf of the School District and on my behalf as attorney for the District.

Very truly yours,

Casper P. Boehm, Jr.

CPB:gh
c: Deborah S. Saridaki

OAL DKT. NO. EDU 09745-18
AGENCY DKT. NO. 155-6/18

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
Y.Z., ON BEHALF OF MINOR CHILD, K.Z.,	:	
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/19

Date of Mailing: 1/23/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09745-18
AGENCY DKT. NO. 155-6/18

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,

Petitioner,

v.

Y.Z. ON BEHALF OF MINOR CHILD K.Z.,

Respondent.

Joseph L. Roselle, Esq., for petitioner (Schenck, Price, Smith & King, attorneys)

Y.Z., respondent, pro se

Record Closed: December 18, 2018 Decided: December 18, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

On or about June 26, 2018, petitioner Board of Education of the Borough of Fair Lawn filed a Petition of Appeal with the Commissioner of Education seeking tuition from respondent. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on July 9, 2018, for hearing as a contested case.

A telephone prehearing conference was held on August 23, 2018, and a hearing scheduled for November 9, 2018. At the hearing, the parties requested an adjournment to try and resolve the matter. Under cover letter dated December 17, 2018, counsel for petitioner submitted the attached Settlement, along with correspondence from the Board approving the settlement.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

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

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

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

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

12/18/18
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: December 20, 2018

Date Mailed to Parties: December 20, 2018

jb

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Petitioner,
Fair Lawn Board of Education

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2018 DEC 18 P 3:33
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FAIR LAWN BOARD OF EDUCATION,

PETITIONER,

V.

YULIA ZHURAVKOVA, ON BEHALF OF MINOR CHILDREN, K.Z. AND B.Z.,

RESPONDENT.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

COMMISSIONER OF EDUCATION

OAL DKT. NO.: EDU 9745-18

AGENCY REF. NO.: 155-6/18

SETTLEMENT

This Agreement is made by and between Petitioner, Fair Lawn Board of Education ("Board"), and the Respondent, Yulia Zhuravkova ("Respondent").

RECITALS

WHEREAS, in or about May of 2018, Petitioner, Fair Lawn Board of Education determined, based on the results of a residency investigation, that minor student K.Z. was not domiciled in the Fair Lawn School District ("District") and thus not entitled to a free, public education in the District. The Board passed a resolution ordering the removal of the student from the District; and

WHEREAS, Respondent did not appeal the Board's determination; and

WHEREAS, the Board thereafter commenced this administrative action to recoup outstanding tuition from Respondent due to K.Z.'s ineligible attendance in the District; pursuant to *N.J.A.C.* 6A:22-6.1; and

WHEREAS, this administrative action is captioned Fair Lawn Board of Education v. Y.Z. o/b/o Minor Children K.Z. and B.Z., and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 9745-18, Agency Dkt. No. 155-6/18 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, during the pendency of the residency investigation, K.Z. was found by the Board not to be domiciled in the Fair Lawn School District.
2. Respondent shall pay the Board the sum of One Thousand Dollars ($1,000.00), representing back tuition due and owing for the period of K.Z.'s ineligible attendance in the District during the 2017-2018 school year, which shall constitute a full and final settlement of the claim for back tuition asserted against Respondent by the Board in the Litigation.

3. The amount of $1,000 is to be paid as follows: Within fifteen (15) days after approval of the Agreement by the Administrative Law Judge and Commissioner of Education, or after adoption by the Board of Education of a resolution accepting this Agreement, whichever is later, Petitioner shall make an initial payment in the amount of Two Hundred Dollars ($200.00), in the form of a check made payable to the "Fair Lawn Board of Education," hand-delivered or mailed to the office of Ms. Brooke Bartley, School Business Administrator/Board Secretary, at the District administrative offices, 37-01 Fair Lawn Avenue, Fair Lawn, New Jersey 07410. The remaining amount of $800.00 shall be paid in four (4) subsequent equal monthly installments of Two Hundred Dollars ($200.00) each, until the full amount has been satisfied. Nothing herein shall prevent Respondent from paying a greater amount than the monthly payment amount, provided that at least the minimum payment of $200.00 is received monthly.

4. Each installment payment is due on the first (1st) day of each Month at the office of the School Business Administrator at the above address, beginning in the month following that in which the initial payment was made. Payments received by the School Business Administrator after the 30th day following the payment due date shall incur a late fee of $10.00. Any payment and late fee not received by the 15th of the then-following month shall constitute a default by Respondent and a breach of this Agreement. Respondent will receive receipts for each payment from the School Business Administrator.

5. Petitioner, in consideration of this Stipulation of Settlement, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of the Petition of Appeal in this matter.

6. Respondent further understands and agrees that, if she fails to make a payment in accordance with this Agreement, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

7. Respondent further agrees to indemnify the Board for any and all costs, including court costs and attorney's fees, associated with any action instituted by the Board to enforce the terms of this Agreement should Respondent breach the Agreement and/or fail to adhere to the agreed-upon payment plan.

8. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that K.Z., nor any other child of Respondent, as may be applicable, is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate K.Z.'s and/or Respondent's residency status in the District at any time should K.Z. be reenrolled in the District or it otherwise becomes necessary to do so, in order to determine whether or not Petitioner and/or her child(ren) remain domiciled in the District.

9. This Agreement is subject to approval by the Fair Lawn Board of Education. If approved, the Board President and/or Business Administrator is/are fully authorized to execute this Agreement on behalf of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner hereby represents that she is freely entering into this Agreement, that she was advised of her right to obtain counsel of her choosing and has knowingly waived that requirement, and that she has read and fully understand the contents and effects of this Agreement.

13. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

14. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

15. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, effective on the day and year first above written.

RESPONDENT

Date: Dec. 4, 2018

Yulia Zhuravkova, Respondent

FOR PETITIONER,
FAIR LAWN BOARD OF EDUCATION

Date: 12/13/18

Fair Lawn Public Schools

Brooke Bartley
Business Administrator/Board Secretary

37-01 Fair Lawn Avenue
Fair Lawn, New Jersey 07410
Tel: (201)794-5500 x 7091
Fax: (201)703-4630
E-mail:bbartley@fairlawnschools.org

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Approval of Settlement Agreement

RESOLVED, that the Board approves the settlement **attached** for **Board Members Only** in the matter captioned Fair Lawn Board of Education v. Y.Z. o/b/o K.Z. and B.Z, OAL Dkt. No. EDU 9745-18, Agency Dkt. No. 155-6/18, in accordance with the terms and conditions therein, which the Board President is authorized to sign on behalf of the Board.

This is to certify that the resolution listed above is a true and accurate copy of such resolution as it appeared on the December 13, 2018 Public Board Meeting.

Brooke Bartley
Business Administrator/Board Secretary

28-19

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY, PETITIONER, V. BOARD OF EDUCATION OF THE VILLAGE OF LOCH ARBOUR, MONMOUTH COUNTY, DR. LESTER RICHENS, AND DAVID JOYE. RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

This matter arose following the establishment in 2017 of the Loch Arbour School District (Loch Arbour), a non-operating district. The Commissioner approved the application of the Loch Arbour Township Board of Education to withdraw from the Ocean Township School District (OTSD) in December 2016. After the new school district was formed, OTSD challenged, *inter alia*, the methods by which Loch Arbour adopted its annual budget and performed required criminal background checks of board members, as well as its alleged failure to adopt bylaws. The within action was filed during the pendency of Ocean Township's appeal of the dismissal of its challenge in Superior Court to the Commissioner's approval of the new Loch Arbour district. The matter was transmitted to the Office of Administrative Law (OAL) for a hearing. OTSD filed a motion to amend its petition, which was opposed by the respondent; Loch Arbour filed a motion for summary decision.

The ALJ found, *inter alia*, that: given the circumstances of this matter, Loch Arbour timely adopted its school budget following the April 2017 referendum vote to establish the new district; the actions taken by the new board of education were valid despite the Board members' failure to complete their criminal history background checks prior to the Board's initial meeting; there was no violation of *N.J.S.A.* 18A:12-1.2 because Loch Arbour requested background checks for the newly appointed Board members within the required 30-day timeframe; further, the new appointees submitted affidavits, per guidance from the Department, stating that they had not been convicted of a disqualifying crime; and Loch Arbour properly acted as a school board without first adopting bylaws because *N.J.S.A.* 18A:11-1 does not require a board to adopt its own rules and bylaws, especially not prior to making decisions as a board. Accordingly, the ALJ denied OTSD's motion to amend its petition, and granted Loch Arbour's motion for summary decision. The petition was dismissed.

The Commissioner found, *inter alia*, that summary decision was properly granted to Loch Arbour, and he adopted the Initial Decision of the OAL with modification regarding the ALJ's finding that school boards do not need to adopt their own rules, bylaws, and policies. The Commissioner noted that *N.J.S.A.* 18A:11-1 is abundantly clear that a board of education must make, amend and repeal rules for its governance; however, nothing in the statute requires that such rule making must be a board's first order of business, nor that board actions taken prior to the adoption of such rules are invalid. Accordingly, the Commissioner granted summary decision to Loch Arbour, and dismissed the petition with prejudice.

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

January 25, 2019

OAL DKT. NO. EDU 16799-17
AGENCY DKT. NO. 213-9/17

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE VILLAGE OF LOCH ARBOUR, MONMOUTH COUNTY, DR. LESTER RICHENS, AND DAVID JOYE.	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Commissioner has also considered petitioner's exceptions, and respondent Loch Arbour Board of Education's (Loch Arbour) reply thereto, filed pursuant to *N.J.A.C.* 1:1-18.4.[1] In this matter, petitioner filed a petition of appeal alleging various violations of the school laws of the State, including statutes governing board of education budgets, actions, and operations.[2] Specifically, in Count I, petitioner argues that respondent Loch Arbour violated *N.J.S.A.* 18A:7F-5, 7F-6, and *N.J.S.A.* 18A:22-32, by failing to timely adopt its preliminary and final budgets. Petitioner further argues that the New Jersey Department of Education (Department) violated said statutes by approving Loch Arbour's budget. In Count II, petitioner alleges that prior to assuming their roles and taking board action, the Loch Arbour board members failed to complete their criminal history background checks in violation of *N.J.S.A.* 18A:12-1 et

[1] The Commissioner will not reiterate the procedural and factual history of the case, as the relevant facts and procedural history is set forth in the Initial Decision and supported by the ample record in this matter.

[2] The Commissioner notes that the petition of appeal also included allegations implicating the Open Public Meetings Act (OPMA), which is indisputably beyond the Commissioner's purview.

seq. In Count III, petitioner alleges that the Loch Arbour board members failed to adopt bylaws, policies and regulations before taking action as a board, and therefore violated *N.J.S.A.* 18A:11-1. In Count IV, petitioner argues that the Department approved budgets for petitioner and Loch Arbour with conflicting tax levies, and therefore Loch Arbour is required to pay its share of school taxes to petitioner for the 2017-2018 school year.

The ALJ found that Loch Arbour timely adopted its school budget in compliance with Title 18A. The ALJ reasoned that Loch Arbour would not have been able to meet the March 20, 2017 deadline – pursuant to *N.J.S.A.* 18A:7F-5 – for adopting and submitting its budget to the Commissioner for approval since it did not become an independent, non-operating school district until after the April 4, 2017 referendum vote. The ALJ explained that Loch Arbour adopted its preliminary budget on May 1, 2017, and submitted it to the Department for approval on May 2, 2017, which was approved on May 4, 2017; subsequently, Loch Arbour adopted its final budget at a board meeting on May 8, 2017, prior to the May 14 deadline set forth in *N.J.S.A.* 18A:22-32.[3]

The ALJ further found that Loch Arbour validly operated as a board despite the new Board members' failure to complete their criminal history background checks prior to its initial meeting. The ALJ reasoned that Loch Arbour did not violate *N.J.S.A.* 18A:12-1.2 because it requested background checks for its newly appointed Board members within the 30-day timeframe and, based upon guidance from the Department, the newly appointed Board members submitted affidavits stating that they had not been convicted of a disqualifying crime. The ALJ held that board members are not required to complete a background check prior to assuming office

[3] The ALJ noted that the budget submission deadline is "tentative" as evidenced by petitioner's untimely submission and adoption of its own budget.

because *N.J.S.A.* 18A:12-2.1 only requires that board members – before entering upon the duties of their office – take an oath that they are not disqualified from serving in the role.

Lastly, the ALJ found that Loch Arbour properly acted as a school board without first adopting bylaws because *N.J.S.A.* 18A:11-1 does not require a board to adopt its own rules and bylaws, especially not prior to making decisions as a board.

In its exceptions, petitioner sets forth the following as errors of fact: 1) The ALJ's finding that the Commissioner "changed the budgetary due date" for Loch Arbour; 2) The ALJ's note that even though the May 2017 board meetings were in violation of OPMA, the Superior Court determined that Loch Arbour corrected its mistake at its June 19, 2017 public meeting when it retroactively ratified both the initial and final budgets; 3) The ALJ's reliance on an undated New Jersey School Boards Association press release and an unauthenticated statement of a Department employee that board members were permitted to submit affidavits and take oath of office pending the background checks; and 4) the ALJ's failure to making findings of fact pertaining to Count IV. Petitioner set forth the following as errors of law: 1) The ALJ's interpretation of *N.J.S.A.* 18A:11-1; and 2) The ALJ's granting of summary decision in favor of respondents when there are material facts in dispute and fact-finding has not been completed.

As a preliminary matter, the Commissioner finds that although the ALJ did not address Count IV in the Initial Decision, further fact-finding is not necessary as the Commissioner is without jurisdiction to grant the relief sought by petitioner in Count IV. The Commissioner further finds that summary decision was properly granted because the material facts relating to Counts I through III are not in dispute, and the issues raised can be decided as a matter to law.

The ALJ's remaining factual "errors" have no impact on the outcome of this matter. First, the Commissioner clarifies that implicit in the Department's acceptance and

approval of Loch Arbour's submission of its budget is the fact that the Commissioner extended the deadline for Loch Arbour under the circumstances of the case. Therefore, the ALJ's characterization of the Department allowing Loch Arbour to submit its budget outside of the deadline as "chang[ing] the budgetary due date for [Loch Arbour]," is not an error of fact. Notably, *N.J.S.A.* 18A:7F-5 allows the Commissioner to adjust the date for the submission of district budgets. In this case – where the district's budget would not have been available by the March 20, 2017 deadline – the Department's acceptance and approval of the budget in May 2017, was proper pursuant to *N.J.S.A.* 18A:7F-5.

Second, the ALJ's finding that the Superior Court determined that Loch Arbour corrected its mistake at its June 19, 2017, public meeting when it retroactively ratified both the initial and final budget, is not an "error". The Commissioner clarifies that the Superior Court found that the June 19, 2017 meeting could satisfy the curative provision of OPMA, but opined that the Commissioner has the ultimate authority to accept the June 19, 2017 action or hold Loch Arbour to the "May 20th" [*sic*] deadline. In other words, the Superior Court's determination is that the June 19, 2017 meeting cures the OPMA violations if the Commissioner waived the May 14, 2017 deadline and accepted Loch Arbour's board action on June 19, 2017. Based on the facts and circumstances of this case and Loch Arbour's curative action, the Commissioner accepts the June 19, 2017 board action.

Third, the ALJ's reliance on alleged unauthenticated documents and statements also has no impact on the outcome of this case because the plain language of *N.J.S.A.* 18A:12-1.2 and 2.1, read in conjunction with *N.J.S.A.* 18A:10-3, demonstrates that petitioner's narrow reading of *N.J.S.A.* 18A:12-1 – that board members must *complete* a criminal history background check before taking the oath of office and conducting board business – is incorrect. *N.J.S.A.* 18A:12-

1.2(a) provides in relevant part that *within* 30 days of election or appointment, each board member "shall undergo a criminal history background investigation for the purpose of ensuring that the member is not disqualified. . . ." Nothing in the statute requires that the board members *complete* the criminal history background check prior to being sworn in; the statute merely requires that the board member submit to a criminal history background check within 30 days of election or appointment. Significantly, *N.J.S.A.* 18A:10-3 – which sets forth the requirements for annual reorganization of the boards – requires that the reorganization meeting take place "on any day of the first or second week following the April school election." Therefore, it is not feasible for board members elected or appointed in April to complete background checks within 30 days of being sworn in and conducting the organization meeting. In this matter, the board members submitted background checks within 30 days of appointment and prior to the first Board meeting, and further submitted affidavits to the Department – consistent with the Department's policy and past practice – certifying that they were not convicted of any of the disqualifying crimes enumerated in *N.J.S.A.* 18A:12-1.[4]

Petitioner's remaining "error" of law pertains to *N.J.S.A.* 18A:11-1. Petitioner argues that a board of education must adopt bylaws before it can validly act as a board. *N.J.S.A.* 18A:11-1(c) provides in pertinent part that a board of education shall "make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of

[4] Submission of affidavits pending the criminal history background check for board members is Department practice and policy for April elections or appointments. This policy was temporarily extended to apply to officials elected in November 2016 for the January 2017 reorganization meeting due to reports of vendor delays in processing the background checks. The temporary application of the policy to the November 2016 election was then rescinded in March 2017 since the delay and the timeframe no longer applied. The Department did not rescind the policy allowing submission of affidavits for April elections/appointments. Petitioner improperly relies on the March 2017 rescission of the temporary application of the policy to the November 2016 elections to argue that the rescission included April, when there is no evidence that the Department changed its policy regarding the April elections.

the public schools . . ." The ALJ has interpreted this to mean that a school board is not required to adopt its own rules, and certainly not prior to making decisions as a board. The Commissioner disagrees with the ALJ to the extent that the ALJ held that school boards do not need to adopt their own rules, bylaws and policies. The statute is abundantly clear that the board of education needs to make, amend and repeal rules for governance; however, nothing in the statute requires that making and adopting rules, bylaws and/or policies is the first order of business and that the board cannot act validly without first having done so. It is also simply not logical or reasonable to expect a board of education to refrain from taking any action during its first or second meeting because it has not adopted rules. This does not mean that a board of education should indefinitely operate without rules. In this case, it was necessary for Loch Arbour to take certain actions, *i.e.*, adopt its budget, which could not be delayed. Therefore, while the board of education does not need to adopt rules as its first act of business, as a matter of practice, the board should adopt rules early in its organization and must not operate indefinitely without adopting rules, policies and bylaws.

Accordingly, the Commissioner adopts the Initial Decision – as modified herein – and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 1/25/19
Date of Mailing: 1/25/19

[5] Pursuant to P.L. 2008, c 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DENYING PETITIONER'S MOTION TO AMEND ITS PETITION

OAL DKT. NO.: EDU 16799-17
AGENCY NO.: 213-9/17

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE OF LOCH ARBOUR, DR. LESTER RICHENS, ECS, AND DAVID JOYE, ECBA,

Respondent.

Michael Gross, Esq., for petitioner Ocean Township Board of Education (Kenny, Gross, Kovats and Parton, attorneys)

James M. Hirshorn, Esq., for respondent Loch Arbour Board of Education (Sills Cummis & Gross, P.C., attorneys)

Record Closed: August 16, 2018 Decision: October 29, 2018

BEFORE **SARAH G. CROWLEY**, ALJ:

PROCEDURAL HISTORY

The Commissioner of Education approved the application of Loch Arbour Township Board of Education (LABOE) to withdrawal from the Ocean Township School District OTSD in December 2016. After the new school district was set up, OTSD filed the instant petition with the Department of Education challenging LABOE's budgetary re-adoption, non-completion of criminal background checks, and failure to adopt bylaws.[1] The Department transmitted the matter to the Office of Administrative Law (OAL) as a contested case. OTSD filed a motion to amend it petition, and LABOE filed a cross motion for summary decision and opposition to the motion to amend the petition. Oral Argument was heard by the parties on August 16, 2018, and the record closed at that time.

FACTUAL BACKGROUND AND SUMMARY OF CASE

This case arises out of the LABOE's petition to the Commissioner of Education to withdraw from Ocean Township School District, and its subsequent withdrawal from OTSD. On June 1, 2016, LABOE petitioned the Commissioner to submit to the voters of Loch Arbour the issue of withdrawing from Ocean Township School District. The Commissioner granted the petition on December 22, 2016. OTSD requested a stay in Superior Court, but the request was denied. On March 8, 2017, OTSD filed an emergent motion with the Appellate Division to stay the Commissioner's December 2016 decision, citing irreparable harm concerning the OTSD 2017-2018, budget and students being placed in send/receive relationships with other districts. This motion was also denied.

On April 4, 2017, Loch Arbour residents voted to approve the withdrawal from OTSD. April 10, 2017, a new LABOE was appointed by the Mayor of Loch Arbour. Loch Arbour board members submitted background check applications on April 26, 2017. The New Jersey Department of Education permitted school board members appointed in April to take office on May 1, prior to completing criminal history checks.

[1] The Commissioner approval was challenged in the Superior Court and the dismissal of that action is currently on appeal.

Investigator James Scarangelli of the Department's Criminal History Review Unit informed Loch Arbour Mayor, Paul Fernicola, that members could be sworn into office if each submitted an affidavit stating he/she had not been convicted of any crime enumerated in N.J.S.A. 18A:12-1. Paul Fernicola Cert., ¶ 6. All five members submitted an affidavit, and were sworn in as board members Simons Cert., ¶ 6.

On May 1, 2018, LABOE had its first organizational meeting, during which official positions were appointed, send/receive relationships with West Long Branch and Shore Regional school districts were discussed, and a tentative budget was approved. LABOE did not adopt bylaws, rules, or regulations at this initial meeting. On May 8, 2018, LABOE held a special meeting to finalize the budget. Notice for both meetings was provided to Coaster and Asbury Park Press via e-mail from the board's clerk, Marilyn Simons, stating notice was sent only for informational purposes and was not to be published.

On May 30, 2017, OTSD filed a complaint in Superior Court challenging LABOE's budgetary actions at the two May meetings on the basis that these meetings violated the Open Public Meetings Act (OPMA) because adequate notice was not provided. On June 19, 2017, while the Superior Court case was pending, the LABOE held another meeting to readopt its tentative and final budgets. Notice for this meeting was provided to and published by Asbury Park Press and the Coaster, in compliance with the OPMA. On August 7, 2017, Superior Court Judge Lisa Thorton dismissed OTSD's complaint ruling that LABOE corrected its OPMA violations at the June 19, 2017, meeting when the board retroactively adopted its budgets. Judge Thorton dismissed the remaining counts two-five of the complaint, those dealing with various violations of Title 18A and demanding judgment against the Department of Education, due to lack of jurisdiction.

The above **FACTS** are undisputed and are **FOUND** as **FACTS**.

LEGAL ANALYSIS

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. 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 a prompt resolution by trial. Judson v. Peoples Bank and Trust Co. of Wesfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court encouraged trial-level courts not to refrain from granting summary judgment when the proper circumstances present themselves. Brill v. Guardian Life Ins. Co. of Am., 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, the trial court should not hesitate to grant summary judgment. Id. at 540. Appellate courts recognize that "[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

OTSD alleges that LABOE failed to comply with the Department of Education's budget submission deadline pursuant to N.J.S.A. 18A:7F-5(c), which states that each district board of education shall adopt a tentative budget on or before March 4 or March 20, depending on when school elections take place, to submit to the Commissioner for approval. However, the statute further states, "the commissioner may adjust the date for the submission of district budgets if the commissioner determines that the availability of preliminary aid numbers for the subsequent school year warrants such adjustment." Thus, if school aid data is unavailable before tentative budgets are due, the commissioner may change the date of submission to conform with the specific situation.

Ibid.; See, e.g. Abbott v. Burke, 206 N.J. 332, 418 (the Comm'r of Education adjusted budgetary due dates because of the governor's late budget press conference release).

The submission of a tentative budget is the first step in the school budgetary process. The proposed budget is reviewed by the Executive County Superintendent and, if approved, is sent back to the board for final adoption. Abbott, 206 N.J. at 417. Furthermore, N.J.S.A. 18A:22-32(b) permits a type II district that has "no board of school estimate" to determine its school budget by May 14 by a majority vote of its full board membership.[2]

LABOE timely adopted its 2017-2018 school budget by readopting its actions at the June 19, 2017, meeting. As stated above, N.J.S.A. 18A:7F-5(c) allows the Commissioner to adjust budget deadlines when preliminary aid numbers are unavailable. In this instance, LABOE formed its board of education after the March 20 tentative deadline. The vote regarding whether Loch Arbour should form an independent district was not even decided until April 4, 2017, well after the March budgets were due. Therefore, LABOE could not have submitted a tentative budget in compliance with the N.J.S.A. 18A:7F-5 deadlines. Moreover, the tentative budget submission date is not a firm date, as evidenced by the fact that OTSD failed to submit its budget on time and adopted its budget one day after the statutory due date. Here, the Commissioner utilized her power under N.J.S.A. 18A:7F-5(c) and changed the budgetary due date for LABOE, and ultimately approved the board's budget on May 4, 2017.

In accordance with N.J.S.A. 18A:22-32(b), LABOE submitted its initial budget to the Executive County Superintendent on May 2, 2017, and he approved the budget on May 4, 2017. LABOE then held a special meeting on May 8, 2017 to adopt its final

[2] Type II districts are classified as a school district "in a municipality other than a city, every consolidated local school district, and every regional school district, pursuant to N.J.S.A. 18A: 9-3, where board member are elected or appointed by the municipality, as applicable, and where in a school district without a board of school estimate the district board of education issues school bonds for school district capital projects, pursuant to N.J.S.A. 18A:24-12. N.J.A.C. 6A: 26-1.2. Loch Arbour qualifies as a type II district because it is considered a village, rather than a city, and its school board was appointed by the municipality. LABOE was without a board of school estimate until its first meeting on May 1, 2017, after the April tentative budgets were due.

budget before the May 14 deadline. The Loch Arbour school board retroactively ratified both the initial and final budget on June 19, 2017. Thus, LABOE fully complied with the statutory deadline of May 14, 2017.

OTSD also argues that LABOE improperly adopted its school budgets because the May 1 and 8, 2017 meetings violated the OPMA, and therefore any actions taken at the meetings are void. Although the May meetings violated the OPMA because adequate notice was not provided to the public, the Superior Court determined that LABOE properly corrected its mistakes at a June 19, 2017 meeting by reviewing at ratifying its prior actions de novo. Thus, the Court determined that the May 1 and May 8, 2017 dates stand as when the initial and final budgets were adopted. As noted above, it was the decision of the Department to approve or reject LABOE's initial budget and the Department approved it. OTSD argues that LABOE did not properly establish its school board because members failed to have completed background checks prior to holding its first meeting on May 1, 2017. N.J.S.A. 18A:12-1 disqualifies from membership on school boards individuals who have committed any crime enumerated in the statute. N.J.S.A. 18A:12-1.2(a) specifically requires newly appointed members to undergo a criminal history background check within thirty days of their election or appointment. However, the statute does not require completion of a background check prior to acting as a school board. Rather, the statute simply requires that new members submit to a background check within thirty days of appointment. The legislature's comment to N.J.S.A. 18A:12-1.2 supports this view. The comment states that a school board member's only requirement *prior* to assuming office is to take an oath swearing he/she is not disqualified due to a conviction of a disqualifying crime. N.J. Senate Education Comm. Statement to S. 295 (Oct. 14, 2010), emphasis added. The comment further explains that each member must "within 30 days of election or appointment. . . undergo a criminal background check *for the purpose of ensuring that member is not disqualified* from membership due to a conviction of one of the specified crimes or offenses." Ibid., emphasis added. The legislature clearly differentiated between what is required prior to taking office and what must be completed within a particular time frame after assuming office. Nowhere in the statute nor in the Senate's commentary does it

specify that completion of a criminal background check is required prior to taking action as a board member.

The Loch Arbour board was appointed on April 10, 2017. LABOE requested background checks on April 26, 2017 for its newly appointed members. This request was made within thirty days of the Board's appointment and satisfies N.J.S.A. 18A:12-1.2(a). Additionally, each of the five board members submitted affidavits before the initial meeting, certifying that they had not been convicted of any of the crimes enumerated in N.J.S.A. 18A:12-1. Background checks were completed on May 10, 2017 and confirmed the members' affidavits stating that none had been convicted of a disqualifying crime. Each LABOE member substantially complied with both N.J.S.A. 18A:12-1.2(a) and the legislature's purpose for requesting criminal background checks.

In addition to complying with the statute, LABOE acted in accordance with the Department of Education's instructions. On April 28, 2017, James Scarangelli of the Department's Criminal History Review Unit advised the board that certifications affirming members had not been convicted of a disqualifying crime were sufficient for members to hold a meeting on May 1, 2017, prior to background checks being completed. Paul Fernicola Cert. ¶ 6. The New Jersey School Board Association also reported the Department's position, releasing a statement which said,

> School board members elected to office for the first time on April 25 will have thirty days from the certification of election results (May 1) to complete criminal background checks. However, they may be sworn into office at the board's organization meeting, even if their criminal background checks are not completed, according to the New Jersey Department of Education's Criminal History Review Unit. Paul Fernicola Cert., Exh. 4.

LABOE properly followed the Department's instructions regarding criminal history checks.

The requirement for a properly constituted Board of Education are set forth in N.J.S.A. 18A:11-1, which provides as follows:

> The board shall——

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

OTSD argues that N.J.S.A. 18A:11-1(c) requires school boards to adopt bylaws, and a board cannot validly act until it has done so. LABOE argues that N.J.S.A. 18A:11-1(c) does not require a board to adopt bylaws, but rather, permits a board to adopt its own rules not inconsistent with the rules of the state board. The plain language of the statute does not provide sufficient information to determine its exact meaning, rather its ambiguous wording allows N.J.S.A. 18A:11-1(c) to be susceptible to dual meanings – either that a board must adopt its own rules that do not conflict with state regulations or if a board chooses to adopt rules, those rules must not conflict with state regulations. Despite this ambiguity, nowhere in the statutory language of N.J.S.A. 18A:11-1 does it say nor imply that the first thing a school board must do is adopt bylaws.

Both the agency and the legislature have been silent on this particular issue and therefore, provide little guidance as to which interpretation correctly corresponds with the law. Nor has a court specifically addressed whether N.J.S.A. 18A:11-1(c) requires boards to adopt rules or bylaws prior to taking any official action, however, the decisions that are available support local school boards' broad authority to carry out their responsibilities so long as their actions are not inconsistent with statute or state regulations. See e.g. Board of Education v. Union City, 112 N.J. Super. 493 (Law Div. 1970), aff'd, 118 N.J. Super. 435 (App. Div. 1972) ("Board of education is an independent corporate entity which manages the operation of the school system substantially free of control by the local governing body pursuant to N.J. Stat. Ann. §§

18A:10-1 and 18A:11-1 et seq."); Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969), certif. denied, 55 N.J. 310 (1970) ("the broad discretionary powers vested in such boards with respect to the day-to-day functioning of the schools within their jurisdiction as provided for at N.J. Stat. Ann. § 18A:11-1").

Though the goal of interpreting statutes is to identify the intent of the legislature, rules of statutory construction are subordinate to the proposition that interpretation of a statute should not lead to absurd results. State v. Provenzano, 34 N.J. 318, 322 (1961). The interpretation argued by OTSD would lead to an absurd result. If a school board cannot take any action without first creating bylaws, then it cannot act in accordance with the other provisions of N.J.S.A. 18A: 11-1. Importantly, a board would not be able to "Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district", including adopt a budget within statutory deadlines. N.J.S.A. 18A: 11-1(d). There are such situations, as here, where a school board may need to act in a short amount of time due to late elections and instituting its own bylaws prior to taking any other official action does not allow a board to do that. Taken as a whole, the statute supports the view that school boards must comply with the existing state board rules.

LABOE's interpretation of N.J.S.A. 18A:11-1 is consistent with the language in the statute. As Union City and Porcelli convey, boards have broad discretion to manage school affairs consistent with other state law.[3] Union City, 112 N.J. Super. 493; Porcelli, 108 N.J. Super. 301. These cases show that the most important aspect of bylaws is creating regulations consistent with existing laws. While it may be common practice among school boards to adopt its own bylaws, as OTSD asserts, LABOE is correct in stating that adoption of its own rules is not required and is certainly not required prior to making decisions as a board. LABOE's interpretation allows for school boards to obey all sections of N.J.S.A. 18A:11-1 and does not lead to an absurd result.

[3] Other case law addressing issues with N.J.S.A. 18A:11-1 state that once a school board has adopted bylaws, it must adhere to said rules until a quorum has voted to change the bylaws. See e.g., Matawan Regional Teachers Ass'n v. Matawan-Aberdeen Regional School Dist. Bd. of Educ., 223 N.J. Super. 504 (App. Div. 1988). However, that is not the issue in this case, as LABOE has not adopted any bylaws, rules or regulations.

CONCLUSION

Accordingly, I **CONCLUDE** that the that LABOE timely adopted its school budget in compliance with Title 18A, validly operated as a board despite incomplete criminal background checks prior to its initial meeting, and properly acted as a school board without first adopting bylaws. Therefore, I hereby deny OTSD's motion to amend its petition and grant LABOE's motion for summary decision.

ORDER

I hereby **ORDER** that LABOE's Motion for Summary Decision is hereby **GRANTED** and the Petition is hereby **DISMISSED**. I further **ORDER** that the motion to amend the petition is **DENIED.**

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

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

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

10/29/18
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: October 29, 2018 (emailed)

Date Mailed to Parties: October 30, 2018 (emailed)

SGC/mel

BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF TENURE HEARING OF

JILL WEINREB,
Respondent

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX

Agency Docket No. 212-8/18

RE: SETTLEMENT AGREEMENT

Dr. Andrée Y. McKissick
Arbitrator

APPEARANCES:

For the School District:
Arsen Zartarian, Esquire
Deputy General Counsel
The Newark Public Schools
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102-7139

For the Respondent:
Charles Auffant, Esquire
Stuart Ball, LLC
661 Franklin Avenue
Nutley, New Jersey 07110

BACKGROUND

After a series of conference calls and email correspondences, it was decided that interrogations shall be served by each party no later than September 21, 2018 and answered no later than October 2, 2018. In sum, all discovery shall be exchanged and completed by October 2, 2018. Tentative hearing dates have been scheduled for: October 16, October 29, October 30, November 1 and November 15, 2018. However, new hearing dates were

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE: January 18, 2019

Dr. Andrée McKissick

ARBITRATOR

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later agreed upon. Those dates were: October 29, December 4, December 5, and December 6, 2018. On October 29, 2018, on our first hearing, it was at this juncture that a settlement was reached at Newark Public Schools, located at 765 Broad Street, Newark, New Jersey 07102-7139.

6A: 3-5.6 WITHDRAWAL, SETTLEMENT, OR MOOTING OF TENURE CHARGES

Pursuant to this provision, settlement requires approval by an arbitrator. The standards established by the State Board of Education in In re Cardonick, April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846 are as follows:

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 the charged party entered into the agreement with a full understanding of his or her rights;**
5. **A showing the agreement is in the public interest and**
6. **If the charged party is a teaching staff member, a showing 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.**

Consent of both Parties was freely given, as evidenced in the Settlement, itself. The public interest for this settlement is evidenced by New Jersey's broad and liberal discovery requirements. The acknowledgement of the duty to refer tenure determinations which results in a loss of position to the State Board of Examiners for possible suppression or revocation is also implicit in the Settlement Agreement. As referenced in Frank Cardonick v. Board of Education of the Borough of Brooklawn, Camden County and In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn,

Camden County, EDU: 7093-81: 7094-81: 100-82, the New Jersey courts have looked with great favor upon voluntary resolution of litigation through settlement (see Judson v. Peoples Bank & Trust Co., 25 NJ 17 (1957); Honeywell v. Bubb, 130 NJ Super 130 (App. Div. 1974)). Thus, all of the substantive requirements of NJSA 6: A: 3-5-6 were satisfied.

THE SETTLEMENT

The Board of Education of the City of Newark (the "District"), with principal offices located at 765 Broad Street, Newark, New Jersey 07102-7139, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Jill Weinreb ("Respondent"), (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following: Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS, Respondent is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS, the Board of Education of the City of Newark ("Board") certified tenure charges of Inefficiency to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Jill Weinreb* ("Tenure Charges"), Docket No. 212-8/18; and Respondent filed an Answer opposing the charges; and the Commissioner of Education accordingly referred the matter to Arbitrator A. Y. McKissick ("Arbitrator") for a hearing; and

WHEREAS, the District is concerned with the uncertainty of the outcome of arbitration as well as the expenditure of resources due to multiple days of hearings with

numerous witnesses and that school personnel will be removed from their educational duties and responsibilities during that time; and

WHEREAS, the Parties are seeking prompt and final resolution of this matter; and

WHEREAS, Respondent has stated that her record of tardiness in the 2017/2018 academic year was due to a medical condition; and

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS, the proposed Stipulation of Settlement is in the best interest of the Parties and the public because this agreement will avoid an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Upon final approval of the signed Stipulation by the District, the District shall and hereby does withdraw the instant Tenure Charges with prejudice.

2. Ms. Weinreb will be returned to work and/or the School District's payroll on Wednesday, October 31, 2018.

3. Ms. Weinreb's family health insurance together with all other benefits and emoluments of employment will be reinstated immediately but no later than Wednesday, October 31, 2018.

4. Ms. Weinreb will be assigned to teaching duties consistent with her educational certification and endorsements.

5. Ms. Weinreb will forego any claim to back pay for the period beginning with the Certification of Charges against her through October 30, 2018.

6. The Board agrees that it will not use Ms. Weinreb's 2017/2018 Annual Summative Evaluation as the basis for Tenure Charges against her.

7. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. The parties understand that this provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

8. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

9. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

10. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

11. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile

signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

12. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

13. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

14. This Settlement shall not constitute a precedent in any matters involving other employees.

15. Except as noted above, Weinreb waives all past or present claims of any nature against the Board with regard to her employment with and/or her reinstatement from the Board including fees or other monetary relief, with the exception of workers' compensation claims.

16. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in this Settlement Agreement, the sufficiency of which is hereby acknowledged, Weinreb hereby releases and discharges the School District, its Board of Education and its members, the Superintendent, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that she has or may have against the Board of the School District regarding her employment with the School District as of and up to the Effective Date. This includes without limitation, any and all actions, claims, and

liabilities of whatsoever kind or character, in law or in equity, directly or indirectly related to Weinreb's employment with the School District and reinstatement to the School District arising out of this claim. It specifically includes, without limitation, all claims arising out of this claim which Weinreb may have regarding tenure, withholding of increment or salary, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract

or collective bargaining/contractual claim or tort law or public policy or whistleblower claim which may have arisen out of this claim, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorney's fees, costs, and/or future wage loss, except for workers' compensation claims and for health insurance continuation coverage under and pursuant to ("COBRA"). Weinreb agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorney's fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

17. Notwithstanding the above paragraph, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Released Parties, or any of them, based upon any of the above-released claims in Paragraph 16, Weinreb agrees not to seek or accept any resulting relief whatsoever.

18. This Stipulation of Settlement is subject to the final approval of the Board of Education of the City of Newark and will only become effective upon the final approval of the Superintendent.

Dated: 11/2/18 (signed)
JILL WEINREB

STUART BALL, LLC

Dated: 11/2/18

(signed)
By: CHARLES AUFFANT, Esq.

BOARD OF EDUCATION OF THE CITY OF NEWARK, COUNTY OF ESSEX

Dated: 11/13/18

(signed)
By: JOSEPHINE C. GARCIA, Chair

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6a:3-5.6(B):

Dated: 11/14/18

(signed)
Arsen Zartarian, Esq.
Attorney, Board of Education
Of the City of Newark

APPROVED:
Dated: January 18, 2019

A. Y. McKissick, Arbitrator

CERTIFICATION

I, Jill Weinreb, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 11/2/18

(signed)
Jill Weinreb

AFFIRMATION

31-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

January 29, 2019

Matthew B. Wieliczko, Esq.
Zeller & Wieliczko
120 Haddontowne Court
Cherry Hill, New Jersey 08034

Louis J. Greco, Esq.
800 Route 50, Suite 2B
Mays Landing, New Jersey 08330

Re: *Atlantic Cape Community College Organization of Supervisory and/or Administrative Personnel and Linda Desantis v. Atlantic Cape Community College. Agency Dkt. No. 316-12/18.*

Dear Counsel:

I have reviewed the materials filed by the petitioners, Atlantic Cape Community College Organization of Supervisory and/or Administrative Personnel and Linda Desantis, and the respondent, the Atlantic Cape Community College (Community College), in the above-captioned matter. The petitioners are seeking an Order declaring that the Community College's decision to deny Linda Desantis her salary increments pursuant to the reclassification process was arbitrary, capricious and unreasonable.

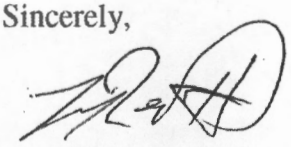
Upon receipt of the petition of appeal, the Office of Controversies and Disputes directed the petitioners to advise the Office of the legal authority that provides the Commissioner of Education with jurisdiction over the Community College. The petitioners maintain that I have jurisdiction over this matter because under *N.J.S.A.* 18A:64A-13, "administrative officers other than the president of the county college are held to possess all the rights and privileges of teachers employed by local boards of education." As such, if a teacher employed by a local board of education has an avenue of review of arbitrary and capricious decision making of the board to the Commissioner, then an administrative officer of a county college has the same right and privilege.

After review and consideration of the submissions, I find that this matter is not properly before me. It is well settled that the Commissioner of Education's jurisdiction extends to controversies and disputes arising under New Jersey school law, excepting those governing higher

education. *N.J.S.A.* 18A:6-9. Here, it is undisputed that the petitioners are seeking to challenge a decision made by the Community College, an institute of higher education. Despite the petitioners' assertions to the contrary, the statutory provisions they cite in support of their position do not afford me with jurisdiction over this matter. Notably, in their submission, the petitioners cite to case law challenging board action that involves appeals initiated by local board of education employees, not employees of a community college. Moreover, pursuant to *N.J.S.A.* 18:3B-6f, the governing board of each public institute of higher education shall have final authority to determine controversies and disputes concerning personnel matters of employees, and the final administrative decision is appealable to the Superior Court, Appellate Division.[1]

Therefore, I do not have jurisdiction over the dispute in this matter. Accordingly, the petition of appeal is hereby dismissed.[2]

Sincerely,



Lamont O. Repollet, Ed.D
Commissioner

c: County Superintendent
State Law Library

LOR/SLP/JKH

Via Regular Mail

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[1] *N.J.S.A.* 18:3B-6f provides a mechanism whereby a dispute between an employee and an institute of higher education can be "assigned to an Administrative Law Judge, an independent hearing officer or to a subcommittee of the governing board for hearing and initial decision." Despite the petitioners' request that I transfer this matter to the Office of Administrative Law, I also have no jurisdiction over the process the governing board engages in when a personnel dispute arises.

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

KATE ROMEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioner – a certified student assistance coordinator (SAC) employed in the respondent Board's school district prior to a Reduction in Force (RIF) – challenged the Board's decision to abolish her position. The petitioner argued that the Board violated *N.J.S.A.* 18A:40A-18 when it distributed her former duties to other existing staff members and contended that she is entitled to reinstatement as a SAC, with back pay and benefits. Further, petitioner maintained that she is also entitled to reinstatement as a teacher of psychology. The Board contended that its actions were consistent with law and regulations.

The ALJ found, *inter alia*, that: petitioner's contention that *N.J.S.A.* 18A:40A-18 requires all SAC-related services to be provided only by a certificated SAC whose position is "separate and distinct" from any other positions in the school district is without merit; the legislative history of the statute reveals it was enacted in 1987 as a vehicle through which to pilot the introduction of SAC services to local school districts, and nowhere does the statute preclude a district from providing student assistance services through the use of properly certificated staff; the Board eliminated petitioner's position for legitimate reasons of economy, and distributed her duties among existing staff in a lawful manner; petitioner did not hold tenure as a teacher of psychology, as the record revealed that she did not deliver instruction to students under her certificate during the time she claims to have taught psychology during the 2011-2012 and 2012-2013 school years; and her claim to reinstatement as a teacher of psychology therefore lacks merit. Accordingly, the ALJ dismissed the petition of appeal.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter, and the petition of appeal was dismissed.

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

January 29, 2019

OAL DKT. NO. EDU 8261-17
AGENCY DKT. NO. 100-5/17

KATE ROMEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Kate Romeo.[1]

The petitioner, a certified student assistance coordinator (SAC), is challenging the High Point Regional Board of Education's (Board) decision to abolish her position as a result of a reduction in force (RIF).[2] The petitioner maintains that she is entitled to reinstatement as a SAC because the Board's decision to distribute the duties she performed as a SAC to other existing staff members violates *N.J.S.A.* 18A:40A-18. Additionally, the petitioner contends that she is also entitled to reinstatement as a teacher of psychology. The Administrative Law Judge (ALJ) found that the Board's decision to abolish the petitioner's SAC position and distribute her duties among existing staff was not unlawful. The ALJ also determined that the petitioner has no right to

[1] The Board submitted reply exceptions beyond the due date without seeking an extension to file late exceptions, therefore, they were not considered.

[2] The petitioner holds a certificate of eligibility with advance standing as a SAC and a certificate as a teacher of psychology.

reinstatement as a teacher of psychology because she did not acquire tenure as a teacher of psychology. As a result, the ALJ dismissed the petition of appeal.

In her exceptions, the petitioner argues that the Initial Decision should be rejected because *N.J.S.A.* 18A:40A-18 mandates that the SAC position must be "separate and distinct from any other employment positions in the District." Moreover, the SAC's duties may not be delegated to "the district guidance counselors, school social workers, and school psychologists." The petitioner stresses that *N.J.A.C.* 6A:9B-14.2 also states that "the SAC position shall be separate and distinct from any other employment position in the school." Therefore, the Board's decision to abolish the SAC position violated the relevant statutory and regulatory provisions.

Further, the petitioner contends that in reaching her decision, the ALJ ignored the most salient and material language from the lead case on this issue, *Maren Bristol v. Northern Valley Reg'l. High School District, Bergen County*, EDU 9053-03, Initial Decision, decided July 1, 2004, *modified*, Commissioner Decision No. 322-04, decided August 4, 2004. The *Bristol, supra*, decision deals with whether a school district, in the abstract, could subcontract the duties of the SAC to a third-party vendor or whether the duties must be performed in-house by a SAC. The ALJ should not have relied on that case because *Bristol, supra*, did not deal with the issue presented herein, which is whether employees within the District who do not hold a SAC certificate can perform the SAC duties. The Superintendent himself testified that employees who are not certified SACs are performing SAC duties in the District, including the behaviorist and members of the Child Study Team. This contravenes the statutory scheme and deprived the petitioner of the protection afforded her as a tenured teaching staff member under her SAC certificate. Moreover, the ALJ inappropriately relied on a footnote from the *Bristol, supra*, decision to support her

determination that the programs and services required by statute need not be provided exclusively by a SAC.

The petitioner also alleges that the ALJ erroneously found that she was not entitled to reinstatement as a teacher of psychology. The petitioner acknowledges that she does not have tenure as a teacher of psychology. However, by virtue of the fact that she taught psychology for two years in the District at the alternative program under her teacher of psychology certificate, she has preference to any position that requires a teacher of psychology certificate over a non-tenured employee. The petitioner cites to case law that she contends supports her position and right to reinstatement as a psychology teacher. Therefore, the petitioner states that the Initial Decision should be rejected, and she should be found to have a right to the tenured SAC position and the ability to exercise her rights over a non-tenured teacher of psychology.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board's decision to abolish the petitioner's SAC position as part of a RIF did not violate *N.J.S.A.* 18A:40A-18. As the ALJ found, the relevant statutory and regulatory provisions require school districts to provide prevention, intervention and treatment programs and services, but do not require all school districts to employ a SAC. The statutory language requiring that school districts employ a SAC, separate and distinct from other district positions, derived from an optional pilot program that commenced in 1987 to introduce SAC services to local school districts.[3] Moreover, *N.J.A.C.* 6A9B-14.1 simply discusses the functions that the SAC endorsement authorizes the holder to perform.

Despite the petitioner's assertion to the contrary, the Initial Decision is also consistent with *Bristol, supra.* In *Bristol, supra,* the Commissioner found that the board of education violated

[3] In the Initial Decision, the ALJ correctly examined the Legislative History of *N.J.S.A.* 18A:40A-18 and explained why the petitioner's argument that all school districts must employ a SAC, separate and distinct from any other employment position, is a misinterpretation of the statute.

the SAC's tenure rights because the RIF was not for reasons of economy but rather was based on concerns about the petitioner's ability to provide the appropriate counseling services to students. Importantly, in *Bristol*, *supra*, the Commissioner stated:

> Irrespective of whether a local board of education chooses to hire a Substance Awareness Coordinator, *all* local boards are statutorily obligated to offer the prevention, intervention and treatment-referral programs and services required by *N.J.S.A.* 18A:40A-1 *et seq*. Thus, while a Board may be prudent to employ a Substance Awareness Coordinator to assist it in meeting its broad statutory responsibilities, there is presently no requirement for it to do so. Consequently, the programs and services compelled by the imposition of these mandates need not, as petitioner argues, be provided exclusively by a Substance Awareness Coordinator, or, necessarily, a district employee. [*Id.* at 3]

Here, it is undisputed that the District effectuated a RIF for budgetary concerns and a decline in student enrollment. It is likewise uncontroverted that the employees who are performing the petitioner's prior duties are eligible to provide these services under their respective certificates. Therefore, the Board's decision to abolish the petitioner's SAC position for economic reasons, and to reassign her duties to existing employees, was not a violation of the statutory and regulatory provisions.

The Commissioner is also in accord with the ALJ's determination that the petitioner has no right to reinstatement to a teacher of psychology position.[4] In her exceptions, the petitioner concedes that she does not have tenure under her instructional certificate, and instead appears to argue that since she has worked in the District under her teacher of psychology certificate, she should be entitled to a position over another non-tenured staff member. First, the ALJ properly found that the work performed by the petitioner in the alternative program was actually under her

[4] The petitioner's tenure status under her substance awareness coordinator certificate does not entitle her to tenure under her teacher of psychology certificate. *See, Dennery v. Passaic City Reg'l High Sch. Dist.*, 131 *N.J.* 626 (1993) (Tenure earned under one certificate does not transfer to another certificate; instead the staff member must serve for the requisite time under the certificate in question.).

SAC certificate and constituted group counseling rather than curriculum-based instruction in psychology.[5] Even assuming arguendo, that the petitioner did work in the District under her psychology certificate, her argument that she has a right to a teacher of psychology position is completely inconsistent with the tenets of seniority. "Seniority 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. denied*, 109 *N.J.* 514 (1987). It is well established that seniority rights are not triggered until tenure is acquired, and the petitioner admits that she does not have tenure as a teacher of psychology. Therefore, the petitioner has no right to reinstatement as a teacher of psychology.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/19

Date of Mailing: 1/29/19

[5] The ALJ heard testimony from the petitioner and the Board's Superintendent regarding the nature of the petitioner's work at the alternative program between 2011 and 2013, and – based on the evidence in the record – determined that the work performed by the petitioner was not under her instructional certificate.

[6] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08261-17
AGENCY DKT. NO. 100-5/17

KATE ROMEO,
Petitioner,
v.
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,
Respondent.

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

Brent Polhman, Esq., for respondent (Methfessel and Werbel, attorneys)

Record Closed: November 26, 2018 Decided: December 17, 2018

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

STATEMENT OF THE CASE

Petitioner, Kate Romeo, is a certificated student assistance coordinator (SAC), and teacher of psychology who was formerly employed by the respondent, High Point

Regional Board of Education (the Board).[1] She appeals the action of the Board terminating her employment effective September 2017, pursuant to a reduction in force (RIF), and asserts that she is entitled to reinstatement and back pay. The Board replies that its actions were consistent with law and regulation.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal by Romeo on May 25, 2017. The Board filed an answer on June 9, 2017, and the matter was transmitted to the Office of Administrative Law as a contested case on June 12, 2017. The case was initially assigned to Judge Joan Bedrin-Murray; upon her elevation to the Tax Court, the matter was reassigned to me on December 15, 2017. A hearing was conducted on August 8, 2018. Post-hearing submissions were filed on November 21 and 26, 2018, at which time the record closed.

Prior to the August hearing, I conferred several times with counsel via telephone conference. I asked whether the outcome of this case, if favorable to Romeo, could implicate the employment of other school district staff. I was repeatedly advised that it was unnecessary to provide notice to potential intervenors, and that the Board did not anticipate that my decision would affect the jobs of other district employees.

I renewed my concern at the hearing. I was again advised that my decision was unlikely to affect other staff members; and that if it did, the Board could not presently advise who might be affected. Counsel urged that the Board was facing additional budget deficits and could not presently predict how it would juggle staffing if Romeo were to prevail. For this reason, no notice was supplied to potential intervenors, as required by N.J.A.C. 1:1-16.4.

ISSUES PRESENTED

The petition raises the following issues for determination:

[1] Her certificate reads "Substance Awareness Coordinator"; the position's title was changed statutorily, but the work authorized by the certificate remains the same. See: L. 2009, c. 54 §4, eff. May 6, 2009.

1. Whether the duties previously performed by Romeo as an SAC have been distributed among existing staff members, and if so, did the action of the Board in doing so contravene N.J.S.A. 18A:40A-18?

2. If so, is Romeo entitled to reinstatement and back pay?

3. Whether Romeo served during the 2011–2012 and 2012–2013 school years under her Teacher of Psychology certificate, and if so, did she earn tenure and seniority as a teacher of psychology?

4. If so, are there psychology classes presently being taught by less senior teachers to which Romeo should have been assigned?

FINDINGS OF FACT

Stipulated Facts

The parties were able to agree to the following background facts via a joint stipulation. I **FIND**:

1. The Board operates a comprehensive four-year public high school, which educates students in ninth through twelfth grades, for the following constituent Sussex County school districts: Branchville Borough, Frankford Township, Lafayette Township, Sussex Borough, and Wantage Township. Students from Montague Township also attend High Point pursuant to a sending/receiving agreement.

2. Romeo began her employment with the Board on September 1, 2008, as a substance awareness coordinator, and remained in that position until June 30, 2017.

3. She was employed as a SAC for the Livingston School District during the 2017–2018 school year.

4. Romeo is employed as a SAC for the 2018–2019 school by the Vernon public schools.

5. On June 7, 2013, Romeo filed a grievance seeking compensation for teaching one period weekly in an alternative-education program.

6. On June 17, 2013, Dr. Terrance Brennan denied the grievance.

7. The grievance proceeded to the Personnel and Policy Committee of the Board.

The Testimony

The SAC

It is uncontroverted, and I **FIND**, that Romeo holds a Certificate of Eligibility with Advanced Standing as a SAC, and a Standard Certificate as a Teacher of Psychology. She held both certificates at the time she commenced her employment with the Board. As a SAC, Romeo supported anyone in the school community who was in crisis, including students and staff. She counseled students on addiction issues and was available to address concerns about student suicide.

Her full-time employment was terminated effective June 30, 2017. In the spring of 2017, Romeo was the president of the local teachers' association, and had been made aware that staff cuts were anticipated in the school district. She was invited in her capacity as president to discuss the impending cuts with the superintendent; Romeo was completely blindsided when the conversation turned to reducing her job as well. She was presented with a letter dated March 8, 2017, indicating that she would be reduced to a 2/5 position. She would no longer be eligible for health benefits. By the time Romeo attended a Board meeting on April 25, 2017, the agenda reflected that the

recommendation of the superintendent was to only reduce the SAC position to 3/5, which would have permitted Romeo to maintain her health benefits. After a recess, the Board acted on the staff reductions. To her surprise, the Board cut the SAC position entirely; Romeo learned she would be unemployed simultaneously with the public.

Superintendent of schools Scott Ripley explained that the district was struggling with budget constraints and decreasing enrollments.[2] In 2008, there were 1,469 students in the school district; by 2017 there were only 920. During the intervening years, staff levels had remained static. Ripley and the Board were thus forced to analyze budget figures, enrollments, tax revenues, and staffing needs. A letter from Ripley dated April 28, 2017, appears intended to assuage public concern about the impact the reductions would have on school programs and services. Ripley advised the High Point community that during the 2017–2018 school year, "[a] full-time crisis counselor/behaviorist who has many years of experience working as a counselor, and working with adolescents battling substance abuse," would be employed by the school district. The district would continue to employ "[f]ive exceptional guidance counselors, one of whom is a certified SAC with experience in this field." And the district would have other interventions available to assists students, to include an Intervention and Referral Services Team, a special disciplinary approach known as "restorative practices," and an enhanced Child Study Team that would include two psychologists.

Edward Blevins has been employed by the Board since 1999, in a variety of capacities. For approximately the last three years, he has worked as a behaviorist. He holds certification in Pupil Personnel Services and Elementary Education, and as a Teacher of the Handicapped. Blevins confirmed that some of the duties that were previously performed by Romeo have now fallen on him. He attends monthly County SAC meetings and has referred to himself as a school substance counselor in emails. His business card uses the title "Crisis and Substance Use Counselor"; these clearly, previously, were Romeo's roles. An email discussing abuse of vapes in schools directs concerned individuals to Blevins. And students and staff in crisis, or who have substance or mental-health concerns, come to him for assistance. Guidance performs

[2] Ripley has been employed by the district for about twenty-one years, and in a variety of prior roles, to include teacher, assistant principal, and director of curriculum.

the prevention components of drug interventions in the school; this too was previously handled by Romeo. Lisa Frisbie is currently employed as a guidance counselor, but had been previously employed by the school district as a SAC.

Ripley likewise confirmed that although the district no longer employs a full-time SAC, the supportive services typically offered by a SAC remain available in the district. Students or staff can direct crisis or drug and alcohol concerns to case managers, the behaviorist, and five guidance counselors. It is thus uncontroverted, and I **FIND**, that the interventions offered by Romeo were still available during the 2017–2018 school year, having been distributed among existing staff, none of whom worked exclusively as a SAC.

The Alternative School Program

Romeo contends that she provided instruction to students under her Teacher of Psychology certification during the 2011–2012 and 2012–2013 school years at the High School Alternative School Program. Ripley shared that this program was created to serve special-education students at risk of dropping out; it was a self-contained special-education program and instruction was supplied by a special-education teacher. Eventually the program was expanded to include "push-in" services; these are services integrated into the classroom setting that would aid the students in transitioning post-graduation. While Ripley had limited involvement with the Alternative School Program during the 2011–2012 school year, during the next year he served as director of curriculum and was very well versed in the particulars of the program.

Ripley was quite firm that Romeo's work was a "push-in" service rather than instruction that required that she utilize her Teacher of Psychology certificate. She went into the transitional classroom one period per week to provide life-skills instruction and offer transitional resources to her students. Ripley pointed out, persuasively, that offering a psychology class to students would have required development of a formal curriculum, and formal approval of that curriculum, none of which took place.

Romeo urged that she was indeed teaching psychology during the 2011–2012 and 2012–2013 school years. Romeo shared the history of a grievance filed in 2013, in which she sought additional compensation under a provision of the collective-negotiations agreement that offered such compensation to a teacher who taught a sixth class.[3] She sought remuneration for one-fifth of a sixth period, insofar as she met with the students once per week. On May 24, 2013, director of special services Rosalie Haller advised the superintendent of schools that the work done by Romeo in the alternative program was "counseling," and part of her responsibilities as a SAC. Haller reiterated that view in a June 3, 2013, memorandum. The grievance was denied by the then superintendent of schools, Dr. Terrance Brennan, on June 17, 2013. It was in turn appealed to the Personnel and Policy Committee of the Board, which granted the grievance via letter dated August 28, 2013. Unfortunately, however, that letter offered no insight into the rationale for granting the grievance. But Romeo contends that the grievance result lends clear support to her claims.

She additionally explained that she taught her students about the biology of emotions like sadness or anger and used this as a vehicle for instruction on self-regulation. She taught them about character traits, recalling that the effect of birth order on personality was of interest to the students. She disagreed that the work she performed was counseling. But she also conceded that the work was performed in a rather unstructured environment, and that although she was teaching special-education students she was unware of any IEP goals related to the instruction she offered. And although Romeo indicated that she prepared lesson plans and was observed and evaluated, she produced copies of neither.

Romeo and Ripley thus offered diametrically opposed viewpoints of the nature of Romeo's work during the two school years in question. Both were credible and sincere witnesses. But Ripley's understanding of the parameters of the position simply made more sense. It was compelling that there was no curriculum attached to the position. Equally compelling was the fact that the "class" met only once per week and was part of a self-contained special-education program. Romeo was unaccompanied by any other

[3] The normal workload for teachers is five instructional periods; if assigned a sixth class, they are entitled to extra compensation.

instructional staff during her time with the students, but does not hold certification as a special-education teacher. For all these reasons, I **FIND** that the work performed by Romeo in the alternative program was under her SAC certification and constituted group counseling rather than curriculum-based instruction in psychology.

Jacqueline McCarthy is a non-tenured teacher who holds certification as a Teacher of Social Studies. She utilizes that certificate to teach a course in behavioral science, and a course in honors behavioral science. Because students in the honors class can sit for the AP Psychology examination, McCarthy was sent for training so that she could structure her class presentation to allow her students to properly prepare. Romeo believes that this is a course that she could teach, and that the Board was required to offer these classes to her. The Board contends that McCarthy teaches under her social studies certification, and that these are not courses in psychology. It is unnecessary that I resolve this factual dispute, as Romeo is not entitled to assignment to the classes in question regardless, as will be more fully explained below.

ANALYSIS AND CONCLUSIONS OF LAW

Romeo's Entitlement to Reinstatement as a SAC

The prerogative of the Board to reduce force is well established. N.J.S.A. 18A:28-9 provides that

> [n]othing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Subsequent to a RIF, a teaching staff member's right to recall is governed by N.J.S.A. 18A:28-11 and N.J.A.C. 6A:32-5.1.

Romeo does not contend that the decision to RIF her was grounded in bad faith, or that the Board continues to employ a SAC who holds less seniority in the school district.[4] Rather, she contends that the statute requires that all SAC-related services in a school district be provided only by a certificated SAC whose position is "separate and distinct from any other employment positions in the District." She thus contends that the action of the Board in redistributing her duties violates the requirements of N.J.S.A. 18A:40A-18 and is ultra vires.

Romeo has misinterpreted the import and meaning of this statute. N.J.S.A. 18A:40-18 was enacted in 1987 as a vehicle through which to pilot the introduction of SAC services in local school districts. The Senate Statement provides that

> [u]nder the bill's provisions, a local school board which wants to participate in the pilot program would submit a proposal to the commissioner which outlines the district's plan to provide alcohol and drug abuse prevention, intervention and treatment services to students through the employment of a substance awareness coordinator. The Commissioner is to select 120 school districts to participate in the program and the State will pay the salary of the coordinator for a three-year period.
>
> [Senate Bill No. 2684, October 23, 1986.]

Consistent with the Senate Statement, the statutory language offers districts the option to participate in this program; if they do so, the statute stipulates that a funded SAC position must be separate and distinct from other district positions. The statute reads:

> The Commissioner of Education, in consultation with the Commissioner of Health, shall develop and administer a program which provides for the employment of student assistance coordinators in certain school districts.
>
> a. Within 90 days of the effective date of this act, the Commissioner of Education shall forward to each local

[4] The parties appear to agree that Romeo was tenured as a SAC, notwithstanding the fact that she did not hold standard certification. In any event, this issue was not raised before me. The focus of Romeo's claim is her interpretation of the Board's obligations under N.J.S.A. 18A:40-18.

> school board a request for a proposal for the employment of a student assistance coordinator. A board which wants to participate in the program shall submit a proposal to the commissioner which outlines the district's plan to provide substance abuse prevention, intervention, and treatment referral services to students through the employment of a student assistance coordinator. Nothing shall preclude a district which employs a student assistance coordinator at the time of the effective date of this act from participating in this program. The commissioner shall select school districts to participate in the program through a competitive grant process. The participating districts shall include urban, suburban, and rural districts from the north, central, and southern geographic regions of the State with at least one school district per county. In addition to all other State aid to which the local district is entitled under the provisions of other pertinent statutes, each board of education participating in the program shall receive from the State, for a three-year period, the amount necessary to pay the salary of its student assistance coordinator.
>
> b. The position of student assistance coordinator shall be separate and distinct from any other employment position in the district, including, but not limited to district guidance counselors, school social workers, and school psychologists. The State Board of Education shall approve the education and experience criteria necessary for employment as a student assistance coordinator. The criteria shall include a requirement for certification by the State Board of Examiners. In addition to the criteria established by the State board, the Department of Education and the Department of Health shall jointly conduct orientation and training programs for student assistance coordinators and shall also provide for continuing education programs for coordinators.

The statute nowhere precludes a district from providing student-assistance services by using other properly certificated staff. Consistent with the plain statutory language, the Commissioner has held that

> [i]rrespective of whether a local board of education chooses to hire a Substance Awareness Coordinator, *all* local boards are statutorily obligated to offer the prevention, intervention and treatment-referral programs and services required by N.J.S.A. 18A:40A-1 et seq. Thus, while a Board may be prudent to employ a Substance Awareness Coordinator to

> assist it in meeting its broad statutory responsibilities, there is presently no requirement for it to do so. Consequently, the programs and services compelled by the imposition of these mandates need not, as petitioner argues, be provided exclusively by a Substance Awareness Coordinator, or, necessarily, a district employee.
>
> [Maren Bristol v. N. Valley Bd. of Educ., EDU 09053-03, Initial Decision, (July 1, 2004), modified, Comm'r (August 4, 2004), http://njlaw.rutgers.edu/collections/oal/.]

Accordingly, I **CONCLUDE** that this record reveals nothing improper or illegal about the action of the Board in abolishing Romeo's SAC position. The Board eliminated Romeo's position for legitimate reasons of economy and distributed her duties among existing staff. Its action in doing so was compliant with N.J.S.A. 18A:28-9.[5]

Romeo's Entitlement to Reinstatement as a Teacher of Psychology

Romeo seeks reinstatement to a position as a teacher of psychology. But I **CONCLUDE** that Romeo did not hold tenure as a teacher of psychology; for this reason, she has no viable claim to reinstatement.[6] N.J.S.A. 18A:28-1 to -18 defines the conditions under which teaching staff members are entitled to the security of tenure. Tenure is 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 (1963). These statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). 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).

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[5] The prerogative of the Board to reassign a "riffed" employee's duties to existing staff is well established. See, e.g., Polaha v. Buena Reg. Bd. of Educ., 85 S.L.D. 1982; Cinnaminson Teachers' Ass'n v Cinnaminson Bd. of Educ., 83 S.L.D. 758, aff'd 84 S.L.D. 1915; Lippincott v. Watchung Hills Reg. Bd. of Educ., 80 S.L.D. 857.

[6] And it is for this reason that the factual question of whether Jacqueline McCarthy teaches psychology, as opposed to social studies, is of no moment. Nor does it matter whether, as the Board contends, it presently offers no classes in the area of psychology. Without tenure, Romeo has no claim regardless.

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 v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991); Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554; Capodilupo v. W. Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div.), certif. den., 109 N.J. 514 (1987). The system of educational certificates established by the New Jersey Department of Education provides for three distinct types of certificates: the Instructional Certificate, the Educational Services Certificate, and the Administrative Certificate. N.J.A.C. 6A:9B-5.2 et seq. Endorsements on these certificates specify the categories within which an individual is authorized to provide service in a public school. Romeo's service as a SAC was under an Educational Services Certificate. Romeo's Teacher of Psychology credential is an endorsement to an Instructional Certificate.

Our Supreme Court has held that tenure earned under one certificate does not transfer to another; the staff member must serve for the requisite time under the certificate in question. Dennery v. Passaic Cty. Reg'l High Sch. Dist., 131 N.J. 626 (1993). The Court confirmed that tenure protection is earned only if a staff member "works in a position for which a teaching certificate is required; . . . holds the appropriate certificate; and . . . has served the requisite period of time." Id. at 638.

Romeo claims to have taught psychology during the 2011–2012 and 2012–2013 school years only. The record reveals that she did not deliver instruction to students using her instructional certificate during the years in question. I thus **CONCLUDE** that she could not have earned tenure under her Instructional Certificate, and that her claim to reinstatement lacks merit. But even assuming, for argument's sake, that Romeo did teach psychology at the Alternative School Program, she simply did not serve long enough in that role to earn tenure. The Board correctly points out that her right to tenure would be governed by N.J.S.A. 18A:28-6, which provides that, where a tenured staff member is transferred to another position, tenure is earned after "employment for two academic years in the new position together with employment in the new position at

the beginning of the next succeeding academic year."[7] She was not reemployed in the controverted alternative school position for the 2013–2014 year. I thus **CONCLUDE** that Romeo did not earn tenure in that position, even if it was a Teacher of Psychology position. See King v. Keansburg Bd. of Educ., 84 S.L.D. 922, 927. I moreover **CONCLUDE** that even if, for argument's sake, the Board is offering its students classes in psychology, Romeo could have no possible claim to assignment to those classes.

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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.

[7] If Romeo was not tenured as a SAC, the time frame for tenure acquisition would have been even longer. See N.J.S.A. 18A:28-5.

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

December 17, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 17, 2018

Date Mailed to Parties: December 19, 2018

sej

APPENDIX

WITNESSES

For Petitioner:

Kate Romeo
Jacqueline McCarthy
Edward Blevins

For Respondent:

Scott Ripley

EXHIBITS

For Petitioner:

P-1 Certificates
P-2 Letter dated March 8, 2017
P-3 Board agenda
P-4 Letter dated April 28, 2017
P-5 Emails dated January 22, 2018
P-6 Board policies
P-7 Grievance packet from 2013
P-8 High Point Employee List
P-9 Professional development activities for Board agenda
P-10 Email to staff
P-11 Business card
P-12 Clarification of P-8

For Respondent:

R-1 Request for Answers to Interrogatories
R-2 Answers to Interrogatories
R-3 Coordinator records

R-4 Memorandum dated April 4, 2017

R-5 Reemployment letter

R-6 Revision to reemployment letter

R-7 Collective Negotiations Agreement

J.H., ON BEHALF OF MINOR CHILDREN, J.S. AND Z.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Synopsis

Petitioner filed a *pro se* residency appeal on behalf of her children, seeking a determination that J.S. and Z.H. were entitled to a free public education in Neptune schools. The respondent Board contended that a residency investigation indicated that petitioner and her children are not domiciled at the Neptune address provided to the school district, but rather are domiciled out of district, at an address in Brick Township, New Jersey. The Board filed a counterclaim for tuition for the period of the children's ineligible attendance.

The ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), a petitioner has the burden of proof in a determination of residency ineligibility; in this matter, a hearing was scheduled for September 12, 2018; J.H. subsequently notified the Office of Administrative Law (OAL) that she had moved her children out of the Neptune school district and had withdrawn the petition; petitioner failed to appear at the previously scheduled hearing, wherein Neptune presented proofs relative to its tuition claim; petitioner later contacted the OAL to object to the tuition reimbursement demanded by the Board; the record was reopened to give the petitioner an opportunity to appear and submit opposition to the tuition cost, but petitioner once again failed to appear at a second hearing held on December 5, 2018 and offered no explanation for her nonappearance. The ALJ concluded that the Board's residency determination should be upheld, and the petition of appeal dismissed pursuant to *N.J.A.C.* 1:1-14.4. Further, the ALJ concluded that the Board is entitled to tuition reimbursement in the amount of $13,350.25 for the period of J.S. and Z.H.'s ineligible attendance from January 12, 2018 through June 21, 2018. The ALJ recommended dismissal of the petition with prejudice.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter, with minor modification to the amount of tuition due. Petitioner was ordered to reimburse the Board in the amount of $13,350.53. The petition was dismissed with prejudice.

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

January 30, 2019

OAL DKT. NO. EDU 06400-18
AGENCY DKT. NO. 86-4/18

J.H., ON BEHALF OF MINOR CHILDREN, J.S. AND Z.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that because petitioner failed to appear at the December 5, 2018 OAL hearing without providing an explanation – after the court rescheduled the hearing following petitioner's previous failure to appear on September 12, 2018 – the petition of appeal is dismissed with prejudice.[2]

In accordance with *N.J.A.C.* 1:1-14.4(d), the ALJ held an ex parte hearing, during which the Board presented proofs relative to its tuition claim. The Commissioner concurs with the ALJ's assessment of tuition – pursuant to *N.J.S.A.* 18A:38-1b – against petitioner for the period of ineligible attendance by her minor children in Neptune. Therefore, the Board is

[1] The Commissioner was not provided with transcripts of the September 12, 2018 or December 5, 2018 hearings at the OAL.

[2] The Commissioner notes that petitioner had previously advised the OAL that although she wanted to withdraw her appeal due to the relocation of her children to another District, she intended to object to the assessment of tuition.

entitled to tuition reimbursement in the amount of $13,350.53 [3] ($70.56 per day for 88 days plus $353.09 for summer school for J.S., and $70.71 per day for 96 school days for Z.H.) for the time period from January 12, 2018 through June 21, 2018, during which time the minor children were ineligible to attend school in Neptune.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, as modified herein, and the petition of appeal is hereby dismissed. Petitioner is directed to reimburse the Board in the amount of $13,350.53 for tuition costs incurred during the time period that the minor children were ineligible to attend school in Neptune.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/19

Date of Mailing: 1/30/19

[3] The ALJ found that the petitioner owed the Board $13,350.25 – a difference of $.28 from the Commissioner's calculation – due to the difference in rounding of the daily tuition cost.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6400-18
AGENCY DKT. NO. 86-4/18

J.H. ON BEHALF OF MINOR CHILDREN, J.S. AND Z.H.,
Petitioners,
v.
TOWNSHIP OF NEPTUNE BOARD OF EDUCATION, MONMOUTH COUNTY,
Respondent.

No appearance by petitioner

Margaret A. Miller, Esq., for respondent (Weiner Law Group LLP, attorneys)

Record Closed: December 5, 2018 Decided: December 19, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Petitioner appeals the determination of the respondent, Township of Neptune Board of Education ("the Board"), that J.S. and Z.H. are not domiciled in its district. The Board seeks an order affirming the disenrollment of J.S. and Z.H., and directing all back-tuition charges for the days of attendance from the first day of illegal attendance to the

date of actual removal of J.S. and Z.H. The Board further requests all cost of litigation including reasonable attorney's fee.

PROCEDURAL HISTORY

Petitioner filed an appeal with the Department of Education ("the Department") on April 9, 2018. The Board filed an answer on May 1, 2018. The matter was transmitted and filed at the Office of Administrative Law (OAL) where on May 3, 2018, it was filed as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Subsequently, the petitioner failed to participate in a prescheduled telephone prehearing. Thereafter, petitioner notified the OAL that she removed her children out of district and withdrew her appeal. All parties were served notice of proof hearing date. On September 12, 2018, Board appeared for the proof hearing, and petitioner failed to appear and did not contact the OAL that day to provide a reason for her nonappearance. On September 14, 2018, petitioner contacted the OAL objecting to the tuition cost. The record was reopened to give petitioner an opportunity to submit opposition to the tuition cost and to appear. All parties were served with a new date to appear, but petitioner failed to appear and prosecute her appeal of the Board's demand for tuition and she failed to advise the OAL of the reason for her nonappearance. The record closed on December 5, 2018.

FACTUAL DISCUSSION

At the hearing, the Board offered a packet of documentary evidence (R-1 – R-11), and the testimony of Peter Barlett, Assistant Business Administrator and Board Secretary, in support of its claim to tuition reimbursement. Based on the documentary and testimonial evidence presented to me, I **FIND** the following **FACTS**:

1. J.S. was a sixth-grade general education school student and Z.H. was a preschool student in the Neptune schools.

2. The Board determined that J.S. and Z.H. were not domiciled in Neptune commencing January 12, 2018. (R-1.)

3. During the time period from January 12, 2018 through June 21, 2018, the District charged petitioner for the days of attendance, when petitioner's children were not domiciled in Neptune. During this time period, J.S., a sixth grade student attended school for eighty-eight days, and Z.H., a pre-school student attended school for ninety-six days. J.S. also attended summer school.

4. The annual per pupil cost for a general education school student in the same grade as J.S. is $12,700 and for Z.H. is $12,728. (R-10.)

5. The daily tuition rate for a general education school student in the same grade as J.S. is $70.56 and for Z.H. is $70.71. This is calculated by dividing the per pupil cost by 180. (R-10.)

6. J.S. also attended summer school. The tuition for summer school totaled $3,530.92 for ten students. The summer school per pupil cost is $353.09.

7. As of June 3, 2018, the amount of tuition owed to the Board for J.S.'s period of ineligible attendance is $6,208.89 for general education, and $353.09 for summer school. The amount of tuition owed for Z.H.'s period of ineligible attendance is $6,788.27. The Board determined that a total of $13,350.25 is owed by petitioner for tuition. (R-10.)

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school 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 principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner 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 section.

Petitioner notified the OAL that she withdrew the petition and moved her children out of district. Thereafter, the parties were notified of a proof hearing. The proof hearing was held on September 12, 2018 and petitioner failed to appear. After the proof hearing, the petitioner contacted the OAL objecting to tuition reimbursement. The record was re-opened. Petitioner was served with a new date to appear but has failed to appear and prosecute her appeal of the Board's demand for tuition and she has failed to advise me of the reason for the nonappearance. Therefore, I **CONCLUDE** that the determination of the Board that J.S. and Z.H. were not domiciled in Neptune Township during the period of time from January 12, 2018 to June 21, 2018, should be upheld and the petition of appeal dismissed pursuant to N.J.A.C. 1:1-14.4.

The Board asserts that it is entitled to be reimbursed for tuition for the period of J.S.'s and Z.H.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school

district prior to the appeal's filing and including the 21-day period to file an appeal.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board relative to its tuition claim. The Board's proofs are convincing, and its calculations are consistent with the requirements of N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-6.2(a). Therefore, I **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $13,350.25, for eighty-eight days of school attendance for J.S. and ninety-six days of school attendance for Z.H. for the period from January 12, 2018 through June 21, 2018.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED WITH PREJUDICE**. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $13,350.25.

The Board's request for all cost of litigation including reasonable attorney's fee is **DENIED**.

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

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

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

December 19, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: December 19, 2018

Date Mailed to Parties: December 19, 2018

MAB/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

Peter I. Barlett, Assistant Business Administrator and Board Secretary

EXHIBITS

For petitioner:

None

For respondent:

R-1 Notice of Final Ineligibility re: J.S., dated January 12, 2018

R-2 Residency Verification Investigation – 2017-2018 School Year

R-3 Notice of Final Ineligibility re: Z.H. and J.S., dated February 28, 2018

R-4 Notice of Final Ineligibility re: J.S. and Z.H., dated March 29, 2018

R-5 Notices of Hearing scheduled for June 20, 2018

R-6 2017-2018 District Calendar

R-7 Board Resolution with certified tuition rates, dated January 25, 2017

R-8 ESY and backup

R-9 Email from Susan J. Green to Peter I. Bartlett and Debra A. Lindblom re: Attendance Audit re: Z.J.H. and J.S., dated September 7, 2018

R-10 Tuition Calculation

R-11 Pre-School Tuition Calculation

OAL DKT. NO. EDU 6664-18
AGENCY DKT. NO. 89-4/18

C.M., on behalf of minor children, J.M., E.M., and E.M. PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION ORDER

On November 1, 2018, a final agency decision was rendered in this matter, wherein the Commissioner found C.M. liable for tuition in the amount of Nineteen Thousand-Three Hundred and Sixty-Seven Dollars and Sixty Three Cents ($19,367.63), representing tuition for a period of ineligible attendance by her children, J.M., E.M., and E.M., in the Board's school district between February 27, 2018 and the end of the 2017-2018 school year. The Board subsequently notified the Commissioner that C.M. has not complied with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. In response to the Board's request, C.M. did not offer any reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Corinne Myers is now subject to entry of a judgment by the court in the amount of $19,367.63, which represents the payment ordered by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/19
Date of Mailing: 1/30/19

C.G., on behalf of minor child, G.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

Synopsis

Pro se petitioner challenged the determination of the respondent Board that her daughter was ineligible for a free public education in the Morris Township Schools during the period from January 20, 2017 through February 2, 2018. The respondent Board contended that a residency investigation indicated that petitioner and her daughter are no longer domiciled at the Morristown address provided to the school district, but rather are now domiciled out of district, at an address in Randolph Township, New Jersey. The Board filed a counterclaim for tuition for the period of the children's ineligible attendance.

The ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are free to persons over five and under twenty years of age who are domiciled within the school district, or are kept in the home of another person domiciled in the district and supported by such other person gratis, as if she were such other person's child; here, the evidence shows that the petitioner and her child lived in Morristown until January 2017, when C.G. purchased a home in Randolph; G.G. continued to attend school in Morris Township Schools after the mother and daughter relocated to Randolph; after receiving a notice of ineligibility from the District, C.G. withdrew G.G. for a short period of time, only to re-enroll her after procuring a court order which granted residential custody of G.G. to a friend of C.G.'s who is domiciled in Morristown; the Board once again conducted a residency investigation to find that G.G. was still residing in Randolph with her mother despite the court order; as a result, the District determined that neither C.G. nor G.G. are domiciled within the school district, and therefore G.G is not entitled to a free public education in Morris Township Schools. Accordingly, the school district is entitled to collect tuition from C.G. for the period of G.G..'s ineligible attendance during the period of January 18, 2017 through Febuary 2, 2018 at a rate of $86.02 per day, for a total of 381 days. The ALJ ordered petitioner to reimburse the Board for tuition in the amount of $26,769.81.

Upon review, the Commissioner concurred with the ALJ that G.G. was not domiciled in the District between January 20, 2017 and February 2, 2018. However, the Commissioner found that the amount of tuition owed is not clear from the record or the Initial Decision. Accordingly, the matter is remanded to the OAL for the calculation of tuition costs owed for the period of G.G.'s ineligible attendance.

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 30, 2019

35-19

OAL DKT. NO. EDU 7231-18
AGENCY DKT. NO. 98-4/18

C.G., on behalf of minor child, G.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The petitioner, C.G., is challenging the Morris Township Board of Education's (Board) determination that G.G. was not eligible to attend school in the District between January 20, 2017 and February 2, 2018. After a hearing at the OAL, the Administrative Law Judge (ALJ) found that G.G. was not domiciled in the District between January 20, 2017 and February 2, 2018 and assessed tuition in the amount of $26,769.81 for G.G.'s ineligible attendance in the District.[2]

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ that G.G. was not domiciled in the District between January 20, 2017 and February 2, 2018. With respect to the amount of tuition owed to the District for G.G.'s ineligible attendance, the Commissioner finds that this matter must be remanded to the OAL for the proper development of the record.

The Commissioner of Education is expressly authorized to assess tuition pursuant to *N.J.S.A.* 18A: 38-1b(2) and *N.J.A.C.* 6A:22-6.2(a), to a parent or guardian for a minor child's ineligible attendance in a school district. Importantly, "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

[1] The record does not include a transcript of the hearing held at the OAL on November 13, 2018.

[2] The petitioner did not appear at the November 13, 2018 hearing.

attendance." *Id.* In the Initial Decision, the ALJ inexplicably calculated the tuition assessment based on the number of calendar days between January 20, 2017 and February 2, 2018. The ALJ states that the per diem tuition rate is $86.01, and that rate multiplied by 381 days of ineligible attendance amounts to a total of $26,769.81 due to the District.[3]

The only evidence in the record regarding the tuition rate is found in the Board's final letter of ineligibility, dated April 3, 2018, where it states that the tuition rate is $86.01. It is not clear if $86.01 was the tuition rate for the 2017-2018 school year as well as the 2016-2017 school year. There is also nothing in the record that indicates the number of school days between January 20, 2017 and February 2, 2018.[4] The Board's submissions provide no clearer indication as to the accurate amount of tuition that should be assessed to the petitioner. In light of the fact that the Board did not submit an affidavit outlining the tuition costs – and the record does not contain a transcript from the hearing at the OAL – it is impossible to ascertain the correct tuition amount that is owed to the District.

Accordingly, this matter is remanded to the OAL for the calculation of tuition costs owed to the District for G.G.'s ineligible attendance in Morris Township Schools. In reaching a decision on the tuition assessment, the ALJ should be mindful that the Commissioner may only "assess tuition for the period during which the appeal was pending, and for up to one year of a student's ineligible attendance in the district prior to the appeal's filing and including the 21-day period to file an appeal." *N.J.A.C.* 6A:22-6.2(a).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/19
Date of Mailing: 1/30/19

[3] Even if 381 was the correct number of days of G.G.'s ineligible attendance, $86.01 multiplied by 381 would equal $32,769.81, not $26,769.81.

[4] The Board is seeking tuition for two separate school years.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07231-18
AGENCY REF. NO. 98-4/18

C.G. ON BEHALF OF G.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,
Respondent.

C.G., Parent of **G.G.**, Petitioner, pro se

Janelle Edwards-Stewart, Esq., for Respondent (Porzio, Bromberg & Newman, attorneys)

Record closed: November 13, 2018 Decided: December 21, 2018

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

STATEMENT OF THE CASE

Petitioner C.G. challenges the "Notice of Final Determination of Ineligibility" dated April 3, 2018, (R-12) rendered by the Morris Township School District (Morris Township B.O.E. or Board), which determined that C.G. was ineligible to attend Morris Township Schools during the period from January 20, 2017, through February 2, 2018. Petitioner

C.G. also seeks an Order relieving her from any obligation to pay for tuition for her daughter, G.G., to the Morris Township School District.

PROCEDURAL HISTORY

On January 24, 2018, the Superintendent of the Morris Township School District (the District) sent a "Notice of Initial Determination of Ineligibility" (R-11) to C.G. advising her that the District determined that she and her daughter, G.G., did not reside in in the District based on its investigation, including an interview of C.G. at her home in Randolph Township. The District offered C.G. the opportunity to appear at a hearing before the Morris Township Board of Education to contest the District's determination. C.G. declined the offer of a hearing and withdrew G.G. A short time later Rosemary Strelec, a friend of C.G. who resided in Morristown (a town within the Morris Township School District) sought and obtained an Order (R-20) from the Superior Court, Chancery Division granting residential custody of G.G. to her with liberal visitation rights for C.G. Strelec re-enrolled G.G. in the District's school. The District conducted a second investigation which confirmed its previous opinion that neither C.G. nor G.G. was domiciled in the District.

C.G. filed a Residency Appeal on April 18, 2018, with the Department of Education, which was transmitted to the OAL on May 17, 2018, and filed on May 18, 2018, under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23 for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9.

An initial telephone conference was held on June 29, 2018, and a Pre-Hearing Order was issued on that date. On or about July 20, 2018, the Tribunal received correspondence from C.G. stating that she wished to withdraw her appeal. The Tribunal processed this as a withdrawal, closed the file, and returned the file to the Department of Education. On August 24, 2018, counsel for the Respondent brought the

provisions of N.J.A.C. 6A:22-6.2 to the Tribunal's attention and demanded the right to a hearing to present its proofs for the charging of tuition against C.G. On October 18, 2018, the Tribunal held a telephone conference on the record with C.G. and Janelle Edwards-Stewart, Esq., counsel to the District. During that telephone conference the ALJ explained that he had erred when he processed the withdrawal and closed the file. The ALJ set the hearing date for November 13, 2018. The ALJ warned the parties that failure to appear at the hearing on November 13, 2018, would result in an adverse verdict for the non-appearing side, that is, a marking of "Failed to Appear," and that the presentation of proofs by the appearing side would take place. On November 13, 2018, the hearing was held, but neither C.G. nor anyone else appeared for the Petitioner's side. The Respondent presented its proofs at that hearing. On the date of the hearing the Tribunal was not aware of any bankruptcy petitions filed by the Petitioner.

TESTIMONY

The following is not intended to be a verbatim recitation of the testimony, but rather only highlights of the testimony, which the ALJ found especially relevant and important.

Testimony of Debora Engelfried

Debora Engelfried (Engelfried) presented a binder of twenty-two tabbed documents and utilized most of them during her testimony. Engelfried testified that the Morris Township School District contains the towns of Morristown and Morris Plains. Persons between the ages of five and twenty years of age who are domiciled in those towns are eligible to enroll in the District's public schools. The Morris Township Board of Education is the body that presides over and operates the District.

Engelfried testified that when students enroll in one of the District's schools his or her parents or legal guardians are asked to provide various documents which would prove that they are domiciled in the District. These can include documents such as the child's birth certificate, utility bills, leases, deeds, mortgages, etc.

Engelfried testified that there is a recurring problem of people who attempt to enroll their children in the District's schools even though they are not bona fide domiciliaries of the District. She testified that when non-domiciliaries enroll in the District's schools, they use resources that should be utilized for students who are bona fide District domiciliaries. The District's efforts to detect the enrollment of people who are not domiciled in the District often involves utilizing the services of a private detective, named Jeffrey Oster.

In regard to G.G.'s enrollment in one of the District's schools, Engelfried testified that the parent of one of G.G.'s classmates alleged that G.G. and her mother, C.G. were no longer living in the District and provided the address of their actual residence in Randolph Township, which has its own school district. Engelfried testified about social media posts by C.G. (R-17), which demonstrated that C.G. and G.G. moved into their Randolph home on January 18, 2017.

Engelfried testified that the District initiated an investigation. Using the address information supplied by C.G. when she enrolled G.G., the District discovered that they were no longer living in their former apartment on Village Drive in Morristown. A search at the Morris County Registry of Deeds and Mortgages revealed that C.G. purchased a home in Randolph Township on January 18, 2017. (R-22 is a copy of C.G.'s Deed to the Randolph home.) Utilizing the surveillance services of Private Investigator Jeffrey Oster (Oster or the detective), Engelfried testified that the District obtained information from him that C.G. and G.G. resided in Randolph in January 2018. Specifically, on January 23, 2018 C.G. admitted to Oster that she and G.G. resided at the Randolph home. (See R-6.)

Engelfried testified that she communicated with C.G. regarding whether she and G.G. were properly domiciled in the District or whether they had changed their domicile to Randolph Township. In the interim, the Board of Education issued its "Notice of Initial Determination of Ineligibility," dated January 24, 2018 (R-11), in which it informed C.G. that G.G. was improperly enrolled in the District's school and it asked C.G. to either withdraw G.G. from the District's school voluntarily or opt for a hearing before the Board of Education. Engelfried testified that she and C.G. spoke about the investigation and

that C.G. decided to withdraw G.G. and enroll her in the Randolph schools on February 2, 2018. However, Engelfried further testified that only a short time later, C.G. asked her how long it would take to re-enroll G.G. in the District's school, an inquiry which Engelfried thought was peculiar. Engelfried testified that shortly thereafter Rosemary Strelec (Strelec), C.G.'s friend, who was domiciled in Morristown, procured an Order from the Morris County Superior Court, Chancery Division on March 19, 2018 (see R-20), which granted residential custody of G.G. to Strelec and granted liberal visitation rights to C.G. On March 19, 2018 Strelec submitted paperwork to re-enroll G.G. in the District's school and G.G. was re-enrolled on April 9, 2018.

Engelfried testified that paperwork from the Randolph Township school system stated that as of February 2, 2018, (the date that C.G. enrolled G.G. in the Randolph School system) C.G. stated that she had sole custody of G.G. She further testified that Strelec gave a copy of the Court Order to the Morris Township School District and informed the District that G.G. has lived with her since March 19, 2018. She testified that the change of custody in such a short time and the statement that G.G. lived with Strelec only since March 19, 2018, were among the circumstances which led her to initiate a second investigation to find out if G.G. was actually residing with Strelec in Morristown or was still residing with her mother in Randolph. Again, Oster's services were utilized. Engelfried testified that Oster's surveillance indicated that G.G. was not residing with Strelec and that G.G. continued to reside with her mother in Randolph. (See R-6, R-7 and R-8.) As a result of this investigation the District decided that neither C.G. nor G.G. were domiciliaries of the District, that G.G. was not entitled to a free public education in the Morris Township School District and that per diem tuition would be sought.

Testimony of Jeffrey Oster, Private Detective

Jeffrey Oster testified that he was a licensed private detective and was a retired detective sergeant from the Mine Hill Police Department.

Oster testified that he went to the Randolph home on January 23, 2018, and spoke with C.G. about the investigation into whether she and G.G. were domiciled in

Morris Township. C.G. admitted that she was the owner of the Randolph home and stated that she moved into the home in the Summer of 2017, but that G.G. sometimes stayed overnight with Strelec in Morristown. Oster mentioned that C.G. did not mention anything about sharing custody of G.G. with Strelec. Oster reported this information to the District. (R-6.)

Oster testified that on March 26, 2018, he was asked by the District to conduct a second investigation. He was aware of the Court Order granting residential custody of G.G. to Strelec. He testified that he conducted surveillance of Strelec's home on March 27 and 28, 2018, both of which were school days, and reported that no child came out of Strelec's residence on either day. (R-8.)

Oster testified that he was aware that G.G. was re-enrolled into the District school on April 5, 2018. He testified that he conducted surveillance of the Randolph home on April 11, 12, and 13, 2018, (all of which were school days) and on those dates he observed C.G. and G.G. leave the Randolph home in the early morning (from 6:45 a.m. to 7:15 a.m.) and drive away in C.G.'s car. He also took several photographs of C.G. and G.G. exiting the home and entering C.G.'s car. Oster testified that on each day he contacted the District and learned that G.G. was in school.

Oster testified that he believes that C.G. became aware of his surveillance activities. During surveillance conducted on April 16, 17 and 18, 2018, he did not see G.G. leave the Randolph home. He testified that he had spoken directly with C.G. at her home on January 23, 2018, and so she already knew who he was. Oster testified that he conducted surveillance on April 25 and 26, 2018. Both were school days. He testified that on April 25, 2018, he saw C.G. leave her home with G.G. and enter a new Land Rover car, which was registered to her. On this occasion C.G. stopped her car near Oster's car and looked straight at him. The next morning, April 26, 2018, C.G. left her home without G.G. Oster testified that he spoke with the District and learned that G.G. was in school on both days. (See R-9 and R-10.) In his report to the District dated April 26, 2018, (R-10) he concluded that G.G. was not residing with Strelec in Morristown and that she was residing with her mother, C.G., in the Randolph home.

FACTUAL DISCUSSION

No one appeared at the hearing on behalf of C.G. Therefore, the testimony of the witnesses for the Morris Township Board of Education was received without objection in its entirety, as summarized above.

FINDINGS OF FACT

Having had the opportunity to examine the documents presented and to hear the witnesses and to assess their credibility, I make the following **FINDINGS of FACT**:

1. C.G. and G.G., formerly of Morristown, moved into their new home in Randolph, NJ on January 18, 2017. (See R-17 and R-22.)

2. C.G.'s social media post of January 18, 2017, (R-17) constitutes an admission that she and her daughter, G.G., resided in the Randolph home from January 18, 2017, forward.

3. G.G. remained enrolled in a Morris Township school after January 18, 2017.

4. Upon information from a school parent, officials from the Morris Township School District conducted an investigation into whether C.G. and G.G. were domiciled in Morris Township. That investigation resulted in the District concluding that C.G. and G.G. were no longer domiciled in Morris Township as of January 18, 2017. (See R-11.)

5. As a result of the District's investigation and of the issuing of the "Notice of Initial Determination of Ineligibility" by the District, C.G. withdrew G.G. from the Morris Township school in which she had been enrolled and registered her in a Randolph Township school.

6. Rosemary Strelec, who is domiciled in Morristown and who is a friend of C.G., initiated an action to obtain residential custody of G.G. On March 19, 2018,

the Superior Court of New Jersey, Chancery Division, Morris County issued an Order entered on March 22, 2018, granting residential custody to Strelec and granting liberal visitation rights to C.G.

7. Having been granted residential custody of G.G. by the Chancery Division, Strelec submitted paperwork to re-enroll G.G. in school in Morris Township and G.G. was re-enrolled on April 9, 2018.

8. Due to unsettled facts and apparent inconsistencies in the facts as related by C.G., the District decided to, once again, verify the actual domicile of C.G. and G.G. The District undertook a second investigation which involved surveillance of Strelec's home and C.G.'s home. The testimony of the District's private investigator, Jeffrey Oster, along with clear and convincing photographic evidence, convinces this Tribunal that G.G. resided almost exclusively with her mother, C.G., at the Randolph home and that she did not leave for school on school days from Strelec's home.

9. As a result of the second investigation the District sent a "Notice of Final Determination of Ineligibility" dated April 3, 2018, to C.G. (R-12.)

10. The District proved by a preponderance of the credible evidence that C.G. sent her daughter G.G. to school in Morris Township during period of time, specifically January 18, 2017, through February 2, 2018, when they were not domiciled in Morris Township, a total of 381 days.

11. Several days after the November 13, 2018, hearing the Tribunal received information (a letter from an attorney representing C.G.) that C.G. had filed for bankruptcy.

APPLICABLE LAW

N.J.S.A. 18A:36-19a provides "the school district shall obtain proper identification of any new student such as a certified copy of the student's certificate of birth." N.J.S.A.

18A:36-25.1(a) provides "When a child is enrolled in a school district for the first time, the superintendent shall require the child's parent or legal guardian to provide a certified copy of the child's birth certificate or other proof of the child's identity, within 30 days of enrollment."

Public schools are free to persons over five and under twenty years of age who are domiciled within the school district or are kept in the home of another person domiciled within the school district and supported by such other person *gratis* as if he were such other person's own child. N.J.S.A. 18A:38-1(a). If the school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by such person *gratis* as if the child was the person's own child, the superintendent or administrative principle may apply to the Board of Education for the removal of the child. N.J.S.A. 18A:38-1(b)(2). The parent or guardian is entitled to a hearing before the board and, if in the judgment of the board, the parent or guardian is not domiciled within the school district or the child is not kept in the home of another person domiciled within the school district and supported *gratis*, the board may order the transfer or removal of the child from school. Ibid. The parents or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and is entitled to an expedited hearing. Ibid. The parent or guardian has the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. Ibid.

Pursuant to N.J.A.C. 6A:22-3(1)(a)(1), a student is eligible to attend a school district if he or she is domiciled within the school district, and a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

"Domicile" is defined as "the place where [a person] has [his or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning." C.B.W. ex rel. A.W. v. Bd. of Ed. of the Township of Belleville, Essex County, 1998 N.J. AGEN. LEXIS 122, Agency Docket number 159-5/96, 1998 WL 668678 (N.J. ADM. JUNE 18, 1998). As the court noted in Collins v.

Yancey, 55 N.J. Super. 514, 520-21 (Law Div. 1959), a person may have several residences or places of abode, but only one domicile at a time. Ibid.; D.L. v. BD. of Educ. of Princeton Reg'l Sch. Dist., 366 NJ Super. 269, 273-74 (App. Div. 2004).]

N.J.A.C. 6A:22-6 governs the tuition rate; and N.J.A.C. 6A:28-2.10 governs the calculation of tuition charged.

CONCLUSIONS

The Tribunal is satisfied that the factual record demonstrates that, during the time period proven by the District, specifically, January 18, 2017, through February 2, 2018, G.G. resided with her mother, C.G. at the Randolph home. Moreover, there was little or no factual evidence presented in support of P=etitioner's allegation that G.G. resided during the school term with Rosemary Strelec in Morristown and/or that Rosemary Strelec supported G.G. *gratis* as if she were Rosemary Strelec's own child. It follows, and I **CONCLUDE** that from January 18, 2017, through February 2, 2018, G.C. was domiciled and resided in Randolph Township, which is not within the Morris Township School District. Moreover, I **CONCLUDE** that C.G. and G.G. did not meet the requirement set forth in N.J.S.A. 18A:38-1(a) of G.G. being "kept in the home of another person domiciled within the school district and supported by such other person *gratis* as if she were such other person's own child." The Petitioner having failed to carry her burden of proving that G.G. was domiciled in the Morris Township School District, I **CONCLUDE** the Morris Township Board of Education acted properly when it removed G.G. from its school. Moreover, I **CONCLUDE** that the Morris Township Board of Education has proven by a preponderance of the credible evidence that during the time of G.G.'s attendance in the Morris Township School District, she was not domiciled in the Morris township School District and therefore the school district is entitled to collect from G.G.'s parent, C.G., an amount of per diem tuition, namely $86.01, times the number of days in attendance.

I **CONCLUDE** that the number of days attended between January 18, 2017, and February 2, 2018, comes to 381 days and that the total due to the District is $26,769.81.

I also **CONCLUDE** that C.G., by failing to appear at the hearing, failed to prove that she is entitled to an Order relieving her from any obligation to pay for the tuition for G.G.'s attendance in the District's school.

ORDER

It is hereby **ORDERED** that the action taken by the District to remove G.G. from its school is hereby **AFFIRMED**. It is hereby **ORDERED** that C.G. shall pay to the Morris Township Board of Education the sum of $26,769.81, which **ORDER** shall be stayed under the laws of the United States of America concerning bankruptcy, until the Trustee in Bankruptcy authorizes the payment or until the conclusion of the bankruptcy proceedings.

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

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

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

John P. Scollo

December 21, 2018
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

ADDENDUM

List of Witnesses

For Petitioner:

None

Respondent's Witnesses:

Debora Engelfried, Supervisor of Strategic Planning and Student Information Management

Jeffrey Oster, Private Investigator

List of Exhibits

Tribunal's Exhibit:

C-1 The Tribunal's Letter to the Parties dated October 18, 2018

Petitioner's Exhibits:

None

Respondent's Exhibits:

R-1 through R-5 Not admitted into evidence

R-6 Initial Report of Residency Investigation, dated January 24, 2018

R-7 Initial Report of Residency Investigation, dated 3/29/18

R-8 Report of Residency Investigation, dated April 13, 2018

R-9 Report of Residency Investigation, dated April 18, 2018

R-10 Report of Residency Investigation, dated April 26, 2018

R-11 Notice of Initial Determination of Ineligibility, dated January 24, 2018

R-12 Notice of Final Determination of Ineligibility, dated April 3, 2018

R-13 Not admitted into evidence

R-14 Email chain between C.G. and Engelfried, dated February 1. 2018

R-15 Email chain between C.G. and Engelfried, dated March 28, 2018

R-16 Not admitted into evidence

R-17 Email chain amongst Superintendent Prendergast, Engelfried, Donna Karr, Carla Walker, and Sandra Wall, dated February 2, 2018

R-18 Randolph Township Schools registration forms completed February 2, 2018

R-19 Morris School District registration form completed March 19, 2018

R-20 Court Order entered on March 22, 2018, concerning custody hearing of March 19, 2018

R-21 Not admitted into evidence

R-22 C.G.'s Deed dated January 18, 2017, to her Randolph home

IN THE MATTER OF THE TENURE CHARGES BROUGHT BY

CLOSTER PUBLIC SCHOOL DISTRICT
BERGEN COUNTY, NEW JERSEY

DOCKET NO. 120/5-18

-AGAINST-

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

PETER IAPPELLI

AWARD APPROVING
SETTLEMENT AGREEMENT

FOR THE DISTRICT:

STEPHEN R. FOGARTY, ESQ.
FOGARTY & HARA
21-00 ROUTE 206 NORTH
FAIR LAWN, NEW JERSEY 07410

FOR MR. IAPPELLI:

JEFFREY R. MERLINO, ESQ.
SCIARRILLO, CORNELL, MERLINO,
MCKEEVER & OSBORNE, LLC
239 ST. PAUL STREET
WESTFIELD, NEW JERSEY 07090

The Closter Public School District, Bergen County ("District" or "Employer") initiated, and the State District Superintendent certified to the Commissioner of Education, tenure charges seeking the termination of employment of Peter Iappelli ("Respondent" or "Mr. Iappelli"), who has been employed and tenured as the School Business Administrator/Board Secretary for the District. The Commissioner of Education referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109. Preliminary conferences were conducted with counsel, and the hearing was commenced on July 11, 2018, at which time oral argument was held regarding the Respondent's Motion to Dismiss. The Arbitrator issued an Interim Award on August 4, 2018, dismissing the allegations set forth in Paragraph 14 of Charge 2, Paragraph 14, and Charge 3, Paragraphs 6 through 16 and 30 through 34. The Motion to Dismiss was denied as to all other Charges.

Additional hearings were scheduled to be held on September 13, 18, 19, 24, and 25, 2018, in keeping with an extension of time approved by the Office of Controversies and Disputes. During a conference held on September 12, 2018, however, counsel jointly requested, and the Arbitrator approved, a postponement of the hearings in light of the development of proposed settlement terms that had been tentatively accepted by both parties. The parties thereafter conveyed to the Arbitrator a Settlement and Release, executed September 20, 2018, with exhibits. The parties also set forth a detailed statement of the grounds upon which they seek approval, in keeping with N.J.A.C. 6A:3-5.6 and the applicable factors set forth therein and in *In Re Cardonick*, New Jersey State Board of Education, 1990 School Law Decision 842.

The Arbitrator, being fully familiar with the charges and defenses set forth in this proceeding and being aware of the additional evidence expected to be adduced by the parties, has given full and careful consideration to the proposed terms of settlement. She finds same to be fair, appropriate, proper, and fully consistent with the applicable standards. The Arbitrator thus approves same and incorporates the Settlement and Release, with exhibits thereto, herein as her Award in this matter.

Dated: October 3, 2018

Jacquelin F. Drucker, Esq.
Arbitrator

Attachment, Incorporated by Reference: Settlement Agreement & Release dated September 20, 2018

State of New York)
) SS:
County of New York)

On this 3rd day of October, 2018, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOHN H. DRUCKER
Notary Public, State of New York
No. 02DR6018984
Qualified in New York County
Commission Expires February 1, 2019

SETTLEMENT AGREEMENT

20 This **SETTLEMENT AGREEMENT** is made and entered into this day of September, 2018, by and between the **CLOSTER BOARD OF EDUCATION**, with offices located at 340 Homans Avenue, Closter, New Jersey, 07624 (the "Board") and **PETER IAPPELLI**, whose address is 32 Whitney Street, Closter, New Jersey, 07624 ("Iappelli").

WITNESSETH:

WHEREAS, the Board currently employs Iappelli as a Business Administrator/Board Secretary and has done so since February 1, 2007; and

WHEREAS, the parties have determined it is in their mutual interests to conclude the employment relationship; and

WHEREAS, Iappelli has indicated a willingness to resign from all employment with the Board, effective at the close of business on January 31, 2019, upon satisfaction of certain terms and conditions to be stipulated in this Separation Agreement (the "Agreement"); and

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promises, and in exchange for the consideration more particularly set forth below, it is hereby agreed:

1. **No Admission.** This Agreement is the compromise of disputed claims and shall never be treated as an admission of liability or wrongdoing by either party for any purpose. All parties shall bear their own attorney's fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement.

2. **Resignation.** In return for full compliance with this Agreement, and subject to formal Board approval and ratification of the Agreement, Iappelli agrees to sign a letter of resignation from all employment with the Board, to be effective at the close of business on January 31, 2019, which shall be in the form attached hereto as Exhibit A. The Board shall, by Resolution, accept this resignation at its next regularly scheduled Board meeting. Said resignation is effective only upon the full terms and conditions of the Agreement being accepted by Resolution of the Board, and is only then binding upon the parties and irrevocable and is not subject to modification or rescission. Iappelli agrees that, upon the execution of this Agreement, and as a result of his

Attachment to Award Approving Settlement Agreement, 30th 2018

resignation, he shall forfeit all tenure and seniority rights he has to any position with the Board.

3. Settlement Terms. In consideration for Iappelli's resignation as set forth in paragraph 1 of this Agreement and the waiver and release as set forth in paragraph 3 of this Agreement, the Board, by and through this Agreement, shall pay Iappelli for the period of his unpaid suspension from May 10, 2018 through June 30, 2018 in the amount of $24,841.20, plus thirteen months' salary for the period of July 1, 2018 through July 31, 2019. The total payments shall be equal to $213,947.86, less the mandatory taxes, pension, health benefit payment, and/or any other deductions required by his employment with the Board. The payments shall be made as follows:

During the period of Iappelli's personal leave of absence, dating back from July 1, 2018 through January 31, 2019, he shall be paid his regular annual salary less the mandatory taxes, pension, health benefit payment, and/or any other deductions required by his employment at the source of wages.

Iappelli shall also receive a lump sum payment equal to his salary for the period of February 1, 2019 through July 31, 2019, or $87,279.96, less the mandatory taxes and/or any other deductions required by his employment at the source of wages.

4. Leave of Absence. Iappelli shall submit a request for a personal leave of absence from July 1, 2018 through January 31, 2019 which is attached hereto as Exhibit B. Iappelli shall not have any professional responsibilities as an administrative staff member during his paid leave of absence.

5. Mutual Limited Contact Clause. The parties mutually agree that both parties will have limited contact with each other. Effective immediately, Iappelli agrees that he shall not be present on any of the Board's campuses without the express written consent of the Superintendent.

6. Release. Iappelli hereby releases and waives any and all claims he has, or could have, against the Board, its individual members, officers, employees, administrators, agents, servants and representatives, including, but not limited to, claims for discrimination, contract, tort, constitutional violation and/or attorneys' fees. Iappelli shall execute a General Release in favor of the Board, its individual members, officers, employees, administrators, agents, servants, and representatives, releasing them from any and all claims, liabilities or expenses to which they may be subject arising

from any claims or rights of Iappelli. The form of this General Release is attached hereto as Exhibit C. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

Nothing in this Agreement or the documents referenced herein, however, shall preclude Iappelli from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

7. Medical Insurance. Iappelli shall continue to be eligible to receive health benefits available to any other employee on an annual basis subject to the appropriate payments towards the annual premiums required as an employee of the Board through January 31, 2019 or his date of resignation. However, it is acknowledged that Iappelli is presently on another district's SEHBP plan through his spouse and will only enroll in the Board's dental insurance program. Iappelli will only enroll in the Board's health insurance program if he ceases to have outside health insurance coverage through his spouse.

Nothing contained within this Separation Agreement shall alter Iappelli's rights to continuation of health insurance through Federal law, i.e. the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") upon separation from employment with the Board as of the date which coincides with the date that Iappelli no longer receives health insurance as provided by the Board.

8. No Interference. Iappelli agrees that he will never apply for re-employment with the Board. Each party shall be free from interference, direct or indirect, by the other and neither shall discuss with, disclose to or communicate with anyone, the terms of this Agreement, except their attorneys or accountants who shall hold such communication as confidential, or as may be required by law. The Board shall be required to adopt a public resolution approving this Separation Agreement and each of the documents which are incorporated by reference in said Agreement.

9. **Reliance.** This Agreement constitutes the entire understanding of the parties with respect to the subject matter hereof, and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the parties.

10. **Full Understanding.** The parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions, and understand them clearly; that the provisions embodied in this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation.

11. **Representation.** Both parties acknowledge that they have consulted with an attorney of their own choosing prior to signing this Agreement, and that they sign this Agreement as their own voluntary act and deed and fully understand the duties and obligations enumerated herein.

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

13. **Voluntary Agreement.** The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. Iappelli further understands that as a result of his resignation, the tenure determination results in the loss of his position and thus notice will be provided to the State Board of Examiners for possible suspension or revocation of his certificate.

14. **Opportunity to Consult With Counsel.** The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this

Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

15. Modifications and/or Waivers. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable only if made in writing and executed with the same formality as this Agreement. The failure of any party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature or of a continuation of an existing default.

16. Governing Law. This Agreement shall be subject to the laws of the State of New Jersey, without regard to its choice of law principles.

17. Ratification. This Agreement is subject to ratification by the Board, and is without prejudice to any party if the terms are not agreed upon.

18. Subject to Ratification. This Agreement and the resignation of Iappelli shall only become effective upon the ratification and approval by the Board.

19. Section Headings. Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

20. 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.

IN WITNESS WHEREOF, the parties set their hands and seals to this Agreement effective on the day and year first written above.

WITNESS:

MICHAEL DONOW
Interim Business Administrator/
Board Secretary

DATED: 9/26/18

WITNESS:

DATED: 9/20/18

CLOSTER BOARD OF EDUCATION

BY:
GREGG LAMBERT
Board President

DATED: 9/26/18

BY:
PETER IAPPELLI

DATED: 09/20/18

EXHIBIT A

Peter Iappelli
32 Whitney Street
Closter, New Jersey, 07624

September 20, 2018

Mr. Gregg Lambert
Board President
Closter Board of Education
145 Spring Valley Road
Closter, New Jersey, 07652

Re: Letter of Resignation

Dear Mr. Lambert:

I hereby submit my irrevocable resignation from all employment with the Closter Board of Education effective at the close of business on January 31, 2019, subject to the terms of the Settlement Agreement executed simultaneously herewith and which are incorporated herein by reference.

Sincerely,

Peter Iappelli

EXHIBIT B

Peter Iappelli
32 Whitney Street
Closter, New Jersey, 07624

September 20, 2018

Mr. Gregg Lambert
Board President
Closter Board of Education
145 Spring Valley Road
Closter, New Jersey, 07652

Re: Request for Personal Leave

Dear Mr. Lambert:

I am requesting a leave of absence for personal reasons, with pay but less any mandatory taxes, pension, health benefit payment, and/or any other deductions required, from to July 1, 2018 through on January 31, 2019. During the period of my personal leave of absence with pay, any personal leave, vacation leave, pay for accumulated sick leave and any other financial remuneration to which I am otherwise entitled under the terms of my employment agreement shall be subsumed during my leave of absence and shall not accrue, nor shall I be entitled to their cash equivalent.

Sincerely,

Peter Iappelli

Exhibit C

RELEASE

This Release, dated September 20, 2018, is given

BY the Releasor(s)

PETER IAPPELLI

referred to as "I" or "Iappelli ",

TO CLOSTER BOARD OF EDUCATION and its members, officers, employees, administrators, agents and servants,

referred to as "You" or the "Board".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly, Iappelli knowingly and voluntarily releases, waives, acquits, disclaims and forever discharges the Board from any and all claims which I have or might have against you from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to, claims arising under the Americans with Disabilities Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Workers' Compensation Act, New Jersey Wage and Hours law, New Jersey Statutes Title 18A, Education, and/or any other federal, state or local employment, human rights, civil rights, wage hour, tenure, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public policy, contract or tort law, or any claim of retaliation

under such law, or any claim of breach of any contract, collective negotiations agreement or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortuous interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, or any action similar thereto against the Board including any claim for attorneys' fees, that Iappelli, his heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct arising out of Iappelli's employment with the Board. This paragraph is not intended and shall not preclude Iappelli from instituting proceedings seeking to enforce the terms of this Release.

2. **Consideration.** The Consideration for this Release is specifically set forth in the Separation Agreement, to which this Release is attached.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Joanne M. Appel
(Seal)
NOTARY PUBLIC

PETER IAPPELLI

JOANNE M. APPEL
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 2187193
MY COMMISSION EXPIRES MARCH 15, 2021

STATE OF NEW JERSEY :
SS:
COUNTY OF :

BE IT REMEMBERED that on this 20th of September, 2018, before me personally appeared **PETER IAPPELLI**, who I am satisfied is the person mentioned in and who executed the within Agreement and who knows the contents thereof and thereupon I acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

Joanne M. Appel
(Seal)
NOTARY PUBLIC

Prepared by:

/s/ Stephen R. Fogarty
Stephen R. Fogarty, Esq.

JOANNE M. APPEL
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 2187193
MY COMMISSION EXPIRES MARCH 15, 2021

New Jersey Commissioner of Education

Final Decision

A.O., on behalf of minor child, V.M.,

Petitioner,

v.

Board of Education of the Town of Kearny, Hudson County,

Respondent.

Synopsis

This case involves a dispute over whether V.M.'s math grades for the first and second marking periods of the 2017-2018 school year should be changed based on his scores on tests and quizzes that he was allowed to retake later in the year, at his mother's request. V.M., a sixth grader in the respondent Board's school district during the period in question, had received failing grades for the first two marking periods, and was allowed to retake the assessments starting in late February 2018 after his mother expressed concern that V.M. might not be academically prepared for seventh grade. Petitioner contended that there had been an agreement with school officials that V.M.'s first and second marking period grades would be changed based upon his retake scores. The Board asserted that no such agreement had been made, and that its actions in denying petitioner's request to change V.M.'s grades were lawful and in keeping with district policy.

The ALJ found, *inter alia*, that: in addition to petitioner's demand that V.M.'s grades be changed based upon his scores on tests and quizzes that he was allowed to retake at A.O.'s request, petitioner also asked that the New Jersey Department of Education "...investigate the internal administration of the Kearny Board of Education interactions with the internal administration of Garfield Middle School;" as the record offers no evidence of the need for such an investigation, the grading dispute is the only issue to be resolved here; pursuant to *N.J.S.A.* 18A:11-1(c), local boards of education make, amend and repeal rules for the government and management of public schools, consistent with state law; allowing a student to repeat entire marking periods months later to earn better grades would compromise the integrity of the grading process and set bad precedent; the testimony of the Board's witnesses that there was no agreement to change V.M.'s first and second marking period grades based on the test retakes was credible, while the testimony of the petitioner was not. The ALJ concluded that there was no evidence that the Board violated any law, and the petitioner failed to demonstrate that the Board's refusal to change V.M.'s grades was arbitrary, capricious, unreasonable or in bad faith. Accordingly, the ALJ ordered that the petition be dismissed with prejudice.

Upon careful and independent review of the record and the ALJ's recommended decision, the Commissioner adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed with prejudice.

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

February 14, 2019

40-19

OAL Dkt. No. EDU 12379-18
Agency Dkt. No. 162-7/18

New Jersey Commissioner of Education

Final Decision

A.O., on behalf of minor child, V.M.,

Petitioner,

v.

Board of Education of the Town of Kearny, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner in refusing to change V.M's grades.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/14/19
Date of Mailing: 2/14/19

[1] The Commissioner was not provided with a transcript of the November 19, 2018 hearing at the OAL.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12379-18
AGENCY DKT. NO. 162-7/18

A.O., ON BEHALF OF MINOR CHILD, V.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,
Respondent.

A.O., petitioner, pro se

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: November 19, 2018 Decided: January 3, 2019

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner A.O. challenges her son's math grades for the first and second marking periods of the 2017-2018 school year.

By letter dated March 29, 2018, petitioner was notified by the Kearny Superintendent of Schools that her appeal was denied and that V.M.'s grades for the

first and second marking periods would not be changed. Petitioner thereafter appealed to the Kearny Board of Education. The full Kearny Board of Education voted to deny petitioner's appeal and V.M.'s grades remained unchanged. On July 12, 2018, petitioner filed a Petition of Appeal with the Department of Education. The Petition of Appeal did not include a proof of service, and the Department sent petitioner a Deficiency Notice on August 2, 2018. Mail receipts were submitted to the Department by A.O. on August 3, 2018. The Board filed an answer on August 20, 2018. Thereafter, on August 27, 2018, the Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9. The hearing was held on November 19, 2018, on which date the record closed.

FACTUAL DISCUSSION AND FINDINGS

Petitioner testified on her own behalf. Lyndsay Vitale and Curtis Brack testified on behalf of the respondent.

Preliminary Facts

After due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following preliminary facts:

V.M. is the son of A.O. V.M. was in sixth grade during the 2017-2018 school year. His math teacher was Lyndsay Vitale. V.M. had not previously had Vitale as a teacher. Vitale has been employed by the Kearny Board of Education as a math teacher for eleven years. Curtis Brack has been employed by the Kearny Board of Education for eighteen years, with this year being his fifth year as principal of V.M.'s school. Patricia Blood was the Superintendent of Schools.

Vitale gave tests and quizzes during the first and second marking periods. V.M.'s June 21, 2018, report card for the 2017-2018 school year reflects his grades in Math 6 as follows: first marking period - 61; second marking period - 60; third marking period - 80; and fourth marking period - 95. The report card comments for Math 6 are "Quality of work shows improvement." (P-1.)

V.M.'s Progress Report for the first marking period reflects an "F" for failing in math and the comments: [i]nteracts well with peers; [h]as a positive attitude; [i]s talkative in class; and [l]ow test scores. (R-1.) V.M.'s Progress Report for the second marking period again reflects an "F" for failing in math and the comments: [a]ccepts teacher guidance; [h]as a positive attitude; [n]eeds to study and prepare better for tests; and [b]ehavior needs improvement. (R-2.)

In late December 2017 or early January 2018, A.O., V.M., Brack, and Vitale had a meeting about V.M.'s first and second marking period grades.

On February 23, 2018, Vitale emailed A.O. and Brack that V.M. would be taking his tests and quizzes on Mondays and Thursdays in Brack's office. (P-6.) Vitale was referring to the first and second and marking period tests and quizzes.

The first marking period was comprised of the following: Quiz 1.1-1.3; Take Home Quiz; Chapter 1 Test; Quiz 2.3; Chapter 2 Test; and Quiz 3.2. The second marking period was comprised of the following: Quiz – Chapter 3; Test – Chapter 3; Quiz 4.1-4.2; Quiz – Equations; Midchapter Test; and Test Chapter 4.[1] V.M.'s grades on the first marking period retakes were 84, 80, 80, 85, and 84.[2] V.M.'s grades on the second marking-period retakes were 50, 91, 90, 100, and 83.[3] Other tests were submitted with Exhibit P-3 not listed by Vitale as part of the second marking period retakes as follows: Chapter 5 Quiz (76); Chapter 5 Test (77/73); Chapter 6 Test (78); and Chapter 7 Mid Chapter Test (60).

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[1] Vitale's list for the second marking period also reflects the following: "Area of Polygons Test cannot be retaken. It was based on completion of entire unit in ST Math."
[2] Quiz 3.2 was not submitted with Exhibit P-2.
[3] Midchapter Test (Chapter 4) was not submitted with Exhibit P-3.

On February 28, 2018, A.O. emailed Blood regarding points on a test. Blood responded that the issue had been addressed by Brack. (P-4.) Later that day, A.O. emailed Blood, stating that she had been trying to resolve a school issue with V.M. since November, and that she had reached out to the Board of Education, but the Board failed to assist her, and that she was now requesting that Blood assist her. (P-4.)

On February 28, 2018, A.O. filed a harassment, intimidation and bullying (HIB) report. (P-7.) By letter dated March 2, 2018, Brack notified A.O. that the allegations would be investigated within ten days. (P-7.)

On March 5, 2018, A.O emailed Blood, Brack, and Vitale as follows:

> [Garfield School] offered test retake for 1,2 marking period. Today eventually I received a phone call from [Brack] said [V.M.] grade will be the same. But a few days ago he told me after all the test will taking and grade, [V.] grade will be changed. Today Patricia Blood and [Brack] told me if I like I can transfer [V.] to another school. I said [V.] will continue his 4 months left of school year in [Garfield School] I just like to these issue yo be resolved shortly.
>
> [P-5.]

By letter dated March 29, 2018, Blood notified A.O. that after review of V.M.'s records and Vitale's gradebook, she found no reason to make any alterations to V.M.'s grades for the first and second marking periods. Blood's letter further notified A.O. that her appeal was denied, and she could appeal Blood's decision to the Board of Education. (P-8.) A.O. appealed to the Board of Education. By letter dated May 17, 2018, the attorney for the Board of Education notified A.O. that the Board of Education agreed to hear her appeal on May 21, 2018. (P-8.) A committee of the Board of Education heard A.O.'s appeal on March 21, 2018. By letter dated June 19, 2018, the attorney for the Board of Education notified A.O. that the Board voted to deny her appeal at its June 18, 2018, meeting. A.O. thereafter appealed to the Department of Education. (P-8.)

Testimony

A.O.

A.O. first learned of V.M.'s poor performance in math in November 2017 when he came home crying and told her Vitale had been talking about him to another student. He said he did not want to be in school, and that Vitale had said she did not like him and he was a terrible student. He was not comfortable going to school. He had never previously complained about Vitale to her. Maybe he did not say anything prior because he was holding it all in. He did not mention his grades. She checked the parent portal. She was enrolled in school at that time and she had not been checking V.M.'s grades. Maybe it was her fault she did not check the first and second marking period grades from the beginning, but she was able to address it when she found out.

She read the progress reports that were sent home. She had a meeting with Brack and Vitale about V.M.'s grades in December after she received a progress report. Vitale did not have the tests and quizzes. Vitale has her gradebook, but it does not mean anything. As a parent, she has a right to see the tests and quizzes. V.M. never brought any math tests home and she never saw the original tests. She does not know if the grades were good or bad. Vitale should have a folder for the parents to see the grades. If V.M. threw the tests away or did not give them to her he should be able to retake them. Vitale had no way to show her the grades, so she told Vitale to allow him to retake the tests.

On March 5, 2018, she emailed the relevant District employees confirming that V.M.'s grade was supposed to be changed based upon the retakes. She believed the retakes would be substituted for his prior grades because the District did not have the original tests to show her.

V.M. had three points taken off a test for behavior in class, but the points were restored after she questioned it. Points cannot be removed for behavior. It was very difficult for V.M. to be in the class and learn the correct way. After V.M.'s homeroom was changed, everything changed, although Vitale remained his math teacher.

As evidence that V.M.'s grades on the original tests were good, A.O. relies upon the retake grades and that his grades in the third and fourth marking periods were good. If V.M. did not know the first and second marking period material, he would not have been able to do well in the third and fourth marking periods.

The first and second marking period math grades for 2017-2018 should be changed because A.O. does not have any way to see how V.M. did on those tests; his grades for the third and fourth marking periods were good; and his grades on the retakes were also good. If he did not know the material before, he would not know it later. V.M. earned the retake grades because he was able to retake the tests and the teacher cannot show her the original tests.

Lyndsay Vitale

A week to a week and a half prior to a test or quiz, she wrote the date of the test or quiz on the homework board. Thereafter, she daily reminded the students to study. Two days prior she would conduct a review and the students would work either in pairs or individually to try problems in advance and she would help. The following day she would go over every question and answer and ask if the students had any questions. The next day she would give the test or quiz, which would be very similar to the review.

Students had the full period to complete the test. If additional time was needed, it was given to the students. She graded tests either the same day or the following day at the latest so that she was able to put the grades on the parent portal. Parents could call or email her if there were any issues. She returns the tests the day after she enters the grades, if no students were absent. If a student was absent on the day of the test, she waited a day or two, until after the absent student took the test.

At the start of the school year, she instructed the students to get a folder or binder in which they would keep their tests and quizzes. She advised the students that because they were in sixth grade, she would return their tests and quizzes to them to keep so they would learn responsibility and accountability before going to junior high

school the following year. She used to keep copies of all tests and quizzes and have the parents sign them, but she discontinued doing so when she began teaching sixth grade. She accurately recorded all the grades in the parent portal prior to returning the tests and quizzes to the students. Parents are able to immediately see the grades.

She noticed that V.M.'s grades were not good. He would get 30's on tests and she would ask him what happened, but he would shrug his shoulders. V.M. fooled around a lot during tests and distracted the other students. Progress reports were generated half-way through each marking period. The progress reports were sent home and parents had to sign them. A.O. never contacted Vitale about V.M.'s progress reports.

The first contact Vitale had with A.O. was in November 2017, when she received an email from A.O. A.O. was upset about certain alleged behavior that Vitale felt was not true, so Vitale spoke to Brack about it. Some time went by and A.O. later advised that she was unhappy with V.M.'s grades. A meeting was set up to discuss it. A.O., V.M., Brack, and Vitale attended the meeting. A.O. was upset that she did not have copies of the tests and quizzes. V.M.'s behavior toward Vitale in a specific class was also discussed. A.O. wanted Vitale to produce the tests and quizzes, but she does not retain a copy of them.

The first and second marking period grades on V.M.'s report card are correct. V.M.'s report card grades were higher than V.M.'s actual grades, because V.M. had 30's on tests and quizzes, but the lowest average grade a student can receive in the computer is 60. Vitale attributed V.M.'s poor performance to not paying attention in class. He started to get better grades after his mother was on top of it, and he started paying attention and his behavior improved. Vitale never made him scared to come to class, and she thought they had a great relationship. He was always smiling, happy, and laughing.

A.O. was very upset that she did not have a copy of the tests and was concerned that V.M. would not be prepared for seventh grade with such low test scores. Brack advised Vitale that V.M. would be allowed to retake the tests and quizzes to allow his

mother to see how well he could do, but that it would not change his grades. Vitale spoke to V.M. the following day and explained that he would be allowed to retake the tests and quizzes, but that it would not change his grades. V.M. advised that he knew it would not change his grades, but his mother just wanted him to retake them. Vitale was very clear that his grades would not be changed.

It was agreed upon that the tests would be taken after school hours in Brack's office. Vitale wanted the math coach to correct them. The math coach graded all but one. The grades were much better on the retakes. Based on the retakes, V.M. was prepared for seventh grade math. Vitale never told anyone V.M.'s prior grades would be changed.

The first marking period ends in November, the second marking period ends in January, the third marking period ends in April. The progress reports go out in the middle of a marking period so that a student has time to improve a grade. Progress reports are returned to Vitale. A.O. signed the progress reports for the first and second marking periods. A.O. did not address with Vitale the comments on the progress reports.

Curtis Brack

A.O. approached Brack with an issue about V.M.'s first and second marking period grades. She was concerned based upon V.M.'s grades and wanted to be sure that V.M. would be academically prepared for seventh grade. Brack was aware Vitale did not retain hard copies of the tests and quizzes, so to reassure A.O. that V.M. would be prepared for seventh grade, Brack would allow V.M. to retake the quizzes and his tests in his office. A.O. did not ask Brack to change V.M.'s grades. Changing grades was never a topic of discussion.

V.M. began retaking the tests after school in Brack's office, a neutral location. Another District math employee graded the tests and the tests were given to A.O. Brack became aware that A.O. wanted V.M.'s grades changed around the time that A.O. filed a HIB report. There had been emails about how V.M. was progressing, but

there had been no discussion prior about changing grades. Changing a student's grades in this manner would undermine the teacher's professionalism, compromise the integrity of the grading process, and set a bad precedent for the other students. Brack has never changed a student's grades in this manner and he denied A.O.'s request to change V.M.'s grades. At no point did Brack ever indicate to A.O. that the retakes would change V.M.'s first or second marking period grades. He was under the impression that everyone was on the same page about the retakes.

A.O. did not want Vitale to continue as V.M.'s math teacher, but the school has only one sixth-grade math teacher. Several options were considered, including putting V.M. with the fifth-grade math teacher, but Brack did not think was appropriate because the curriculum is different, or having a resource teacher teach him sixth-grade math, but Brack did not think that was appropriate either. The last resort option he discussed with the superintendent was to allow V.M. to switch schools if A.O. really did not want Vitale to be his teacher.

Additional Findings of Fact

A credibility determination requires an "over-all evaluation of the testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). For "testimony to be believed, it must not only proceed from the mouth of a credible witness, but must be credible in itself." Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). It must be "such as the common experience and observation of mankind can approve as probable in the circumstances." Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "'The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Petitioner presented no written documentation of an agreement that V.M.'s grades would be changed based upon the retakes. There is an email from Vitale on February 23, 2018 confirming that V.M. would be taking the tests and quizzes in Brack's

office after school. However, there was no response to that email from A.O. confirming that grades would be changed based upon the retakes. Vitale and Brack both credibly testified that there was no agreement that V.M.'s grades would be changed based upon the test retakes. Brack explained why he would not have agreed to change V.M.'s grades, and further explained that the retakes were to address A.O.'s concerns about V.M. knowing the material to be prepared for seventh grade. A.O. did not send an email about changing grades until March 5, 2018, which was after she would have been aware that V.M.'s grades on the retakes were significantly higher than his grades on the original tests. Accordingly, I credit the testimony of the Board's witnesses and **FIND** that there was no agreement that V.M.'s first and second marking period grades would be changed based upon the retakes.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to N.J.S.A. 18A:6-9, the commissioner of the Department of Education has jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws. N.J.A.C. 6A:3-1.1 et seq. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1(a).

The Petition requests that the Department "intervene in the grade change for [V.M.] as well as investigate the internal administration of the Kearny Board of Education interactions with the internal administration of Garfield Middle School." However, the record is devoid of evidence of the need for an investigation, and petitioner failed to cite to any legal authority to order such investigation. Thus, the sole remaining issue is the grading dispute.

Local boards of education make, amend and repeal rules, consistent with law and the rules of the state board, for the government and management of the public schools. N.J.S.A. 18A:11-1(c).

Petitioner disputes V.M.'s grades primarily because she was not provided with the original graded tests and quizzes. However, she did not request to view the tests or quizzes at any point until late November or December 2017, despite that the grades were available on the parent portal within a day or two of when the test or quiz was taken, and despite that she already had received a report card and progress reports reflecting that V.M. was failing. Vitale testified that it was the student's responsibility to maintain the copies of the tests and quizzes, but V.M. failed to do so. Although there was testimony from A.O. about harassment, intimidation and bullying, there is no evidence of the same in this record. Likewise, there is no evidence in this record that the grades earned by V.M. on the original tests and quizzes were not accurately recorded by Vitale. V.M.'s performance on the retakes, months later and after his mother became involved, does not establish that those were the grades he earned on the original tests and quizzes. I concur with Brack that allowing a student to repeat entire marking periods months later to earn better grades would compromise the integrity of the grading process and set a bad precedent. "School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." Kenney v. Bd. of Educ. of the Town of Montclair, Essex County, 938 S.L.D. 647, 653 (1934), aff'd, State Board of Education, 938 S.L.D. 649 (1935). There is no evidence that the Board of Education violated any law, and I **CONCLUDE** that petitioner has failed to demonstrate that the Board's refusal to change V.M.'s grades was arbitrary, capricious, unreasonable or in bad faith.

ORDER

It is **ORDERED** that that V.M.'s math grades for the first and second marking periods remain unchanged and that petitioner's Petition be **DISMISSED** with prejudice.

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

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

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

January 3, 2019
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: January 3, 2019

Date Mailed to Parties: January 4, 2019

APPENDIX

Witnesses

For Petitioner:

A.O.

For Respondent:

Lyndsay Vitale
Curtis Brack

Exhibits

For Petitioner:

P-1 Report Card 2017-2018
P-2 Tests/Quizzes for Marking Period 1
P-3 Tests/Quizzes for Marking Period 2
P-4 Email, dated February 28, 2018
P-5 Email, dated March 5, 2018
P-6 Email, dated March 6, 2018/February 23, 2018
P-7 HIB Letter, dated March 2, 2018
P-8 Superintendent Letter, dated March 29, 2018; Board Attorney Letters, dated May 17, 2018, and June 19, 2018

For Respondent:

R-1 Progress Report, Marking Period 1
R-2 Progress Report, Marking Period 2

43-19

OAL Dkt. No. EDU 17730-18
Agency Dkt. No. 276-11/18

New Jersey Commissioner of Education

Final Decision

R.C., on behalf of minor child, B.C.,

Petitioner,

v.

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

Respondent.

The record of this matter, the proposed settlement agreement and release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Agreement states that the first settlement payment is due on February 1, 2019. This date precedes the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/22/19
Date of Mailing: 2/22/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17730-18
AGENCY DKT. NO. 276-11/18

R.C. ON BEHALF OF MINOR CHILD, B.C.,

Petitioner,

v.

CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY,

Respondent.

R.C., Petitioner, pro se

Christina M. DiPalo, Esq., for petitioner (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: January 10, 2019 Decided: January 14, 2019

BEFORE **Carol I. Cohen**, ALJ (Ret. on recall):

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on December 3, 2018.

The parties appeared and voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached agreement.

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

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

ORDER

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

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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

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

January 14, 2019
DATE

Carol Cohen esb
CAROL I. COHEN, ALJ (Ret. on recall)

Date Received at Agency: 01-18-2019

Date Mailed to Parties: 01-15-2019
db

EDU-17150-18

+B.C. v. Elizabeth Board of Education

The parties agree to mutually dismiss this matter. B.C. agrees to dismiss her appeal and Elizabeth Board of Education agrees to dismiss its counterclaim for tuition; and

In exchange for these dismissals B.C. (Ruth Correa) agrees to pay the sum of $8,457.74, which represents the 06 remaining school days in the 2018-2019 school year. This amount shall be split into five (5) payments amounting to $1,691.55. These payments shall be due on the first of every month, commencing on February 1, 2019. Payments shall be made directly to the law firm of LaCorte, Bundy, Varady & Kinsella, 1999 Bonnel Court, Union NJ 07083.

If BC defaults on the above provision, B.C. is no longer entitled to an education in the Elizabeth school district.

I hereby agree to these terms

Ruth M. Correa
Ruth Correa

Christina M. DiPalo, Esq.
@ Elizabeth Board of Education
1/10/19

45-19

OAL Dkt. No. EDU 13040-18
Agency Dkt. No. 171-7/18

New Jersey Commissioner of Education

Final Decision

Phyllis Majewski and Mellk O'Neill,

Petitioner,

v.

Board of Education of the Township of Franklin, Somerset County,

Respondent.

The record of this matter, the proposed settlement agreement and release, 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 review, the Commissioner[1] approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 2/25/19

Date of Mailing: 2/26/19

[1] This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

PHYLLIS MAJEWSKI AND MELLK O'NEILL,
Petitioners,
v.
TOWNSHIP OF FRANKLIN BOARD OF EDUCATION, SOMERSET COUNTY,
Respondent.

OAL DKT. NO. EDU 13040-18
AGENCY DKT. NO. 171-7/18

Edward A. Cridge, Esq., for petitioners (Mellk O'Neill, attorneys)

Robert M. Tosti, Esq., for respondent (Purcell, Mulcahy & Flanagan, LLC, attorneys)

Record Closed: January 7, 2019 Decided: January 9, 2019

BEFORE **ELIA A. PELIOS**, ALJ:

Petitioners, Phyllis Majewski and Mellk O'Neill seek payment from respondent, Township of Franklin Board of Education, Somerset County, for reasonable costs and attorney's fees pursuant to N.J.S.A. 18A:16-6.1. The matter was transmitted to the Office of Administrative Law (OAL) on August 30, 2018, for a hearing.

On January 7, 2019, an executed settlement agreement and Board Resolution authorizing the settlement was received, 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 confirmed by the representations of both counsel.

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

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

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

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

January 9, 2019
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 1-10-19

Date Mailed to Parties: 1-11-19

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement

J-2 Resolution

J-1

RECEIVED

2018 JUN 7 A 3:24

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

RELEASE AND SETTLEMENT AGREEMENT

WHEREAS, MELLK O'NEILL, having an address at 5 Dutch Lane Street, Hopewell, NJ 08525 ("Releasor") is a New Jersey Law firm; and

WHEREAS, Phyllis Majewski was a teacher employed by the Franklin Township School District Board of Education, Somerset County, New Jersey, having an address at 1755 Amwell Road, Somerset, NJ 08873 (the "Board"); and

WHEREAS, Ms. Majewski was charged with the disorderly persons offense of assault in the matter of *State v. Phyllis Majewski,* Franklin Township Municipal Court Summons No. SC 2017-018166 (the "Complaint"); and

WHEREAS, The Releasor appeared and defended Ms. Majewski in connection with the aforesaid charge; and

WHEREAS, on April 24, 2018, the aforesaid charge against Ms. Majewski was dismissed; and

WHEREAS, Releasor has demanded that the Board pay to Releasor the costs and fees associated with Ms. Majewski's defense pursuant to N.J.S.A. 18A:16-6.1, and has filed a Petition with the Commissioner of Education *captioned Phyllis Majewski and Mellk O'Neill, Petitioners, v. Franklin Twp. Bd. of Ed., Somerset County,* Dept. of Education Agency Dkt. No. 171-7/18, OAL Dkt. No. EDU 13040-2018S (the "Petition") in furtherance of said claim; and,

WHEREAS, in order to avoid expense, expenditure of time, and the uncertainty of litigation, and without admitting any liability whatsoever, both Releasor and the Board wish to fully and finally settle all claims that Releasor may have against the Board, including its predecesors, successors, assigns, and its former and current members, officers, directors, representatives, employees, agents, insurers, and indemnitors, individually, collectively and in their official and individual capacities (hereinafter referred to collectively as the "Releasees");

NOW, THEREFORE, in consideration of the promises and mutual agreements, conditions and covenants contained in this document, and for other good and valuable consideration, the sufficiency of which both parties acknowledge, the Board, and Releasor agree as follows:

1: Upon its receipt of this Agreement, fully executed by Releasor, The Board shall issue payment to Releasor, by way of check payable to MELLK O'NEILL, of in the amount of, Thirty Five Thousand, One Hundred Sixty Five Dollars and Fourteen Cents ($35,165.14) representing $34,982.50 for legal fees, and $182.64 for expenses.

2: Upon receipt of the payment set forth in paragraph 1 above, Releasor, on its behalf and on behalf of its behalf of its partners, shareholders, members, officers, directors, employees, representatives, administrators, successors, successors in interest, and assigns, hereby, freely and unconditionally, waives, releases and forever discharges Releasees from all possible claims, complaints, liabilities, promises, obligations, demands, agreements, damages, debts, dues, sums of money, covenants, and lawsuits, whether presently known or unknown, which may have arisen from the beginning of time through the date of Releasor's signature on this Agreement with respect to the aforesaid costs and fees associated with the defense of Phyllis Majewski in connection with the Complaint. Upon receipt of the payment set forth in paragraph 1 above, Releasor shall further file a Stipulation of Dismissal with Prejudice as to the Petition with the Office of Administrative Law and/or Commissioner of Education, and/or take the action necessary to effectuate the dismissal of same.

3: The signatory below hereby declares and represents that that he is duly authorized and empowered to make this Release; that he has never been declared incompetent by any court or administrative agency; that no representation respecting the nature and extent of any injuries, disabilities, damages, legal liability or financial responsibility made by any representative, attorney, agent or employee of Releasees has induced Releasor to make this settlement; that in determining the sum it has accepted, Releasor has taken into account not only the ascertained injuries, but also unknown and/or unanticipated injuries, disabilities, losses and damages to which it recognizes and agrees this Release shall also apply.

4: It is understood that the parties hereby released admit no liability of any sort, for injury, loss or damage of any kind, incident, act, casualty or event. It is further recognized and understood that this Release constitutes the good faith compromise of disputed claims, and is made in good faith to terminate any further controversy respecting all claims for damages that Releasor may have heretofore asserted or might hereafter assert because of any incidents, acts, casualties, or events, described or alluded to hereinabove.

5: Releasor also covenants and agrees that:

a: This Release may be pleaded as a defense to any action or other proceeding which may be brought or instituted against Releasees in breach hereof.

b: This release will serve to discharge all claims made or claims which could have been made by Phyllis Majewski and the New Jersey Education Association Releasor will hold harmless and indemnify Releasees from and for any and all actions, causes of action, damages and costs, including reasonable attorney's fees, incurred in defense of

or in settlement of all actions, causes of action, suit or suits, or demands, third-party or otherwise, which may be brought or made against said Releasees arising out of the matters discharged and released hereby.

6: Releasor agrees and understands that Releasor is solely responsible for any and all tax obligations resulting from payments made pursuant to this Release, if any, including, but not limited to, all reporting and payment obligations which may arise from the payment of the settlement consideration. Releasor further agrees that she will indemnify Releasees from any liability resulting or arising from non-payment of any such tax obligations.

7: This Release contains the entire agreement between the parties hereto, and the terms of this Release and Settlement Agreement are contractual and not a mere recital.

RELEASOR FURTHER STATES that it has carefully read the foregoing Release and Settlement Agreement and knows the contents hereof, and signs the same as its own voluntary free act.

SIGNED AND DATED this 13th day of December 2018.

MELLK O'NEILL

By: Arnold M. Mellk, Esq.
Managing Partner

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MERCER)

On December 13, 2018, before me personally came Arnold M. Mellk, Esq., known to me to be the individual whose signature appears above and who executed the foregoing **RELEASE**, and duly acknowledged to me that he executed same.

Edward A. Cridge, Esq.
NJ Bar ID No. 026462006

J-2

EXTRACT FROM THE MINUTES OF A MEETING
THE BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Franklin in the County of Somerset, New Jersey convened in Public Session on Thursday, December 20, 2018 at 6:30 pm.

The following members of the board were present: Ms. Danielson, Ms. Merris, Mr. Seamon, Ms. Shelton, Ms. Singh, Dr. Smith, Ms. Steele and Ms. LaCorte.

The following resolution was offered by Ms. Singh, seconded by Ms. Danielsen, and adopted by the Board of Education:

BE IT RESOLVED THAT, upon the recommendation of insurance counsel, that the case of Majewski et al v. Franklin Township BOE, Commissioner of Education, OAL Docket No, EDU 13040-2018S, and in accordance with the indemnification statute, N.J.S.A. 18A:16-6.1, be settled in the total amount of $35,165.14, the District being responsible for the deductible amount of $5,000.00 only;

BE IT FURTHER RESOLVED, that insurance counsel be authorized to execute the appropriate documents, closing the case. (CONFIDENTIAL Exhibit A-05)

ROLL CALL: **AYES: 8**
NOES: 0
ABST: 0

STATE OF NEW JERSEY }
} ss
COUNTY OF SOMERSET }

I, Jonathan Toth, Secretary of the Board of Education of Franklin Township Public Schools, in the County of Somerset, 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 December 20, 2018 at 6:30 pm, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Franklin Township 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 21st day of December 2018.

Jonathan Toth, Board Secretary

46-19LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

February 25, 2019

Edward Cridge, Esq.
Mellk O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

Casey P. Acker, Esq.
Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey
136 Franklin Corner Road, Unit B2
Lawrenceville, New Jersey 08648

Re: *Ann Bull v. Board of Education of the Township of Hamilton, Mercer County, OAL Dkt. No. EDU 10053-18, Agency Dkt. No. 138-6/18*

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge (ALJ) Tama B. Hughes's order issued February 13, 2019, compelling respondent to disclose – for purposes of the above-referenced Harassment, Intimidation and Bullying (HIB) appeal – the unredacted HIB investigative report, as well as witness statements, attendance records, math grades, and the names and addresses of the individuals interviewed as part of the HIB investigation. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.[1]

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

LOR/SP/BCM
cc: Tama B. Hughes, Administrative Law Judge
Clerk, Office of Administrative Law

VIA FACSIMILE AND REGULAR MAIL

[1] With respect to the parties' arguments regarding whether minor and student witnesses may be required to testify at a hearing on the merits, such arguments may be raised if, and when, the issue arises.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 10053-18
AGENCY DKT.. NO. 138-6/18

ANN BULL,
Petitioner,
v.
THE BOARD OF EDUCATION
OF THETOWNSHIP OF HAMILTON ,
MERCER COUNTY,
Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Casey P. Acker, Esq., and **Patrick F. Carrigg**, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, LLC, attorney)

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Ann Bull (petitioner) appeals the Board of Education of the Township of Hamilton's (respondent) determination that she committed an act of Harassment, Intimidation and Bullying (HIB) in violation of N.J.S.A. 18A:37-15 et seq. Petitioner is seeking to compel discovery - the unredacted HIB investigative report, witness interview statements, student records and the home addresses of all those interviewed.

LEGAL ANALYSIS AND CONCLUSIONS

According to N.J.A.C. 1:1-10.1(a), "[t]he purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal." The discovery rules under the Uniform Administrative Procedure Rules "are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary." N.J.A.C. 1:1-10.1(a). Thus, "[i]t is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." N.J.A.C. 1:1-10.1(b). N.J.A.C. 1:1-10.1(c) states:

> [i]n considering a discovery motion, the judge shall weigh 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. Except where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.

Petitioner asserts that she has the right to meaningfully investigate the charges levied against her and develop her own proofs. This right includes access to the information and/or witnesses which respondent relied upon in reaching its HIB determination and who may be called upon to testify at the hearing. To this end, petitioner seeks the unredacted HIB investigative report, witness statements and the records (i.e. grades, attendance, disciplinary and IEP) of the students who were interviewed as part of the investigation among other things.

Respondent argues that petitioner is not entitled to the unredacted investigative report or the confidential school records of the students who were interviewed as part of the investigation and that the information/records in question are not relevant to the underlying charges.

N.J.S.A. 18A:37-15 provides that each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property and that a procedure is put in place for a prompt investigation of reports of violations and complaints. The results of the investigation are required to be reported to the superintendent of schools within two school days of the completion of the investigation and reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation.

N.J.S.A. 18A:37-15(b)(6)(d) states in pertinent part:

> [P]arents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. . . A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents.

Staff members are subject to the Anti-Bullying Act and as such, are also entitled to the same procedural protections. See K.T. ex rel. K.H. & T.D. v. Bd. Of Educ. Twp. of Deerfield, EDU 0278-13, final decision (July 30, 2013); S.G. v Board of Education of the Hunterdon Central Regional School District, Hunterdon County (unpublish Docket No. A-5199-15T3).

Here, respondent provided the Tribunal, for in-camera inspection, the unredacted investigative report and student records of those students who were interviewed as part of the investigative process. In looking through the same, I **FIND** that petitioner is entitled to understand the breath and scope of respondent's investigation and should be provided the opportunity to meaningfully investigate the charges levied against her and

prepare her defense. Therefore, I **CONCLUDE** that petitioner is entitled to the following information: 1) The unredacted HIB investigative report including witness statements; 2) The math grades of all students interviewed; 3) The attendance records of all students interviewed; and 4) The names and addresses of all individuals interviewed as part of the HIB investigation.

Also reviewed were the disciplinary records of the students that were interviewed. I **CONCLUDE** that such records are not germane to the issue before this Tribunal and therefore should not be disclosed. Last, upon representation of counsel for the respondent, none of the students interviewed as part of the HIB investigation have IEP's therefore this request by petitioner is moot.

ORDER

For the reasons cited above, it is **ORDERED** that petitioner's request for a copy of the unredacted HIB investigative report and witness statements; the math grades of all students interviewed for the relevant time period in question; the attendance records of all students interviewed for the relevant time period in question; and the names and addresses of all individuals interviewed as part of the HIB investigation is **GRANTED.** It is further **ORDERED** that the release of this information shall be in accordance with the requirements of the Family Education Rights and Privacy Act (FERPA) and subject to a Protective Order A fully executed Protective Order shall be provided to the Tribunal within two weeks of the issuance of this Order.

Additionally, it is **ORDERED** that petitioner's request for the disciplinary and other academic records of the students interviewed as part of the HIB investigation is **DENIED**.

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.

February 13, 2019
DATE

TAMA B. HUGHES, ALJ

tat/lam

New Jersey Commissioner of Education

Final Decision

N.S., on behalf of minor child, S.B.-S.,

Petitioner,

v.

Board of Education of the Kingsway Regional High School District, Hudson County,

Respondent.

Synopsis

Petitioner appealed the respondent Board's decision to impose discipline upon her minor son for violating the school district's code of conduct after he was involved in an altercation with a classmate, specifically challenging the severity of the punishment imposed. The Board filed a motion for summary decision, contending that the Commissioner does not have jurisdiction to hear the appeal; in the alternative, the Board argued that its decision must be upheld because it was not arbitrary, capricious or unreasonable. The petitioner opposed the motion, arguing that the Student Code of Conduct Tier I penalty of four "administrative lunch detentions" would have been a more appropriate punishment than the Tier II penalty of four extended school days which S.B.-S. was assessed for his infraction.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-9, the Commissioner has jurisdiction to hear all controversies and disputes arising under the school laws; the regulations governing pupil discipline, *N.J.A.C.* 6A:16-7.1-9, specifically address the due process rights of students who are suspended or expelled for code of conduct violations, including the right of appeal to the Commissioner; the regulations do not, however, address this right of appeal for less serious forms of discipline that do not result in removal of the student from the classroom; in the instant case, the Commissioner's enormously broad jurisdiction over school matters extends to disputes arising under the school laws and regulations governing student conduct and discipline; the Board had a reasonable basis for concluding that S.B.-S. committed a Tier II offense, namely violating the rule requiring students to "Respect the Rights of Others"; the proper procedures were followed in reviewing the discipline imposed upon S.B.-S.; and the petitioner failed to raise any genuine issues of fact to show that the Board's disciplinary decision was arbitrary, capricious or unreasonable. Accordingly, the ALJ granted summary decision to the Board, and dismissed the petition.

Upon comprehensive review of the record, and for the reasons stated in the Initial Decision, the Commissioner concurred with the ALJ's determination that the Board did not act in an arbitrary, capricious or unreasonable manner when it imposed a penalty of four extended school days upon S.B.-S. for violation of the Student Code of Conduct. The Commissioner is also in accord with the ALJ's determination that he has jurisdiction over this matter. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

February 25, 2019

OAL Dkt. No. EDU 7378-18
Agency Dkt. No. 90-4/18

New Jersey Commissioner of Education

Final Decision

N.S., on behalf of minor child, S.B.-S.,

Petitioner,

v.

Board of Education of the Kingsway High School District, Gloucester County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, and for the reasons stated in the Initial Decision, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that the Board did not act in an arbitrary, capricious or unreasonable manner when it imposed a penalty of four extended school days upon S.B.-S. as discipline for an incident that involved another student. The Commissioner is also in accord with the ALJ's determination that the Commissioner has jurisdiction over this matter.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/19
Date of Mailing: 2/27/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07378-18
AGENCY DKT. NO. 90-4/18

N.S. ON BEHALF OF MINOR CHILD S.B.-S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

N.S., on behalf of minor child **S.B.-S.,** petitioner, pro se

Allan P. Dzwilewski, Esq., for respondent (Weiner Law Group LLP, attorneys)

Record Closed: December 18, 2018 Decided: January 10, 2019

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

Petitioner N.S., on behalf of her minor son, S.B.-S., appeals respondent, Board of Education of the Kingsway Regional High School District, Gloucester County's (Board) decision to punish him with four extended school days for violating its code of conduct as a result of an altercation he had with a classmate.

PROCEDURAL HISTORY

On April 16, 2018, N.S. on behalf of minor child S.B.-S. filed a petition with the Commissioner of Education challenging the Board's decision. On May 16, 2018, the Board filed an answer to the petition. The matter was transmitted to the OAL as a contested case on May 18, 2018.[1]

The Board filed a motion for summary decision on September 27, 2018. The Board argues that the Commissioner does not have jurisdiction to hear this appeal. In the alternative, the Board argues that even if this appeal were properly before the Commissioner, the Board's decision must be upheld because it was not arbitrary, capricious, or unreasonable. Petitioner opposed the Board's motion on October 9, 2018.[2] Petitioner contends S.B.-S. "could have and should have received" the lesser Tier I (M) offense "General Misconduct" and four "administrative lunch detentions" instead of four extended school days for the Tier II (P) offense. Pet. Brief at p. 2. The Board filed its reply brief on October 22, 2018. Multiple subsequent correspondence was received from both parties and was reviewed, but did not impact the outcome of this decision.

FACTUAL DISCUSSION AND FINDINGS

On January 29, 2018, near the end of drama class at Kingsway Regional High School (Kingsway), the teacher asked S.B.-S., a male student, to collect the props that were used during class. (Informational/Statement form completed by S.B.-S. on January 29, 2018.) A female student was wearing one of those props, a bandana, on her head. S.B.-S. said that when he attempted to remove the bandana, her hair got caught in it. Ibid. He claimed it was accidental, and that he apologized. Ibid. The female student believed that S.B.-S. intentionally pulled her hair. (Disciplinary Referral form). A few minutes later, the female student approached S.B.-S. and slapped him in the face. Ibid. S.B.-S. told her "to get her boyfriend because he wasn't going to fight a girl." Ibid.

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[1] The transmittal form describes the nature of the case as: "Petitioning parent challenges Board's HIB [Harassment Intimidation and Bullying] determination." There is no indication in the record, however, that this matter implicates the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13, et seq.

[2] Petitioner did not include an affidavit in her opposition papers.

The teacher, Andrew Young, ordered both students to Kingsway's Assistant Principal's office. (Email from Mr. Young to Ms. Stowman-Burke dated January 31, 2018.) That same day, Assistant Principal Monique Stowman-Burke filled out a "Disciplinary Referral Form" for S.B.-S., charging him with violating the student code of conduct. Kingsway's Code of Conduct, which is part of the Student Handbook, includes a tiered system for imposing discipline (Tiers I, II, III, and IV). Board's Brief, Ex. A. Each Tier lists a number of different offenses (identified by letter) and a corresponding disciplinary action that should be taken (depending on the number of offenses committed). Id. at pp. 41-44.

S.B.-S. was charged with a Tier II (P) offense: "Respect the rights of others [physically, sexually, and verbally (spoken, written or electronic)] including but not limited to hazing, harassment, ridicule, embarrassment, inflammatory statements, slur, and racial/religious comments." Id. at p. 42. For first-time offenders like S.B.-S., the Tier II (P) offense carries discipline of four "extended school days." Ibid. As the name suggests, an "extended school day" means more time in school: instead of being dismissed at regular time, 2:18 p.m., the student must report to a dedicated classroom from 2:30 to 5:30 p.m. Id. at p. 37. This form of discipline is reserved "for students who commit serious infractions" and "for repeat offenders." Ibid.

Assistant Principal Stowman-Burke notified S.B.-S.'s mother (petitioner) of the altercation. The two spoke again by phone the following day, January 30, 2018, and met in person on January 31, 2018. (Letter from petitioner to Dr. Lavender dated February 14, 2018 at pp. 3-4.)

The code of conduct gives students "the right to appeal the discipline decision of a school administrator." Board's Brief, Ex. A at p. 45. The appeal process begins with an informal conference. Ibid. If the matter is not resolved at the conference, the disciplinary decision can be appealed to the assistant principal. Ibid. If the matter remains unresolved, the decision can be appealed to the principal, who must render a written decision. Ibid. The principal's decision can then be appealed to the superintendent, who must also render a written decision. Ibid. Finally, the superintendent's decision can be appealed to the Board, and the Board must "hear the appeal at the next scheduled Board meeting." Ibid.

Petitioner requested a disciplinary appeal hearing, which was held on February 13, 2018. (Letter from petitioner to Mr. Mueller and Ms. Boerlin dated March 11, 2018 at p. 7.) By letter dated February 21, 2018, Kingsway's Principal, Craig Stephenson, upheld the disciplinary decision, finding that S.B.-S. "did commit the violation 'Respecting the Rights of Others' physically when he did pull a hat off another student's head and verbally when he exchanged inappropriate and threatening language with the other student." (Letter from Mr. Stephenson to petitioner dated February 21, 2018.)

Petitioner then appealed that decision to the Superintendent, Dr. James Lavender, who conducted his own investigation, in which he interviewed S.B.-S., the female student, and three other witnesses. (Letter from Dr. Lavender to petitioner dated March 7, 2018.). He found that both students gave "contradictory accounts" of the physical and verbal altercation. Id. at p. 2. S.B.-S. testified that when he removed the bandana from the female student's head, he may have inadvertently pulled her hair. Id. at p. 1. The female student testified that S.B.-S. pulled her hair "so hard that it pulled her over." Ibid. When she confronted S.B.-S. about why he pulled her hair, she said he laughed and she slapped him in the face. Ibid. She also testified that when she turned to walk away, S.B.-S. slapped the back of her head. Ibid.

The Superintendent also found that the witness testimony supported the conclusion that "both students played equal roles in the incident." Id. at p. 2. The first witness testified that S.B.-S. pulled the female student's hair when he grabbed the bandana from her head and she responded by slapping him in the face. Id. at p. 1. That witness also testified that S.B.-S. later pushed and/or grabbed the female student's head. Ibid. The second witness did not see the physical altercation but heard the students yelling at one another. Ibid. The third witness testified that S.B.-S. pulled the female student's hair and she slapped him in response. Ibid. That witness also testified that "both students were loud, disrupted class, and the teacher responded by calling for an administrator to assist." Ibid.

The superintendent also spoke to the school nurse who examined both students. Id. at p. 2. The nurse confirmed the S.B.-S.'s cheek was red from being slapped. Ibid. The nurse also

said that although the female student claimed her head hurt and was noticeably upset, she did not sustain any injuries. Ibid. Based on these findings, the superintendent concluded that "the assistant principal, and principal, has administered the code of conduct correctly." Id. at p. 2.

Next, petitioner appealed that decision to the Board. (Letter from the Board to petitioner dated March 26, 2018.) The Board held an executive meeting on March 15, 2018, during which petitioner, S.B.-S.'s grandfather, and the superintendent offered testimony and answered questions. (Transcript of executive meeting transcribed by petitioner). By letter dated March 26, 2018, the Board notified petitioner that it had voted on March 22, 2018 to uphold the superintendent's decision.[3] Ibid.

On April 13, 2018, petitioner filed a juvenile delinquency complaint against the female student for simple assault in Superior Court, Chancery Division, Family Part, County of Gloucester.

On April 16, 2018, N.S. filed a petition with the Commissioner of Education challenging the Board's decision. On May 16, 2018, the Board filed an answer to the petition. The matter was transmitted to the OAL as a contested case on May 18, 2018.

The Board filed a motion for summary decision on September 27, 2018. The Board argues that the Commissioner does not have jurisdiction to hear this appeal. In the alternative, the Board argues that even if this appeal were properly before the Commissioner, the Board's decision must be upheld because it was not arbitrary, capricious or unreasonable. Petitioner opposed the Board's motion on October 9, 2018. Petitioner contends S.B.-S. "could have and should have received" the lesser Tier I (M) offense "General Misconduct" and four "administrative lunch detentions" instead of four extended school days for the Tier II (P) offense. Pet. Brief at p. 2. The Board filed its reply brief on October 22, 2018.

[3] S.B.-S. has served one of the four extended school days.

The factual history for purposes of this motion reflects the procedural history of this matter as described above. To the extent it does not appear to be in dispute, the preceding statements are hereby **FOUND** as **FACT.**

LEGAL ANALYSIS AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'
>
> [Brill, 142 N.J. at 540 (citations omitted).]

The mere existence of disputed facts is not conclusive. An agency must grant a plenary hearing only if material disputed adjudicative facts exist. Bally Mfg. Corp. v. Casino Control Com'n, 85 N.J. 325, 334, 426 A.2d 1000 (1981), App. Div. 454 U.S. 804, 102 S.Ct. 77, 70 L.Ed.2d 74 (1981); Cunningham v. Dept. of Civil Service, 69 N.J. at 24-25, 350 A.2d 58. N.J.S.A. 52:14B-9. Here, the parties do not dispute any material facts. Accordingly, I **CONCLUDE,** that summary decision as a matter of law is appropriate.

As part of this matter, the Board has filed a motion for summary decision, arguing that the Commissioner lacks jurisdiction to review the Board's decision, and in the alternative, that the Board's decision must be upheld because it was not arbitrary, capricious or unreasonable. In opposition, petitioner does not dispute that S.B.-S. should have been disciplined but argues that he should have received a lesser punishment for his role in the altercation.

Generally, the Commissioner of Education has jurisdiction to hear "all controversies and disputes arising under the school laws . . . or under the rules of the State board or of the commissioner." N.J.S.A. 18A:6-9. Under the school laws, a board of education shall "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." N.J.S.A. 18A:11-1(d). The school laws further provide that "[p]upils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them." N.J.S.A. 18A:37-1.

The regulations governing pupil discipline, N.J.A.C. 6A:16-7.1 to -7.9, require boards of education to adopt a code of conduct "that establishes standards, policies, and procedures for positive student development and student behavioral expectations on school grounds" and that includes "[a] description of school responses to violations of behavioral expectations established by the district board of education that, at a minimum, are graded according to the severity of the offenses, and consider the developmental ages of the student offenders and their histories of inappropriate behaviors[.]" N.J.A.C. 6A:16-7.1(a) and (c)(5). Those regulations specifically address the due process rights of students who are suspended or expelled for code of conduct violations, including the right of appeal to the Commissioner. See, N.J.A.C. 6A:16-7.2(c), Short-term suspensions; N.J.A.C. 6A:16-7.3(b), Long-term suspensions; N.J.A.C. 6A:16-7.4(b), Expulsions. However, those provisions do not address a right of appeal to the Commissioner for less serious forms of discipline that do not result in removing a student from the classroom.

The absence of an explicit right of appeal of minor discipline does not necessarily mean that the Commissioner lacks jurisdiction over a petition alleging that a board of education inappropriately punished a student for violating its code of conduct. Instead, the Commissioner has enormously broad jurisdiction over school matters. To the extent the dispute in this matter arises under the school laws and regulations governing student conduct and discipline, I **CONCLUDE** that the Commissioner has jurisdiction to hear this matter.

The question then becomes whether the Board improperly imposed four extended school days on S.B.-S. as punishment for violating the code of student conduct. J.D. and E.D. ex rel. B.D. v. Bd. of Educ. Toms River Reg'l Sch. Dist., EDU 6009-97, Initial Decision (December 29, 1997) adopted, Comm'r (July 8, 1998) <https://njlaw.rutgers.edu/collections/oal/>. Indeed, an action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965).

Turning to the substance of this matter, petitioner does not dispute that S.B.-S. should have been disciplined for his role in the drama class altercation. Rather, petitioner contends that S.B.-S. "could have and should have received" the lesser Tier I (M) offense "General Misconduct" and four "administrative lunch detentions" instead of four extended school days for the Tier II (P) offense "Respect the Rights of Others."[4] Pet. Brief at p. 2.

Despite this contention, the Board had a reasonable basis for concluding that S.B.-S. violated the Tier II (P) offense "Respect the Rights of Others" and therefore, that disciplinary decision should not be disturbed.

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[4] The Tier I (M) offense is "General misconduct [Including, but no limited to: profanity, loitering, inappropriate physical contact (P.D.A.), disruption to the academic environment and improper use of a hall pass]." Ex. A at p. 41. An "administrative lunch detention" is "typically the primary behavioral intervention used to address most Tier I and Tier II discipline code violations." Id. at p. 36.

Petitioner does not offer much explanation or factual support for her contention. Instead, she primarily argues that the other student in the incident should have been more severely punished. However, parents generally do not have the right to appeal discipline imposed on a student who is not their child. U.K. & G.K. ex rel. D.K. v. Bd. of Educ. of the City of Clifton, 93 N.J.A.R.2d (EDU) 71.

In reviewing the discipline imposed by the Assistant Principal, Kingsway followed the proper procedure outlined in the code of conduct. As mentioned previously, students have "the right to appeal the discipline decision of a school administrator." Board's Brief, Ex. A at p. 45. The appeal process begins with an Informal Conference. Ibid. If the matter is not resolved at the conference, the disciplinary decision can be appealed to the assistant principal. Ibid. If the matter remains unresolved, the decision can be appealed to the principal, who must render a written decision. Ibid. The principal's decision can then be appealed to the superintendent, who must also render a written decision. Ibid. Finally, the superintendent's decision can be appealed to the board of education, and the Board must "hear the appeal at the next scheduled Board meeting." Ibid.

At petitioner's request, a disciplinary appeal hearing was held on February 13, 2018. (Letter from petitioner to Mr. Mueller and Ms. Boerlin dated March 11, 2018 at p. 7.) Following that hearing, the principal upheld the disciplinary decision, finding that S.B.-S. "did commit the violation 'Respecting the Rights of Others' physically when he did pull a hat off another student's head and verbally when he exchanged inappropriate and threatening language with the other student." (Letter from Mr. Stephenson to petitioner dated February 21, 2018.)

Petitioner then requested that the superintendent review the decision. (Letter from Dr. Lavender to petitioner dated March 7, 2018.) The superintendent conducted an independent investigation in which he interviewed S.B.-S., the female student, and three other witnesses. Id. at p. 1. He found that both students gave "contradictory accounts" of the physical and verbal altercation. Id. at p. 2. S.B.-S. testified that when he removed the bandana from the female student's head, he may have inadvertently pulled her hair. Id. at p. 1. The female student testified that S.B.-S. pulled her hair "so hard that it pulled her over." Ibid. When she confronted S.B.-S. about why he pulled her hair, she said he laughed and she slapped him in the face. Ibid. She also testified that when she turned to walk away, S.B.-S. slapped the back of her head. Ibid.

The superintendent also found that the witness testimony supported the conclusion that "both students played equal roles in the incident." Id. at p. 2. The first witness testified

that S.B.-S. pulled the female student's hair when he grabbed the bandana from her head and she responded by slapping him in the face. Id. at p. 1. That witness also testified that S.B.-S. later pushed and/or grabbed the female student's head. Ibid. The second witness did not see the physical altercation but heard the students yelling at one another. Ibid. The third witness testified that S.B.-S. pulled the female student's hair and she slapped him in response. Ibid. That witness also testified that "both students were loud, disrupted class, and the teacher responded by calling for an administrator to assist. Ibid.

The superintendent also spoke to the school nurse who examined both students. Id. at p. 2. The nurse confirmed the S.B.-S.'s cheek was red from being slapped. Ibid. The nurse also said that although the female student claimed her head hurt and was noticeably upset, she did not sustain any injuries. Ibid.

Based on these findings, the superintendent concluded that "the assistant principal, and principal, has administered the code of conduct correctly." Id. at p. 2. The Board voted to uphold the superintendent's decision on March 22, 2018 after holding an executive meeting on March 15, 2018, during which petitioner, S.B.-S.'s grandfather, and the superintendent offered testimony and answered questions. (Transcript of executive meeting transcribed by petitioner).

Again, petitioner concedes that S.B.-S. should have been disciplined for his role in the incident but disagrees with the type of discipline imposed. But, as has been held before, "disagreement with the punishment given is not enough to overcome the discretion afforded to the Board, even if the punishment was not the most appropriate or effective means of discipline." T.B.M. ex rel. M.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) adopted, Comm'r (April 7, 2008) <https://njlaw.rutgers.edu/collections/oal/>. Here, petitioner has failed to raise any genuine issues of material fact showing that the Board's decision to impose four extended school days on S.B.-S. for violating the code of conduct was arbitrary, capricious,

or unreasonable.[5] For this reason, I **CONCLUDE** that the Board's motion for summary decision should be **GRANTED.**

ORDER

The Board's motion for summary decision is **GRANTED.** Petitioner's claim is hereby **DISMISSED.** Hearings in this matter, scheduled for January 14 and 15, 2019, are hereby **ADJOURNED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

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[5] While neither party specifically mentioned the fact that S.B.-S. is a special education student, petitioner included in her papers S.B.-S.' Individualized Education Program (IEP), which indicates that he has been diagnosed with "Adjustment Disorder with Anxiety." Under the State regulations implementing the Individuals with Disabilities Education Act, 20 U.S.C. 1400 to -1482, a school district may, for disciplinary reasons, remove a special education student from the classroom for up to ten days without first determining whether the misconduct was a manifestation of the student's disability. N.J.A.C. 6A:14-2.8. The State regulations further provide that "[s]chool district personnel may, on a case-by-case basis, consider any unique circumstances when determining whether or not to impose a disciplinary sanction . . . for a student with a disability who violates a school code of conduct." Ibid. Thus, it does not appear that this matter, which does not involve a removal from the classroom for ten days or more, involves special education issues that are outside of the Commissioner's jurisdiction. Also, while it does not appear that the Board considered S.B.-S.' disability in determining the appropriate punishment, State law provides a school district with discretion to consider a disability in punishing a special education student, and petitioner did not argue here that the Board should have considered S.B.-S' disability.

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

January 10, 2019
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: January 10, 2019

Date Mailed to Parties: January 10, 2019

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50-19LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

February 27, 2019

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Re: *Under the Sun Learning Center of Marlton, Inc., A.M.P. Land Enterprises, L.P., and Thomas A. Petruzzi v. Board of Education of the Township of Evesham, Burlington County, Agency Dkt. No. 256-9/14, Commissioner Decision No. 323-18.*

Dear Counsel:

I have reviewed the materials filed by the parties in connection with respondent's Motion to Stay the Commissioner's October 19, 2018 decision ("the Decision").[1]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion to stay is considered an extraordinary remedy that may only be granted upon a finding that the moving party has met *each* prong of the four-part test set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The movant must establish that: they will suffer irreparable harm without such relief; the legal right underlying their claim is settled; they have a likelihood of prevailing on the merits; and, in the weighing of the equities and interests, they will suffer greater harm if relief is not granted.

The Board argues that it will suffer irreparable harm if the matter is not stayed because it will lose considerable revenues that the District generates and relies on from year-to-year. The Board also argues that the children and parents of Teddy Bear Academy ("TBA"), and the District's high school students receiving credit for working with the child care program, will be adversely impacted if the stay is not granted. Respondent argues that it has a likelihood of

[1] The Decision is presently on appeal at the Superior Court of New Jersey, Appellate Division.

prevailing on the merits before the Appellate Division because the Commissioner narrowly interpreted the subject provision of *N.J.S.A.* 18A:20-34. Respondent contends that it will suffer greater harm if the stay is not granted, as there is no foreseeable, irreparable harm to petitioners since the decision does not impact petitioners' ability to operate their business. Petitioners oppose the motion, arguing that the Board has failed to establish that it will suffer irreparable harm, and has not shown that it will prevail on the merits.

Upon review of the submissions, I find that the Board has failed to meet the standard for granting a stay of the October 19, 2018 decision.[2] The Commissioner is unpersuaded by the Board's arguments, which do not provide any evidence or information that the Commissioner has not already considered in rendering his decision. The present motion substantially relies on the arguments made during the course of the litigation, which were comprehensively addressed in the Decision. The Board does not have a likelihood of success on the merits because the plain language of the statute, coupled with the Assembly Education Committee's Statement on the underlying bill, make it abundantly clear that a school district may only use school facilities for the provision of child care services before or after school hours, and such services are to be available only to school-aged children residing in the district. Furthermore, respondent has failed to demonstrate a likelihood of success on the merits because it has not established that the Commissioner's determination that the Board's operation of TBA violated *N.J.S.A.* 18A:20-34 was arbitrary, capricious or unreasonable.[3] The Commissioner also disagrees that the Board will suffer irreparable harm. Respondent has failed to demonstrate that the revenue from TBA is necessary for the District's operation and has not presented specific evidence supporting its claim that loss of such revenue will irreparably harm the Board. Moreover, the Board's reliance on the alleged potential impact of the Decision on the parents and children of TBA – and on the high school students involved in its operation – to establish irreparable harm *for the Board*, is improper and speculative. In rendering the Decision, the Commissioner thoroughly considered the potential impact of the closure of TBA on all stakeholders and permitted the operation of TBA for the remainder of the school year precisely so that the stakeholders are not adversely impacted. The June 30, 2019 deadline – set forth in the Decision as the closing date for TBA – allows the District sufficient time to mitigate any potential impact on the District's operations, and provides the District, parents and students adequate time to make alternate arrangements. Finally, respondent's assertion that it will suffer greater harm if the stay is not granted because the decision does not impact petitioners' ability to operate their business ignores the contention that respondent's operation of TBA impacts petitioners' business; therefore, it is not clear that the Board will suffer greater harm if the stay is not granted.

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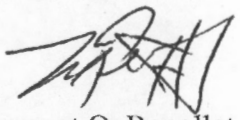
[2] The Board has neglected to address whether the legal right underlying its claim is settled. The Commissioner finds that the Board cannot establish that the legal right underlying its claim is settled, and that alone is sufficient to deny the motion to stay as the moving party must satisfy all four prongs of the test. However, for sake of thorough adjudication, the Commissioner will address the merits of the Board's arguments.

[3] The scope of appellate review of a final agency decision is limited; there must be a clear showing that the agency's determination was arbitrary, capricious, or unreasonable. *In the Matter of the Proposed Quest Academy Charter Sch. of Montclair Founders Group*, 216 *N.J.* 370, 386 (2013) (citation omitted).

Accordingly – as the Board has failed to demonstrate that its legal right is settled; that it is likely to prevail on the merits of its underlying claim; that it will suffer irreparable harm; or that, in weighing of the equities and interests, it will suffer greater harm if the stay is not granted – the Motion to Stay the October 19, 2018 decision is hereby DENIED.[4]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: State Law Library

LOR/SLP/ATA

VIA EMAIL & REGULAR MAIL

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

New Jersey Commissioner of Education

Final Decision

David Moy,

Petitioner,

v.

Board of Education of the Township of Maple Shade, Burlington County,

Respondent.

Synopsis

Pro se petitioner challenged the attendance and care of school property policies of the respondent Maple Shade Board of Education (Board), and argued that the Superintendent of Schools violated District policy regarding the duties of the superintendent. More specifically, petitioner contended, *inter alia*, that these Board policies violated *N.J.A.C.* 6A:32-7.6, and further claimed that the attendance policy conflicted with other Board policies on: promotion and retention; reporting student progress; student discipline and code of conduct; and high school graduation. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: the petitioner challenged the District's policies on attendance and care of school property and alleged that the Superintendent violated District policy regarding the Superintendent's duties, but failed to dispute the veracity of the facts as set forth by the Board; nor did petitioner set forth any specific evidence to show that there are material facts in dispute; additionally, aside from invoking various Board policies, the petitioner has set forth no facts explaining the alleged conflicts or showing that any genuine issue of material fact exists; even if petitioner were to set forth evidence supporting a policy, statutory, or regulatory violation by the Superintendent, he would not be entitled to any relief, as evaluation of the superintendent's performance and any action resulting therefrom is governed by contract and statute; accordingly, as there are no real issues of material fact herein, the matter is ripe for summary decision; petitioner's claims regarding the District's attendance policy are moot because, *inter alia*, the implementing regulation of the attendance policy has been revised to modify or eliminate the challenged provisions; regarding the care of school policy, petitioner has produced no evidence to show that the District has withheld report cards from students with outstanding fines for damage to school property; and it is well settled that decisions of local boards of education are entitled to a presumption of correctness; petitioner has not met his burden to prove that the District's attendance and care of school property policies are arbitrary, capricious or unreasonable. Accordingly, the ALJ granted summary decision to the Board.

Upon comprehensive review of the record, and for the reasons expressed by the ALJ, the Commissioner adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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

February 27, 2019

OAL Dkt. No. EDU 4389-18
Agency Dkt. No. 36-2/18

New Jersey Commissioner of Education

Final Decision

David Moy,

Petitioner,

v.

Board of Education of the Township of Maple Shade, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision. In this case, the petitioner is challenging the Maple Shade School District's attendance policy and the care of school property policy. The petitioner further contends that the Superintendent violated District policy.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge – for the reasons thoroughly outlined in the Initial Decision – that Board of Education is entitled to summary decision. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 2/27/19
Date of Mailing: 2/27/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04389-18
AGENCY DKT. 36-2/18

DAVID MOY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,
Respondent.

David Moy, petitioner, pro se

Victoria S. Beck, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: November 29, 2018 Decided: January 14, 2019

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

The petitioner, David Moy, challenges the attendance and care of school property policies of the respondent, Maple Shade School District Board of Education[1](District) and

[1] Pled as the Board of Education of the Township of Maple Shade, Burlington County.

argues that the Superintendent of Schools violated the District's policy regarding the duties of the superintendent.

PROCEDURAL HISTORY

On February 12, 2018, petitioner filed a petition with the Department of Education challenging respondent's policies. The Commissioner transmitted the matter to the Office of Administrative Law, where it was filed on March 26, 2018, for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to this ALJ in July 2018, and multiple status conferences were held with the parties. On November 5, 2018, the Board filed a motion for summary decision[2]. On November 17, 2018, petitioner filed a letter in opposition to the motion and on November 21, 2018, the District filed a letter brief in reply to petitioner's letter.[3] On November 29, 2018, a final status conference regarding the motion for summary decision was held and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

In response to the District's motion for summary decision petitioner filed a one paragraph letter stating "...I'm reaffirming that Ms. Beck and the Maple Shade BOE has failed to address ALL items in the original petition. I'm asking that her motion be denied for the above mentioned reasons." Petitioner provided no statement of facts, affidavit, nor certification supporting his opposition to the motion. Nor did he dispute the District's statement of facts or the certification of Superintendent of Schools, Beth Norcia, in support of the District's motion. The below facts are gleaned from the parties' submissions and exhibits attached thereto.

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[2] On or about March 19, 2018, prior to the matter being transmitted to the Office of Administrative Law for hearing as a contested case, the District filed a motion to dismiss with the Department of Education.

[3] On November 5, 2018, petitioner sent an email advising "I'm reaffirming that Ms. Beck has failed to answer or address items in my original petition and her latest motion also supports my case in regard to policy 5513. I'm asking that her motion be denied." Thereafter, by letter dated November 15, 2018, this ALJ confirmed the briefing schedule in this matter including that petitioner had until November 25, 2018, to file a formal response to the motion.

1. In January 2018, the implementing regulation of the District's attendance policy-5200 was revised. The key revisions related to the "Student Attendance Policy" section of regulation 5200.

2. The definition of the term "Failure Due to Attendance" (FDA) was revised to remove the condition that a student is placed on FDA status when they accumulate a specific number of unexcused absences in one marking period. (Norcia Certification Exhibit A at 9; Exhibit B at 9.)

3. There were also revisions to the "Maintaining Academic Credit as it Pertains to Attendance" provision of the regulation. Students who accumulate greater than four unexcused absences per marking period, no longer receive a grade of "59" for the marking period. Such students will now receive "no credit" for the marking period. Id. (Exhibit A at 10-11; Exhibit B at 10.)

4. The revised regulation allows students to restore their academic credit by attending a Saturday or Wednesday session. It also removes the prior provision regarding "Mandatory Tutoring" sessions. Id.

5. Students are now at risk of earning no credit for the year only if they are on FDA status and exceed sixteen unexcused absences for the year. Id.

6. The revisions address the "Fourth Marking Period" provision of the regulation. Students placed on FDA status during the fourth marking period are now able to make up credit by attending a credit completion program. Id. (Exhibit A at 11; Exhibit B, at 10.)

7. Parents/guardians of students on FDA status receive a notice explaining that their student did not meet the attendance criteria for the marking period and is "in danger of not earning credits for the year due to high absenteeism/lateness." The notice requests parents to schedule a meeting to develop an action plan for improved attendance. Parents are further advised that both they and their

student must log into their portal account and acknowledge the attendance document before grades can be viewed. (Exhibit D, Norcia Certification.)

8. On September 30, 2014, the Department of Education issued a memo to Chief School Administrators regarding "Reporting Student Absences." The memo noted in pertinent part that:

> N.J.A.C. 6A: 16-7.6(a) requires each district board of education to "develop, adopt, and implement policies and procedures regarding the attendance of students" and these policies must contain, at a minimum, a "definition of excused absence that count towards truancy..." See N.J.A.C. 6A:16-7.6(a)(3). See Exhibit F, Norcia Certification.

9. The District's care of school property policy-5513 and implementing regulation authorize the imposition of a fine for the loss, damage or defacement of a textbook and reserves the right to withhold a report card or diploma from any pupil whose payment of a fine is in arrears. (Exhibit H, Norcia Certification.) While the policy and implementing regulation-5513 reserve the right to withhold a report card for outstanding fines, it is not the District's practice to do so. Id.

LEGAL ANALYSIS AND CONCLUSION

Legal Analysis

The issue is whether the respondent, District, should be granted summary decision in its favor or whether petitioner is entitled to an evidentiary hearing on his challenge to District policies.

I. Summary Decision Standard

A summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). "An adverse party in order to prevail must by responding affidavit set forth specific facts showing that

there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. See Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). The non-moving party has the burden "to make an affirmative demonstration. . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962).

While petitioner challenges the District's policies on attendance and care of school property and alleges that the Superintendent violated the District policy on the Superintendent's duties, he has not made any declaration to this tribunal that the facts are not as the movant alleges or set forth any specific facts showing that there is any material fact in dispute. In addition to claiming that the attendance and the care of school property policies violate N.J.A.C. 6A:32-7.6, petitioner also contends that the attendance policy conflicts with the District's policy on promotion and retention-5410, reporting pupil progress- 5420, student discipline/ code of conduct- 5600, and high school graduation – 5460. Aside from invoking these policies, petitioner sets forth no specific facts explaining the alleged conflicts or showing that a genuine issue of material fact exists.

Similarly, the petitioner claims that the Superintendent violated the District policy regarding the duties of a superintendent as it relates to various state statutes and regulations including "N.J.S.A 18A:7A-11; N.J.S.A 18A:17-17; N.J.S.A 18A:17-18; N.J.S.A 18A:17-20; N.J.S.A 18A:17-21; N.J.S.A 18A:22-8.1; N.J.S.A 18A:27-4.1; N.J.S.A 18A:37-4, N.J.A.C. 6A:8-3.1; N.J.A.C 6A: 32-4.1, and N.J.A.C 6A: 32-12-2." Here too, aside from citing to these various statutes and regulations, petitioner provides no facts explaining how the superintendent's alleged action or inaction, regarding the challenged policies, implicates or violates his duties in refence to the cited statutes and regulations. Finally, even if petitioner were to set forth facts supporting a policy, statutory, or regulatory violation by the Superintendent, he would not be entitled to any relief for same. Evaluation of the superintendent's performance and any action resulting therefrom is governed by contract and statute. As a result, petitioner is not entitled to any relief he may seek regarding the Superintendent's alleged violations, and this tribunal is without authority to grant same.

Further, even accepting petitioner's petition to the Department of Education dated

February 12, 2018, as opposition to respondent's motion for summary decision, there too he fails to set out any genuine issue of material fact which might preclude the granting of respondent's motion. Accordingly, petitioner has failed to meet his burden of proof as required by Spiotta and the matter is ripe for summary decision.

II. Mootness

It is well settled law that once a matter becomes moot prior to judicial resolution, it is appropriate to dismiss. Oxfeld v. NJ. State Bd. of Education, 68 N.J. 301 (1975), Nini v. Mercer County Comm. College, 202 N.J. 98, (2010). In Cinque v. New Jersey Dept. of Corrections, 261 N.J. Super. 242 (App Div. 1993) the Appellate Division explained that there are two basic reasons for this doctrine:

> First, for 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. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. (citing to Anderson v. Sills, 143 N.J. Super. (Ch. Div. 1976) 432, 437.) Id.

A. Attendance Policy

Petitioner claims that the District's attendance policy withholds students' unaltered grades in violation of N.J.A.C. 6A:32-7.6 (Conditions for access to student records.) His challenge to the attendance policy, specifically provisions relating to FDA status and maintaining academic credit, are however moot because the implementing regulation of attendance policy-5200 has been revised to modify or eliminate the challenged provisions.[4]

[4] If petitioner contends that the revised attendance policy/implementing regulation continues to violate the regulation on access to student grades he may wish to file a new petition.

Additionally, petitioner's claims that the attendance policy/regulation improperly withholds students' grades are moot because grades are available to students and parents/guardians online via their portal accounts.

Finally, petitioner claims that the current version of the attendance policy is not posted on the District's website. Aside from failing to set forth any specific facts opposing the District's claim that the revised attendance policy/regulation have been posted on its website, petitioner fails to cite to any legal authority which requires the District to do so. Thus, petitioner's claims regarding the attendance policy are moot.

B. Care of School Property Policy

Petitioner contends that the District's care of school property policy-5513 violates N.J.A.C. 6A:32-7.6 (Conditions for access to student records.) Pursuant to the District's policy, the board of education authorizes the imposition of a fine for the loss, damage, or defacement of a textbook and reserves the right to withhold a report card or diploma from any pupil whose payment of a fine is in arrears.

Despite petitioner's contentions, he has produced no evidence that the District has engaged in the practice of withholding report cards of students with outstanding fines for damage to school property. Moreover, petitioner did not oppose or otherwise challenge the certification of Superintendent Norcia in which she stated that while the policy reserves the District's right to withhold report cards due to outstanding fines, it is not the District's practice to do so. Thus, petitioner has not demonstrated an adversity of interest between the parties on this issue.

III. Presumption of Correctness

It is well settled in New Jersey that decisions of local boards of education are entitled to a presumption of correctness and are to stand undisturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." J. M., by His Guardian, D. M. v. Hunterdon Central Regional High School District, Hunterdon County, 96 N.J.A.R.2d (EDU) 415, 419; R. A. M. and C. A. M. v. Board of Educ. of the Township

of Tabernacle, 94 N.J.A.R.2d (EDU) 573, 576 (citing, Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960)). See, Boult v. Board of Educ. of Passaic City, 136 N.J.L. 521 (E. & A. 1948); Fraser v. State Bd. of Educ., 133 N.J.L. 15 (Sup. Ct. 1945); Offhouse v. State Bd. of Educ., 131 N.J.L. 391 (Sup. Ct. 1944); Greenway v. Board of Educ. of the City of Camden, 129 N.J.L. 461 (E. & A. 1943). Petitioner bears the burden of proving, by a preponderance of the evidence, that the respondent's action was "arbitrary, capricious or unreasonable." J.M., 96 N.J.A.R.2d at 419.

N.J.A.C 6A:16-7.6 directs that boards of education shall develop policies and procedures regarding student attendance. The District's attendance policy-5200 and its implementing regulation are in keeping with the directive of this regulation.

Similarly, N.J.S.A. 18A:34-2, provides that every board of education shall make rules for the safekeeping and proper care of textbooks, and shall keep an account of all moneys expended for textbooks and supplies. The District's policy on care of school property is consistent with the directive of N.J.S.A. 18A: 34-2. The District's policy is also consistent with case law. In Ballato v. Board of Education of the City of Long Branch, Monmouth County, 1990 S.L.D. 1296, the Commissioner of Education held that it was not arbitrary, capricious, or unreasonable for a board to withhold a diploma from a student who is otherwise qualified if financial obligations exist for loss or damage to property. Id. (at 1300.) Even if petitioner had presented evidence that the District was exercising its right to withhold report cards due to outstanding fines for damage to school property, such action would be consistent with applicable statutory and case law.

Thus, petitioner has failed to meet his burden that the attendance and the care of school property policies are arbitrary, capricious, or unreasonable.

Conclusions

I **CONCLUDE** that there exists no genuine issue of material fact. I further **CONCLUDE** that the District has met its burden of proof that it is entitled to judgment as a matter of law; therefore, its motion for summary decision is **GRANTED.**

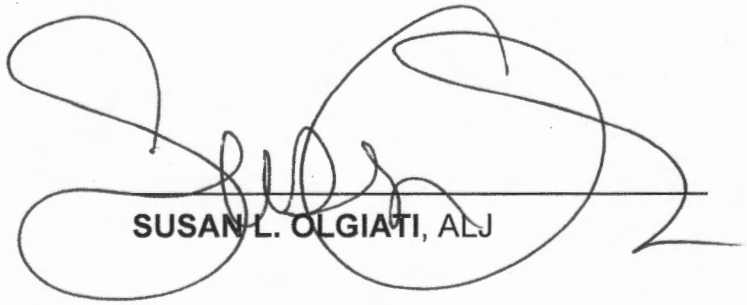
ORDER

It is hereby **ORDERED** that the District's motion for summary decision is **GRANTED** and petitioner's appeal is **DENIED**.

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

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

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



January 14, 2019
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 1/14/19

Date Mailed to Parties: 1/14/19

SLO/vj

APPENDIX

EXHIBITS

For petitioner:

Petition of Appeal to the Commissioner of Education of New Jersey, February 12, 2018.

Letter requesting that the Board's motion for summary decision be denied, dated November 17, 2018.

For respondent:

Brief in support of motion for summary decision, dated November 2, 2018

Letter brief in reply to petitioner's opposition to the motion, dated November 21, 2018.

New Jersey Commissioner of Education

Final Decision

Valerie Mattes,

Petitioner,

v.

Board of Education of the Township of Washington, Warren County,

Respondent.

Synopsis

Petitioner – an administrator formerly employed by the respondent Washington Township Board of Education – alleged that the Board wrongfully denied her request for payment for unused sick leave upon her retirement. The Board contended that petitioner did not retire, but rather resigned and pursued employment elsewhere; accordingly, petitioner is not entitled to the payment she sought.

The ALJ found, *inter alia*, that: although it is well established that contractual claims generally do not require an interpretation of the school laws and fall outside of the Commissioner's jurisdiction, the Commissioner does have jurisdiction here, as petitioner's appeal must be examined within the procedural context of this matter; Mattes filed an application for Deferred Retirement Benefits with the Division of Pensions and Benefits, with a deferred retirement date of March 1, 2018; in May 2015, petitioner notified the Board of her retirement, effective June 30, 2015; the Board treated her separation as a resignation, advising her that she was ineligible for payment of accrued sick leave; petitioner appealed in Superior Court in 2016; the Board argued both that petitioner was not entitled to the sick leave payment and, alternatively, that jurisdiction properly lay with the Commissioner; Superior Court dismissed this first appeal and directed that the matter be transferred to the Commissioner; Mattes appealed to the Commissioner in 2017; the ALJ dismissed this appeal as untimely, but found that sick leave entitlement could not be enforced until after the March 2018 deferred retirement date; the instant appeal was filed when the Board again declined to make the sick leave payment after petitioner's deferred retirement date in March 2018. The ALJ concluded that: Mattes relied on past proceedings in filing the within petition; it would be inequitable to dismiss and send her back to a forum that earlier declined jurisdiction; the Commissioner has subject matter jurisdiction here, as the dispute requires analysis of the parties' rights and obligations both under contract and school laws; petitioner's separation from employment constituted retirement because it is the last place Mattes worked as a TPAF member; petitioner is entitled to the sick leave payment promised in her contract because *N.J.S.A.* 18A:66-113 allows for deferred retirement, her application for which was indisputably approved by the Board of Trustees of TPAF; and the petitioner's appeal was timely, as her cause of action was triggered by her retirement date of March 1, 2018. Accordingly, the ALJ ordered the Board to pay petitioner $15,000 for unused sick leave days, per her contract with the District.

The Commissioner concurred with the findings and determination of the ALJ herein; accordingly, the Initial Decision of the OAL was 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.

February 27, 2019

OAL Dkt. No. EDU 06936-18
Agency Dkt. No. 97-4/18

New Jersey Commissioner of Education

Final Decision

Valerie Mattes,

Petitioner,

v.

Board of Education of the Township of Washington, Warren County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions have also been reviewed and considered by the Commissioner.[1]

Upon such review, the Commissioner concurs with the ALJ's determination – for the reasons thoroughly set forth in the Initial Decision – that petitioner is entitled to payment of $15,000 as compensation for her accrued, unused sick leave. Accordingly, the Initial Decision is hereby adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/27/19
Date of Mailing: 2/27/19

[1] The exceptions – while reflecting the Board's obvious disagreement with the findings and conclusions contained within the Initial Decision – are unpersuasive, and, substantially recast and reiterate the arguments made below, which have been exhaustively addressed by the Administrative Law Judge (ALJ) in the Initial Decision.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06936-18
AGENCY DKT. NO. 97-4/18

VALERIE MATTES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, WARREN COUNTY,
Respondent.

Sandford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Nathanya Simon, Esq., for respondent (Scarinci Hollenbeck, attorneys)

Record Closed: October 31, 2018 Decided: November 29, 2018

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

STATEMENT OF THE CASE

Valerie Mattes, an Administrator formerly employed by the Washington Township Board of Education (the Board), alleges that the Board wrongfully denied her request for payment for unused sick leave upon her retirement. The Board replies that she did not retire, but rather resigned and pursued employment elsewhere; accordingly, Mattes has no entitlement to the payment she seeks.

PROCEDURAL HISTORY

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on April 19, 2018. The Board filed an answer on May 10, 2018. The contested case was transmitted to the Office of Administrative Law (OAL) on May 11, 2018.

The parties agreed that this case presented a purely legal question; accordingly, they filed a comprehensive Joint Stipulation of Fact on October 25, 2018. I received a brief from the Board on October 22, 2018, and from Mattes on October 26, 2018. The Board filed a reply brief on October 30, 2018. Mattes filed a reply brief on October 31, 2018, at which time the record closed.

This appeal comes in the aftermath of an earlier petition, filed in or about January 2017, through which Mattes sought the identical relief. The earlier petition was dismissed as untimely, although both the Administrative Law Judge and the Commissioner left open to Mattes the opportunity to refile her claims, as will be more fully explained below.

FINDINGS OF FACT

The parties stipulated to the salient facts and I **FIND** as follows:

Mattes' First Request for Sick Leave Payment

Mattes was employed by the Board as a "Principal/Child Study Team Director," pursuant to a contract dated February 27, 2015. That contract had a term of one year, from July 1, 2014 until June 30, 2015. Article 3, Clause B read as follows:

> The Principal/Child Study Team Director shall be allowed twelve (12) days sick leave per year for the term on [sic] this Contract. Unused sick leave days

> shall be cumulative in accordance with the provisions of Title 18A. Upon retirement from the Washington Township School District, 30 days of unused sick days will be reimbursed, at the rate of $500 per day. Reimbursement for sick days shall be consistent with the law in effect at the time this Contract is signed. Such payment shall not exceed $15,000. Accumulated unused sick leave compensation shall not be paid to the Principal/Child study Team Director's estate or beneficiaries in the event of death prior to retirement.

This sick leave clause was not included in a prior contract between Mattes and the Board. On February 15, 2013, prior to executing this contract, Mattes had submitted an application for Deferred Retirement Benefits to the Division of Pensions and Benefits, with a deferred retirement date of March 1, 2018.

By letter dated May 26, 2015, Mattes submitted "a notification of retirement from [the] Washington Township School District" to Superintendent of Schools Keith Neuhs, effective June 30, 2015. The Board formally accepted her "resignation" on June 8, 2015. On June 12, 2015, Mattes entered into an employment contract with the Five Town Community School District in Camden, Maine, for a position as Director of Special Education for a one-year term, from July 1, 2015 through June 30, 2016. Mattes continues to be so employed, to date.

Prior to June 29, 2015, Neuhs advised Mattes via text message that the Board did not consider her resignation to be a retirement; he advised via text message on July 8, 2015, that the Board would not be releasing the payment for unused sick leave described in her contract. Mattes asked that he so advise her formally, and in writing. Via letter dated July 15, 2015, Board President Karen Graf explained that the sick leave provision was intended "strictly to entice [Mattes] to stay in the district until she reached age sixty," or until she had accrued twenty-five years of pensionable public service. Since Mattes had resigned outside these parameters, Graf explained that she was not entitled to the payment she sought. Indeed, Graf pointed out that although Mattes was

leaving the State, she could return to New Jersey, and re-enroll in the pension system at any time.

By letter dated July 17, 2015, Neuhs again formally denied Mattes' request for the sick leave payment described in her contract.

The First Litigation

On or about April 5, 2016, Mattes filed a Complaint in the Superior Court of New Jersey, Warren County. She sought payment for unused sick leave in the amount of $15,000, contending that she had retired within the meaning of N.J.S.A. 18A: 66-36. In an answer filed on May 13, 2016, the Board raised several defenses, to include lack of subject matter jurisdiction. Via a Motion for Summary Decision filed on July 15, 2016, the Board urged both that Mattes was unentitled to the payment she sought, and alternatively, that jurisdiction properly lay with the Commissioner of Education. Via Order dated August 26, 2016, the Superior Court dismissed Mattes' complaint without prejudice, and directed that the matter by transferred to the Commissioner. Mattes unsuccessfully filed a Motion for Reconsideration on September 2, 2016. She filed a petition before the Commissioner on or about January 25, 2017.

Mattes' January 25, 2017, petition was dismissed by the Honorable Lisa James-Beavers, A.L.J., as untimely under N.J.A.C. 6A:3-1.3 (i). (Docket Number EDU 02729-17). Judge James-Beavers expressly noted in her June 19, 2017, opinion that the petition had been filed more than ninety days after Mattes had received notice of Board action. But, she also held that since the right to payment for unused sick leave does not arise until retirement, and Mattes had filed for a Deferred Retirement date of March 1, 2018, "any right she had to payment for unused sick time cannot be enforced until then." Judge James-Beaves went on to say that "[i]f petitioner does not receive payment for unused sick leave upon her official retirement date, as recorded by the TPAF, she should be permitted to again file a petition with the Commissioner to enforce the terms of her contract."

A final decision was issued by the Commissioner on September 12, 2017. While agreeing that the challenge to the Board's July 17, 2015, denial of sick leave benefits was untimely filed, the Commissioner likewise agreed that "[a]ny disputes that may arise between the parties that are triggered by the petitioner's Deferred Retirement date of March 1, 2018, are not yet ripe for . . . review."

This Petition of Appeal

On October 5, 2017, the Board of Trustees of the Teachers' Pension and Annuity Fund approved Mattes' application for Deferred Retirement, effective March 1, 2018. She was again notified that on February 1, 2018, the Board of Trustees approved her application for Deferred Retirement effective March 1, 2018; apparently Mattes had changed her option for the type of retirement payments she would receive. She received an Explanation of Retirement Allowances via letter dated March 27, 2018, and her first pension check was dated April 1, 2018. Through counsel, Mattes again asked for the sick leave payment promised by her contract. The Board declined to make that payment, and the present petition of appeal was filed.

CONCLUSIONS OF LAW

Jurisdiction

This case raises thorny questions about jurisdiction; indeed, the transmittal cover sheet notes "jurisdiction is a threshold matter." And upon reviewing the file, I too initially questioned whether this matter arose under the school laws. N.J.S.A. 18A:6-9. Our courts have held that where a controversy does not arise under the school laws, it is outside the jurisdiction of the Commissioner, even if the dispute pertains to school personnel. Bd. of Educ. of East Brunswick Twp. v. Twp. Council of East Brunswick, 48 N.J. 94, 102 (1966). It is well established that contractual claims by school employees do not invoke the Commissioner's jurisdiction, as such claims do not require an

interpretation of the school laws. Picogna v. Board of Education of Cherry Hill, 249 N.J. Super. 322, 335 (App. Div. 1991). Demikoff v. Harrington Park Board of Education, 97 N.J.A.R.2d (EDU) 16. Mattes relies heavily on the language of her employment contract in support for her claim to relief.

I nonetheless **CONCLUDE** that the Commissioner does have jurisdiction to adjudicate Mattes' case for the following reasons. Mattes' petition must be examined in its overall procedural context. Firstly, in its earlier incarnation, this petition was initially filed with the Superior Court; I might have suggested that was the proper forum. But, the Superior Court judge disagreed, and the Commissioner accepted jurisdiction. At no time did the prior A.L.J., or the Commissioner herself, suggest that jurisdiction was improperly laid here. Mattes relied on this procedural history when she filed the petition now before me. She did not repeat "the mistake" she made the first time; she now filed directly with the Department of Education. It would be inequitable to dismiss her case and return her back to a forum that earlier declined jurisdiction. Indeed, were I to do so, Mattes would rightly protest that she surely has a right to be heard somewhere. I **CONCLUDE,** based on this procedural history, that Mattes' somewhere is here.

Secondly, the Board has persuasively argued in favor of jurisdiction. While conceding that the Commissioner lacks jurisdiction over purely contractual claims, the Board notes that "incidental interpretation of the contract necessary to resolve the educational claims is properly done by the Commissioner." Middletown Bd. of Educ. v. Witmer, 2009 N.J. Super. Unpub. LEXIS 2260 (App. Div., August 17, 2009). And indeed, the contract provision at issue here specifically references Title 18A; providing that any payment for unused sick days "shall be consistent with the law in effect at the time this Contract is signed." The parameters of the Board's ability to make payment for unused sick leave is governed by N.J.S.A. 18A:30-3.5 and N.J.S.A. 18A:30-3.6. Apropos to the issue before me, these statutes provide that payment for unused sick leave is available "only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited at the time of retirement." This statutory scheme will guide my determination whether Mattes has "retired" within

the contemplation of her contract, and my determination whether the relief she seeks is consistent with law, as likewise required by her contract. I accordingly **CONCLUDE** that the Commissioner has subject matter jurisdiction, as this dispute requires an analysis of the parties' right and obligations both under contract and under the school laws.

Mattes' Entitlement to Reimbursement for Unused Sick Leave

Mattes' contract, and the applicable law, make it plain that Mattes was entitled to payment for unused sick leave only "at the time of retirement." N.J.S.A. 18A:30-3.5; N.J.S.A. 18A:30-3.6. Her contract specifies an additional condition precedent for such payment; that is, that her "retirement" be "from the Washington Township School District."

It is clear from the earlier decision by Judge James-Beavers, as affirmed by the Commissioner, that Mattes had not yet "retired" when she left her employment with Washington Township in 2015. Indeed, Judge James-Beavers held that

> ...these statutory provisions [N.J.S.A. 18A:30-3.5, N.J.S.A. 18A:30-3.6] indicate that an individual is typically not entitled to be paid for unused sick time until her date of retirement from a State-administered or locally-administered retirement system. Here it is undisputed that petitioner's deferred retirement date is March 1, 2018. Therefore, any right she has to payment for unused sick time cannot be enforced until then.
>
> [Mattes v. Washington Township Bd. of Educ., EDU 02729-17, Initial Decision, June 19, 2017]

It is also easy to **CONCLUDE** that Mattes is now "retired," as that term is understood both under her contract and under the school laws. The relevant statutes define "retirement" as "retirement from a State-administered...retirement system." N.J.S.A. 18A:30-3.5; N.J.S.A. 18A:30-3.6. Mattes retired from the TPAF effective March 1, 2018. She did so via the "Deferred Retirement," mechanism, described by statute as when "a member of the pension fund who has 10 years of service credit in

the pension fund and who separates voluntarily or involuntarily before attaining the age of 60 years...[elects] to receive a Deferred Retirement Allowance beginning at the age of 60 years..." N.J.S.A. 18A:66-113. The trickier question is whether Mattes' retirement in 2018 constituted retirement "from the Washington Township School District," notwithstanding the fact that she physically left her employment there years earlier.

The Board urges that several concerns militate against granting Mattes the relief she seeks. Its most significant argument, from a public policy standpoint, is that granting this petition would allow "similarly situated employees to collect windfalls from districts across the State..." The Board contends that other TPAF-covered employees with at least ten years of service would be encouraged to resign from their positions; demand their sick leave pay-outs; and then return to a new school district "where they could continue to accumulate sick leave and presumably repeat this cycle." This argument made sense in the context of Mattes' November 2017 petition of appeal, because then, she had not yet retired. Paying her then could have led to the ills the Board describes.

But the Board's argument holds little appeal under facts that reveal that between the date of her resignation from Washington Township, and the date of her Deferred Retirement, Mattes engaged in no TPAF-eligible employment. By determining that Mattes' claims were not ripe until her Deferred Retirement Date, Judge James-Beavers and the Commissioner guaranteed the Board an opportunity to decline payment if Mattes had secured TPAF-eligible employment elsewhere after she had "retired" from Washington Township. And had she done so, the Board's argument that she did not retire from service in its school district would have made perfect sense and would have compelled a denial of Mattes' claim to relief.

But Mattes did not return to employment in a TPAF position at any time after she left Washington Township. I thus **CONCLUDE** that her separation of employment constituted retirement because Washington Township is the last place Mattes worked while a TPAF member. And she was employed there when she filed for Deferred

Retirement. I thus **CONCLUDE** that Mattes retired from the Washington Township district and is entitled to the sick leave payment promised by her contract.

The Timeliness of This Petition

Finally, the Board urges that this petition, like Mattes' earlier one, should be dismissed as untimely under N.J.A.C. 6A:3-1.3(i). This argument is a nonstarter. The Board asserts that the time for appeal was triggered in 2015, when the Board initially declined payment. But Judge James-Beavers and the Commissioner both held that a cause of action would accrue anew once Mattes retired in March 2018.

Their holdings constitute the law of the case. The law of the case doctrine generally prohibits a second judge, in the absence of additional developments or proofs, from differing with an earlier ruling. The doctrine is a non-binding rule intended to prevent re-litigation of a previously resolved issue. Lombardi v Masso, 207 N.J. 517, 538 (2011). Our courts have held that "[a] hallmark of the law of the case doctrine is its discretionary nature, calling upon the deciding judge to balance the value of judicial deference for the rulings of a coordinate judge against those factors that bear on the pursuit of justice and, particularly, the search for truth. Little v KIA Motors Am, Inc., 425 N.J. Super 82 (App. Div. 2012). Sound discretion dictates that I defer to these earlier rulings. I **CONCLUDE** that Mattes' cause of action was triggered by her retirement date of March 1, 2018. Her petition was filed on April 19, 2018, and thus is timely.

ORDER

Based on the foregoing, the Washington Township Board of Education is **ORDERED** to make payment to Mattes in the sum of $15,000; that sum representing compensation for unused sick leave days per her contract.

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

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

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

November 29, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: November 29, 2018

Date Mailed to Parties:

sej

APPENDIX

EXHIBITS

J-1 Joint Stipulation of Fact with attachments.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

NOEMIA GOMES, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Agency Docket #69-3/18

Walt De Treux, Esq., Arbitrator

Hearing Date: 11/5/18
Briefs Received: 1/28/19
Decision Date: 3/4/19

Appearances: For Respondent – Paul W. Tyshchenko, Esq., *CARUSO SMITH PICINI*
For the District – Nishali A. Rose, Esq.; Lester E. Taylor, III, Esq., *FLORIO PERRUCCI*

Introduction and Statement of Relevant Facts

Respondent Noemia Gomes served as an Administrative Secretary (12 months) for the City of Elizabeth Board of Education since February 25, 2008. During her employment, Gomes had a poor attendance record. She missed 27.38 days in the 2008-09 school year and was on a paid leave of absence for the entire 2009-10 school year. She missed 68.43 days in 2010-11; 112.13 days in 2011-12; 33.93 days in 2012-13; 40.75 days in 2013-14; 47.58 days in 2014-15; 109.05 days in 2015-16; and 74.76 days in 2016-17 with an additional 107 days on leave of absence. In 2017-18, Respondent missed 108.60 days through January 22, 2018. She worked a total of 13 days that school year. Her last day of work was August 23, 2017. Respondent provided medical certification for her absence until October 2017, but provided no other certification or reason for her absence since that time. She was absent from work without any approved leave of absence.

The City of Elizabeth Board of Education certified tenure charges against Respondent on February 22, 2018. The charges sought dismissal from employment for excessive absenteeism, neglect of duty for failing to report to work, abandonment of position, conduct unbecoming, and insubordination and/or other just cause. The Commissioner of Education referred the charges to arbitration. Respondent filed a Motion for Summary Decision, which was denied by Order dated June 25, 2018.

On November 5, 2018, a hearing was held at the Board of Education offices in Elizabeth, New Jersey, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs, and the matter was submitted to the Arbitration for a decision.

Issue

Has the City of Elizabeth Board of Education established the allegations against Respondent Noemia Gomes as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

The Board of Education (BOE) calculated that Respondent was absent 970.42 days during her 10 years of employment. Remarkably, she faced only minor discipline for such poor attendance. During the 2007-08 and 2008-09 school years, Respondent received several memos admonishing her on her attendance. The BOE withheld her salary increment for the 2010-11 school year after she took a leave of absence during the entire 2009-10 school year. It also withheld a salary increment for the 2012-13 school year. It apparently issued no other disciplinary action other than to advise her to improve her attendance.

Respondent cites to this lack of discipline and the District's failure to place her on an Attendance Improvement Plan as reasons to dismiss the tenure charges. The District's lax approach to Respondent's attendance is troubling. The recitation of absences over a 10-year period rings hollow when the BOE failed to adequately and seriously address those issues during the course of Respondent's employment. The BOE certainly has the right to discipline and discharge an employee who consistently fails to show for work over a period of time, whether or not those absences are excused or justified. It also has an obligation to monitor an employee's attendance and counsel and progressively discipline the employee in an effort to improve that attendance. If this case rested solely on Respondent's past attendance record,

the District would have difficulty overcoming the absence of any recent, significant, and progressive discipline. But the resolution of this case is much simpler than assessing Respondent's 10-year attendance record and the BOE's response or lack thereof to that record.

Charges II and III of the tenure charges allege, respectively, Neglect of Duty for Failure to Report for Work and Abandonment of Position. During the 2017-18 school year, Respondent worked a total of 13 days prior to the filing of the tenure charges. She was absent for all but 6 days in July and 5 days in August. Her last day of work was August 23, 2017. As of August 29, 2017, her time off was recorded as "SICK DAY – NO PAY." She provided medical certification for her absences into October 2017, but failed to provide any further medical documentation or give reasons for her continued absence.

BOE Policy No. 4150/4250 defines an unauthorized absence as "a non-approved absence resulting in non-performance of those duties and responsibilities assigned by the district...An employee is deemed to be on unauthorized leave at such time and on such occasions as the employee may absent himself/herself from required duties." The policy further explains, "Unauthorized leave shall constitute a breach of contract, and therefore, may result in the initiation of dismissal procedures, loss of salary or such disciplinary action as may be deemed appropriate."

Respondent has been on an unauthorized leave of absence at least since October 2017, and she has failed to document to the BOE any reasons for that continued absence. She has abandoned her position, and her unauthorized leave constitutes neglect of duty.

In her brief, Respondent attributes the multiple absences through the years of her employment to "acute chronic lumbar pain that includes symptoms of debilitating pain that

renders [her] immobile for long periods of time." Presumably, Respondent's absence since August 23, 2017 is due to the same alleged chronic condition. However, Respondent offer no proof at hearing as to any such condition. Respondent, without explanation, did not attend the hearing. She offered no testimony and no explanation for her unauthorized and undocumented absence from work. The only conclusion that can be drawn is that Respondent abandoned her position.

In her brief, Respondent raises several procedural, due process, and substantive defenses to the tenure charges. But those defenses fail to address the most striking and pertinent allegations in the tenure charges, i.e., she abandoned her position by failing to work since August 23, 2017 and failed to provide documentation or reasons for her absence since October 2017.

Respondent's attendance record over her 10 years of employment is dismal, but it need not be considered to resolve the tenure charges. The resolution rests squarely on the fact that Respondent cease working on August 23, 2017 and has failed to provide justification for her absence since October 2017. Her actions are the exact definition of abandonment, and the Board's policy on unauthorized leave allows for dismissal. Respondent's failure to communicate and document the reasons for her absences left the BOE with no choice but to seek dismissal.

For these reasons, I find that Counts II and III of the tenure charges have been established and warrant dismissal.

Award

The City of Elizabeth Board of Education established the allegations of neglect of duty for failure to report to work (Count II) and abandonment of position (Count III) and as set forth in the tenure charges. Those proven charges are sufficient to warrant dismissal.

Walt De TReux

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

NOEMIA GOMES, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Agency Docket #69-3/18

Walt De Treux, Esq., Arbitrator

Affirmation

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

Walt De Treux

WALT De TREUX

In the Matter of the **TENURE** Hearing	)	
	)	
of	)	
	)	**OPINION and AWARD**
JENNY AN	)	
	)	
"Respondent"	)	
	)	
and	)	AGENCY DOCKET NO. 261-10/18
	)	
SCHOOL DISTRICT OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY	)	
	)	
"Petitioner"	)	
	)	

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

The hearings were held on December 3, 4 and 20, 2018 at the Board of Education office, Wayne, New Jersey. Both parties were afforded full and fair opportunity to present evidence and argument, to engage in the examination and cross-examination of affirmed witnesses, and otherwise to support their respective positions. A verbatim transcript was made and all witnesses were sworn. Briefs were received on January 18, 2019 as agreed.

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR PETITIONER:

John G. Geppert, Jr., Esq.
Scarinci Hollenbeck

APPEARING FOR RESPONDENT:

Randi April, Esq.
Oxfeld Cohen, P.C.

BACKGROUND:

The matter arose as a result of tenure charges filed against Jenny An, (**Respondent**) a tenured school psychologist, assigned to a child study team working with Pre-K students since the 2007-2008 school year. Her job description, entered into the record of the hearing as Board Exhibit B-5, indicated that she was a member of the basic Child Study Team (CST) and listed fifteen (15) specific job responsibilities. Amongst other job responsibilities, Respondent was tasked with

- Providing consultation to staff and parents
- Working collaboratively with staff
- Serving as a liaison to classroom teachers
- Providing support to parents, students, teachers

On October 22, 2018, the New Jersey Department of Education received the Board's (**District/Board/Employer**) Notice of Tenure Charges filed against Respondent, which were also served on Respondent and mailed to Gail Oxfeld Kanef, Esq. at the Law firm of Oxfeld Cohen, P.C. These Tenure Charges were based upon Conduct Unbecoming and Other Just Cause pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-16, N.J.S.A. 18A:6-17.1 and N.J.A.C. 6A:3-5.1.

According to a letter dated November 5, 2018 from Samantha L. Price, Director, Office of Controversies and Disputes, Respondent's answer to the charges was received on October 26, 2018. The charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary. . . . Additionally, the charges have been referred to Arbitrator Mattye M. Gandel pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109."

The Board cited the following District Policies, which it claimed Respondent violated.

Policy No. 3211, Code of Ethics, which in part states that the educator

7. shall not knowingly make false or malicious statements about a colleague.

Policy No. 3212, Attendance, states in part that

A teaching staff member who fails to give prompt notice of an absence, . . . is repeatedly tardy, . . . is absent without authorization, is repeatedly tardy, . . . may be subject to appropriate consequences, . . . which may include . . . dismissal, and/or certification of tenure charges.

Policy No. 3230, Outside Activities, states in part that

. . . staff . . . are advised to refrain from conduct, associations, and speech that, if given publicity, would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . or disrupt the normal activities of the school.

Policy No. 3281, Inappropriate Staff Conduct, states in part that

School Staff's conduct in completing their professional responsibilities shall be appropriate at all times. . .

Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. . . such conduct, which may include, . . . communications . . . using e-mails, text-messaging, social networking sites, or any other medium . . .

Policy No. 3321, Acceptable use of Computer Network(s)/Computers and Resources by Teaching Staff Members provides in part that

. . .

Any individual engaging in the following actions declared unethical, unacceptable . . . shall be subject to discipline . . .

1. Using the computer network(s)/computers for . . . inappropriate . . . purposes . . .
2. . . .
3. Using the computer network(s) in a manner that:

   . . .

   k. Engages in other activities that do not advance the educational purposes for which computer network(s)/computers are provided.

Violations:

Individuals violating this policy shall be subject to appropriate disciplinary actions . . but are not limited to:

. . .

7. Dismissal

Policy No. 3351, Healthy Workplace, which states in part that

A significant characteristic of a healthy workplace environment is that employees interact with each other with dignity and respect regardless of an employee's work assignment or position. . . Repeated malicious conduct of an employee . . . is unacceptable. . . This unacceptable conduct may include, but is not limited to, repeated infliction of verbal abuse . . . use of derogatory remarks; insults; verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act of such conduct shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious.

Rather than restate all the charges, the following is a summary of the charges:

Charge One: Conduct Unbecoming

Respondent has created a hostile work environment . . .
Respondent has falsely stated that she was discriminated against . . .
Respondent stated that she intended to fabricate and file a false complaint . .
Respondent attempted to recruit other District employees to falsely testify on her behalf . . .
Respondent engaged in a pattern of conduct comprising a violation of the implicit standard of good behavior.
Respondent knew or should have known her actions were unprofessional . .
Respondent's actions were potentially harmful to the career, dignity . . of the person against whom she sought to file false charges.
Respondent's actions were disruptive of the efficient operation of the District.

Charge Two: Conduct Unbecoming

Created a hostile work environment
Harassed and intimidated co-workers

Charge Three: Conduct Unbecoming

Insubordination
Failed to follow directives

Charge Four: Conduct Unbecoming

Dishonesty and lack of candor regarding interviews, swiping in/out and obstructive actions.

Charge Five: Conduct Unbecoming

Related to the texts at issue
Deleted texts

Charge Six: Conduct Unbecoming

Violated sign-out policy

Charge Seven: Conduct Unbecoming

Theft of time/Attendance Policy No. 3212

Charge Eight: Conduct Unbecoming

Theft of time related to visiting all the schools she was assigned to

Charge Nine: Conduct Unbecoming

Theft of time through computer use and violation of District Policy No. 3321

Charge Ten: Other Just Cause

Failed to follow instructions
Violated District policies
Inattentive and ambivalent to her duties, co-workers

POSITIONS OF THE PARTIES:

The **School District's position is** that Respondent fabricated a claim of discrimination, took steps to carry out the threat of a false claim and upon discovery, engaged in a further course of action to obfuscate her initial intent. Further, Respondent demonstrated a pattern of disregarding District policies, came and went as she pleased, was late and unprepared for meetings and was disrespectful and insubordinate to her superiors. The District cited the legal standard for defining conduct unbecoming and cases in support of that standard. Bases on these recognized standards, such as destroying

public respect, her effect on the morale and efficiency of the District and her fitness to discharge her duties, the District contended that Respondent's actions severely disrupted the functions of the District both because she deprived the District of her services as psychologist and because of the chilling effect of her threat on administrators.

Further, it is the position of the District that Respondent's lack of candor during the investigation demonstrated a failure to adhere to the high standards of candidness expected of a public educator; that she violated the trust the District place in traveling teaching staff by regularly violating the District's attendance policy and that she failed to adhere to the District's policies regarding ethical conduct toward colleagues, attendance, behavior and the use of public resources.

Moreover, Respondent's threat to file false charges against the principal was such a flagrant act that it supports dismissal as conduct unbecoming independently and in conjunction with the other charges against her. Even if she never intended to follow through with the threat, which is immaterial, the claim to have been a "joke" is not only a single self-serving statement but also demonstrated such poor judgment as to preclude her from further employment in the District and shows that she is incapable of maintaining a professional relationship with administrators in the future.

Additionally, the District contends that during the interview, Respondent had the opportunity to speak candidly but, by her own admission, she lied almost immediately about speaking to co-workers about the investigation and despite her attempt to come clean, three or four minutes later, she came clean only when confronted with the fact that

her interviewers already knew the truth. Her lying means she cannot be trusted to serve any role in the District.

It is the District's position that Respondent was guilty of unbecoming conduct through insubordination by disregarding the Superintendent's directive not to discuss the investigation and by failing to adhere to the District's attendance policy and sign-out and leave policies, of which she was aware through annual training and receipt of the Employee Handbook, though she refused to confirm. Further, testimony was elicited from District witnesses that Respondent violated Board Policies including the Code of Ethics, Inappropriate Staff Conduct, Healthy Workplace Environment and Outside Activities.

Respondent has never expressed a single modicum of responsibility for her actions and this failure compounds the unbecoming conduct and warrants her dismissal. Her defense seems to be that because no supervisor noticed her truancy until she was investigated, she is innocent of any violations but the evidence proved that she violated the system of trust the District must maintain with respect to its traveling employees.

Further, the District asserts that despite the fact that Respondent had no prior discipline, the charge of unbecoming conduct is based on actions sufficiently flagrant to justify tenure revocation, which caused profound disruption in the District and which should lead to dismissal.

Finally, it is the District's position that it met the "seven tests" recognized by arbitrators to prove that it had just cause to terminate Respondent's employment with the District.

Therefore, the District asks this Arbitrator to sustain the charges of Unbecoming Conduct and Other Just Cause and to revoke Respondent's tenure.

Respondent's position is that there is no documented proof to sustain most of the charges; that there is no evidence of online shopping; that there is no evidence of a lunch policy for members of the CST; that there is no evidence that Respondent was informed of any deficiencies with regard to signing-in/signing-out; that there is no evidence that she was informed of any personal deficiencies with her presence in the buildings and that there is no evidence that she was informed of any issues whatsoever with her performance before the Halloween email. Rather, it was only after the text message that the District threw the proverbial "spaghetti to the wall" in the hope that something would stick but conduct unbecoming cannot be proven if the only evidence presented in support of a tenure charges is uncorroborated hearsay.

Further, the Respondent claims that regarding the text exchange, she has taken responsibility for it; that it was foolish, foolhardy and hurtful to Principal Matthew Kriley and that it must be taken within the context of a running group text between colleagues who often blew off steam together. Moreover, it is Respondent's position that all three participants in the text exchange provided inappropriate comments; that none of them disavowed any comments during the exchange; that none of them appeared to be coerced in the exchange and that it was only later that night that Jerry Battifarano, a member of the CST and a participant in the text exchange, believed his job could be in jeopardy so he told Kriley and Rosa Barreira, a friend and colleague, what occurred.

Additionally, while all three disregarded the directive to not discuss the investigation, only Respondent is out of work.

Respondent cited two tenure matters in support of her position that the tenure charges should be dismissed and contends that arbitral law provides that when there is no prior discipline coupled with a single incident of wrongdoing, termination is not the proper punishment. Therefore, Respondent asks this Arbitrator to return her to her former position and, if necessary, to consider progressive discipline in this matter.

OPINION:

On May 10, 2018, the principal of Lafayette school, Matthew Kriley, sent the following email, B-4, to Respondent and copied Patricia Monaco, Respondent's supervisor, and Debra Strauss, a member of the District whose title was not identified during the hearing.

> Jenny,
>
> Please ensure that when you report to Lafayette or any other building for that matter, that you sign in and out in the main office. This is due to matters of security of which I'm sure you're aware.
>
> I see that you signed in today upon your arrival, but noticed that you exited out of the side door.
>
> Thank you for your anticipated cooperation.
>
> Matt

In reaction to that email, the record established that Respondent initiated a text exchange, B-3, between herself and two other members of the Child Study Team (CST), Nancy Linden and Jerry Battifarano, which read as follows:

Respondent: Ducking Matt Kriley
Linden: At Ryerson?
Respondent: Fucking he emailed me and Strauss and patty cuz I went there and signed in and left out the side preK door and didn't sign out. What an ass hat
Linden: Ugh
Respondent: He makes my blood boil. Fucking tiny Napoleon complex on a power trip. Ass
Battifarano: Ha ha ha! He's a little bitch I know
Linden: Jenny you need some Queen to cool off. Lol. These people are all on power trips.
Battifarano: They are that's why I lay low
Respondent: Seriously makes me so mad and to email those two too. I'm going to hib[1] him and say he is discriminating bc I Asian and you will both concur that you heard him call me egg roll or something to that effect.
Battifarano: What?! Wait! What happened!
Linden: Sashima mama
Battifarano: Haha
Respondent: Lol or that!!!

The facts surrounding this text exchange occurring on May 10 and 11, 2018 are not in dispute.

- Battifarano testified that later the night of May 10, 2018 he sent the text to Matthew Kriley, Principal of Lafayette School, and Rosa Barreira, a learning consultant and a colleague.
- Battifarano called Barreira that evening and she told him not go along with the scheme suggested in the text.
- On the morning of May 11, 20018, Kriley called Battifarano and he went to Kriley's office that afternoon and spoke to Kriley and Paula Clark, Director of Human Resources Compliance and Labor Relations. Battifarano gave Kriley the text.[2] Battifarano was visibly upset because of his involvement in the text and his employment, asked to leave school and was told by Kriley not to speak to anyone about this matter. Battifarano left school thirty minutes before the end of the school day.
- Clark forwarded the text to Superintendent Mark Tobak and he placed Respondent and Linden on leave that afternoon.
- Battifarano went to his car and saw messages from Respondent and Linden. Responded to them. Told them he had given the text to Kriley and drove home. When Battifarano was home, Respondent and Linden called him and told him they were en route to his home which was 30-40

[1] HIB stands for Harassment, Intimidation and Bullying and is a process whereby someone reports a person for this unacceptable and very serious behavior.
[2] This text exchange was on Battifarano's cell phone.

minutes away from school. Battifarano did not tell them not to come. They told him that they had been put on administrative leave.

- Though he was told by Barriera that afternoon, not to let Respondent and Linden into his home, he let them in, served them refreshments and they stayed for about one hour to one and one-half hours discussing what had happened and what could happen to them.
- Respondent deleted the text message "the Friday after the text exchange took place." While at Battifarano's home, because she had deleted it, Respondent made a copy of the text message from Battifarano's phone.
- Respondent called Battifarano again on Saturday, May 12, after which time Battifarano blocked any future calls. All three participants had been told not to discuss this matter.
- An investigation took place and Clark interviewed the following individuals: Kriley, Battifarano and Barreira, Respondent and Linden in that order. Taback sat in on the last two interviews.
- Based on the interviews, the District concluded that Respondent had violated several Board policies and subsequently filed tenure charges.
- Linden was disciplined but Battifarano did not receive any discipline.

During the interviews, the Board learned that, in addition to the full details regarding the text exchange and the policies related to that event, which will be addressed later, Respondent have violated two other Board policies: Policy 3212 – Attendance, B-7, and Policy 3321 – Acceptable Use of Computer, B-10.

Clark testified that employees receive the Employee Handbook, B-35, at the beginning of each year; that each principal reviews the policies with staff members and that they are on the District website. However, Respondent was very evasive about receiving the Handbook and about having read the District's policies although she acknowledged that the District operates under Board policies. Despite being employed by the District for ten years, she recalled getting the Handbook possibly only in the 2016-2017 school year; that she believed that she received a District-wide email of the Handbook and that there were references to specific policies like computers and cell

phone use. In response to many questions about seeing polices, Respondent stated that she did not recall. For a ten-year employee these responses were not reasonable.

There were several aspects of the attendance issue. The record established through Board exhibits B-12 through B-34 that Respondent arrived late in the mornings and left early without receiving permission a significant number of times and without signing out. In fact, it was because Kriley was looking for Respondent on May 10, 2018 and could not find her that he wrote the May 10, 2018 email reminding Respondent to sign in and out.[3] Additionally, there was the issue of leaving early to pick up a niece. While Tabak and Clark both testified that Respondent told them during her interviews that she left early fifty times during the school year to pick up her niece, Respondent testified that it was maybe three times and disputed the fact that she told Tabak and Clark it was fifty times.

Regarding the computer policy, which was one of the few policies that Respondent actually acknowledged having been advised of, there was testimony that colleagues saw her using her computer at school for outside purchases. However, there was no documentary evidence of these activities and although Tabak stated that Respondent admitted to shopping on line before the end of the day, Respondent denied the accusation and only admitted to shopping on line for educational materials.

Respondent's position was that no one had advised her that she was violating a policy by not signing out; that she had not been advised that she needed to ask for permission to leave the building early and that, as a member of a traveling team, she

[3] The important factor was that Kriley saw Respondent in the parking lot just after she had left the building without signing out and not whether Kriley actually saw her exit the door.

could have been in many places or even at the home of students when she either signed in late or left early. In essence her defense was that she did not receive proper notice of the alleged violations and, in fact, this Arbitrator must agree. Under normal circumstances, all employees have to receive notice that they are violating a rule and, if a reasonable rule is violated, notice must be given in the form of a warning, a suspension or some lower level of discipline so that the employee would have an opportunity to correct the inappropriate behavior.

Further, this Arbitrator agrees with Respondent that administrators and supervisors have a responsibility to monitor staff activities, to properly notify them if they are violating any policy and to counsel them and then impose discipline, if appropriate. Progressive discipline should be corrective, not punitive. Given the safety issue in schools, the rule of signing in and out is very reasonable. Building administrators must know where staff are for many reasons but especially in cases of emergency, all staff members must be accounted for.

Taken in a vacuum, this Arbitrator would agree that a lower level of discipline would have been appropriate for violations of the Attendance and Computer policies. However, the only reason that the District learned about these policy violations was because of the text exchange, and, in the opinion of this Arbitrator, the text message was so egregious and at the heart of these tenure charges allowing the District to impose the strictest of penalties, even for an employee with a good record.

In regard to the text exchange, the District claimed that Respondent violated the following Board policies:

- Policy 3211 – Code of Ethics, B-6, which stated that the educator "shall not knowingly make false or malicious statements about a colleague."
- Policy 3230 – Outside Activities, B-8, which states that "staff are advised to refrain from conduct . . speech that if given publicity, would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."
- Policy 3281 – Inappropriate Staff Conduct, B-9, which states that inappropriate conduct will not be tolerated; that staff must be appropriate at all times; conduct outside the professional responsibilities may be considered conduct unbecoming and that staff must be concerned with the use of emails and text-messaging.
- Policy 3351 – Healthy Workplace Environment, B-11, which states that staff must interact with others with dignity and respect and that derogatory remarks, insults are unacceptable conduct. Of significance to this Arbitrator was that the Board and Policy 3351 recognized that "[A] single act of such conduct, referring derogatory remarks or insults, shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious."

Clark testified, and this Arbitrator must agree, that Kriley's May 10, 2018 email was very reasonable and not threatening and it was appropriate for him to have included Respondent's supervisor in the email to let her know what others had noted, but apparently had not followed through on, that Respondent was violating Board policies by not signing out and that she was hard to find when needed.

Tabak also testified that the May 10th email was the genesis of this issue; that the District must know where Respondent and others are doing during the day and that there is a new level of concern when there are threats to the safety of staff and students. In this day and age of terrorist attacks, administrators, who have the ultimate responsibility for the safety of the staff and students, must be extra vigilant in enforcing rules related to the whereabouts of personnel.

District witnesses recognized that staff sometimes criticize their superiors; that they sometimes make inappropriate comments and that they sometimes blow off steam

after a certain event. However, while Respondent claimed that she was just blowing off steam and that the text exchange was a joke, this Arbitrator was not convinced.

When responding to a question about why she sent the May 10th text, she acknowledged that she "was upset . . . a little angry that Mr. Kriley . . . complained about my presence in his building." She was further asked if she had a problem with Mr. Kriley prior to sending this text and she responded,

> Not any specific problem. I don't know if it was just me or the team or, you know, the fact that preschool was suddenly placed in his building for the first time that year . . .

However, the text at issue was written after the May 10th email, which addressed the fact that Respondent did not sign out of the building. It had nothing to do with her "presence in his building" or the fact that there was a preschool in Lafayette for the first time. Rather, it was the October 31st email that addressed the fact that the CST had not been at Lafayette since the beginning of the school year. It appeared that Respondent still harbored hostility toward Kriley for over six months because he had sent that October email, which stated in pertinent part that

> [A]s of Tuesday, October 31st, some members of the pre-K CST have not yet visited the classrooms, students, and teachers at Lafayette.

Reading this earlier email and reviewing Kriley's testimony as to why he sent it, this Arbitrator agreed with his testimony that, first of all, it was a friendly reminder and secondly, that as a principal he had a responsibility and an obligation to write to the CST since some of the members of the team had not visited his school during the first two months of the school year.

Respondent acknowledged that she had not visited Lafayette during September or October 2017 and her explanation was that she did not have any students assigned at Lafayette during those first two months. However, Respondent was the only psychologist on the preschool CST and she recognized that the 2017-2018 school year was the first year that there was a Pre-K program at Lafayette school. Despite this knowledge and the fact that there were nineteen students in this new Pre-K program at Lafayette, she contended that she "wasn't concerned" because of the competence of the teachers. Respondent further testified that she was not called to the school regarding a problem with a student but admitted that she did not even stop by the school to see how everything was going with the new program during the first two months of school. Her explanations were unreasonable and unacceptable.

On cross-examination, Respondent was also asked about her reaction to the May 10th email, B-4, and she testified that it made her angry because Kriley chose to include Strauss and Monaco in the email and that it was immediately after receiving this email from Kriley that she texted the CST. As noted above, even if Respondent's supervisor was copied on the email, this Arbitrator could not understand the level of Respondent's reaction to this polite email simply reminding Respondent to sign out from the main office.

Whatever level of shock, dismay and disapproval cited by Board witnesses was completely warranted in the opinion of this Arbitrator. A school district cannot tolerate a staff member threatening to HIB anyone and must be taken very seriously. Respondent claimed it was a joke; that she was blowing off steam but this Arbitrator asks, blowing

off steam because she was reminded politely to sign out when she leaves a building, a very reasonable directive? Battifarano and other Board witnesses acknowledged that teachers sometimes get upset with administrators and blow off steam. However, while Battifarano testified that he was not concerned about the first part of the text when Respondent wrote, "Fucking he emailed me . . . ass hat ... fucking tiny Napoleon complex . . . Ass" but that when Respondent wrote that she was going to "hib him" and that she wanted the other members of the CST to support her false allegations, he was shocked. Of course, he was afraid for his job because he himself had made some inappropriate comments but it was noted that after Respondent made those false allegations he wrote, "What?! Wait! What happened!" indicating to this Arbitrator that Battifarano recognized that Respondent had gone over the edge. Therefore, he went to Kriley that afternoon and reported the text exchange initiated by Respondent. Clearly, the full blame for the unacceptable, inappropriate text was Respondent's.

All three members of the text exchange were told not to discuss the matter. Yet, they all disregarded the directive to not discuss this matter with others, which was considered insubordination. Respondent claimed that tenure charges were filed against her, Linden received some level of discipline but Battifarano was not disciplined. Though this Arbitrator was not asked to assess the level of discipline for the other two people on the text, it was clear that Respondent was the initiator/instigator and wanted the others to back up her claim. Further, it was clear that Battifarno was very upset about what Respondent wrote, felt like Respondent was bulling and bossing him and, most

importantly, he was the only one of the group who reported this incident to Kriley that afternoon.

One does not know if Respondent would have carried out her threat but that is irrelevant. Rightfully so, the Board did not wait around to see if she would file a HIB complaint but rather placed Respondent on leave and immediately began an investigation to gather the facts before it filed the tenure charges.

Respondent cited a prior tenure matter in support of a lower level of discipline. However, this matter can be distinguished from Orleans Sarmiento and the School District of the Township of Saddle Brook Agency Docket # 79-4/17 in that a full and fair investigation was conducted in this matter and that all persons with knowledge of the incident were interviewed. In contrast, this Arbitrator concluded in Sarmiento

> that the Board did not fulfill its responsibility to conduct a fair and through (sic) investigation, did not interview all participants who would have had knowledge of Respondent's behavior in the class, did not give Respondent a copy of the text in question, did not contact Respondent after the investigation was completed as Riscica stated in his November 4, 2016 suspension letter to Respondent, did not select the students to be interviewed in a fair and impartial manner and did not supply the Board (sic) with all the interviews conducted or the evaluations/observations of Respondent with the tenure charges.

Of significance, and another differentiating factor from Sarmiento, was that Respondent's written threat put in jeopardy the reputation, professionalism and livelihood of a school principal and did damage to the District even if Respondent did not have the chance to actually follow through on her threat to HIB him. This in no way could be taken as a joke. To do so would have been irresponsible of the Board.

Finally, Policy 3351 provides that a single act of derogatory remarks would not be unacceptable conduct unless "it is especially severe and egregious." This Arbitrator must conclude that Respondent's behavior involving the text exchange must be considered a severe and egregious act and warrants termination for a single act. To not only threaten to falsely report a principal and to potentially end his career but also to try to coerce coworkers to lie for her and back up her false claim was severe enough on its own for the Board to file tenure charges.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that Conduct Unbecoming Charges One, Two, Three, Count 1 and c of Four and Five were proven.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

AWARD

The Board has proven Conduct Unbecoming Charges One, Two, Three, Count 1 and c of Four and Five by a preponderance of the evidence warranting tenure revocation and dismissal of Respondent.

Mattye M. Gandel

Mattye M. Gandel

Dated: February 1, 2019

State of New Jersey)
:SS
County of Essex)

On the 1st day of February, 2019 before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

MUSARRAT MOGHAL
Notary Public, State of New Jersey
My Commission Expires
January 20 2022

Arnold M. Mellk, Esq. (NJ Bar ID. No 272001971)
MELLK O'NEILL
51 E. Broad Street
Hopewell, NJ 08525
P:(609)-924-0700 / F: (609)-924-4622
Attorneys for Respondent Troy Soto

IN THE MATTER OF THE TENURE CHARGES AGAINST: TROY SOTO,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
	Agency Dkt. Docket No. 257-10/18
CITY OF TRENTON BOARD OF EDUCATION, MERCER COUNTY, NEW JERSEY	Before Melissa Biren, Arbitrator
	Administrative Action
	STIPULATION OF SETTLEMENT

The Trenton Public Schools (the "Board"), whose principal office is located at 108 N. Clinton Avenue, Trenton, New Jersey, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Troy Soto, having an address at 334 Harrison Street, Passaic, NJ 07055 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the Board as a teacher; and

WHEREAS the Board certified the above-captioned tenure charges regarding excessive absenteeism and incapacity to the Commissioner of Education of the State of New Jersey, and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Melissa Biren ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board having stringent budget limitations, and due to the expenditure of resources resulting from multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent voluntarily resigns from his employment without litigation and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the Board, which shall provide for his resignation from the Board effective end of day on May 24, 2019 ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be returned to the payroll (retroactively if necessary) from January 24, 2019, and will remain on the payroll through end of day on May 24, 2019. All salary paid for said period shall be subject to all applicable and mandatory salary withholdings and deductions, including, but not limited to health insurance premium contributions. Respondent will be recorded as an employee on administrative leave with pay between January 24, 2019 and May 24, 2019.

4. The Board shall provide Respondent with health insurance coverage until May 24, 2019. Pursuant to Chapter 78, Respondent shall be responsible for his employee contribution for all health insurance provided pursuant to this Stipulation of

Settlement. Respondent's required Chapter 78 contributions shall be deducted from the payments he will receive pursuant to Paragraph 3 of this Stipulation of Settlement.

5. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective May 24, 2019, is and shall be deemed a voluntary resignation-in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation.

6. The Board expressly reserves the right to oppose any application by Respondent for unemployment benefits. Notwithstanding any other term or condition of this Agreement, Respondent does not waive or release his right to seek unemployment compensation, his entitlement to which shall be determined by the State of New Jersey, Department of Labor and Workforce Development.

7. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. The Board acknowledges and represents that the allegations and evidence underlying the subject tenure charges addressed Respondent's alleged incapacity in the form of absenteeism occasioned by medical and/or other legitimate causes, and not any allegation of conduct unbecoming a teaching staff member, or other just cause.

8. As of the Effective Date, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

9. Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

10. In exchange for the consideration set forth in paragraphs 2, 3, and 4 above, the sufficiency of which is hereby acknowledged, Respondent, through the date of his resignation, hereby waives, releases and discharges any and all claims or rights that he has or may have against the Board, the Superintendent, its Board of Education and its members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as

amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent agrees to withdraw any and all other pending complaints or actions

that have been filed against the Board or any of its employees or representatives. This paragraph shall not apply to claims for unemployment compensation, or to claims for Workers' Compensation.

11. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

12. Respondent warrants that he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the Board or School Board. Further, Respondent agrees that he will not commence any legal proceedings against the Board or School Board arising from or relating to anything that has happened up to his date of resignation. Should any such

legal proceedings be commenced on Respondent's behalf, Respondent agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Respondent agrees that the Board and School Board shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the Board and School Board's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the Board or School Board based upon any of the above-released claims in Paragraph 3, Respondent agrees not to seek or accept any resulting relief whatsoever, in accordance with this paragraph. This paragraph shall not apply to claims for unemployment compensation.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which he is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that he will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of

the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. This agreement shall not constitute a precedent in any matters involving other Board employees.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive

jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

22. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of

this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

IT IS SO AGREED

TROY SOTO

Dated: 1.18.19

Troy Soto

TRENTON PUBLIC SCHOOLS
BOARD OF EDUCATION

Dated:_____

By:

Gene Bouie/Board President

Title:_____

CERTIFICATION

I, Troy Soto, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

01/18/2019 14:38 9736572282 GARY PHARMACY PAGE 01/03

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1·18·19

Troy Soto

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 1/30/19

Adam S. Herman, Esq.
ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the Trenton City Public Schools Board of Education

APPROVED:

Dated: 2/9/19

Melissa Biren, Arbitrator

01/18/2019 14:38 9736672282 GARY PHARMACY PAGE 02/03

EXHIBIT "A"

Troy Soto
334 Harrison Street
Passaic, NJ 07055

January 10, 2019

Dr. Frederick McDowell, Superintendent
Trenton Public Schools Board of Education
108 N. Clinton Avenue
Trenton, NJ 08609

Re: Letter of Resignation

Dear Superintendent McDowell:

Please accept this letter as my irrevocable resignation from employment with the Trenton City Public Schools, for personal reasons, effective at the close of business on May 24, 2019.

Very truly yours,

Troy Soto

1-18-19

cc: Arnold Mellk, Esq.

01/18/2019 14:38 9736572282 GARY PHARMACY PAGE 03/03

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH TROY SOTO

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement between Troy Soto and the Board of Education in regard to Docket No. 257-10/18 and

WHEREAS, the Board has voted on this date to accept the Settlement Agreement with Troy Soto; and

WHEREAS, the Board designates and authorizes the Board President to execute the Settlement Agreement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Settlement Agreement between Troy Soto and the Board of Education

Gene Bouie
Board President

Jayne S Howard
Jayne S. Howard
School Business Administrator/Board Secretary

January 28, 2019
ADOPTED

59-19

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Manchester Regional High School District, Passaic County,

Respondent.

Synopsis

Petitioner filed a *pro se* residency appeal on behalf of her child, seeking a determination that C.J. is entitled to a free public education in the Manchester Regional High School District. Petitioner contended that she and her daughter are domiciled within the respondent's school district, but that C.J. had filled out a form relating to school bus pickup that used the address of one of petitioner's other properties located in Paterson, NJ. The Board filed an answer stating that it had acted in accordance with the law in determining that C.J. was not eligible for a free public education in its school district. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case and a hearing was scheduled.

The ALJ found that: prior to the scheduled hearing date, petitioner sent correspondence stating that she had provided the school district with all of the required paperwork requested by the Board; petitioner also stated that she would like to close the case; the respondent Board subsequently advised the OAL that it will not seek tuition for C.J.'s attendance unless her residency circumstances change. Accordingly, the ALJ concluded that this is no longer a contested case before the OAL, and dismissed the matter.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter.

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 6, 2019

OAL Dkt. No. EDU 17954-18
Agency Dkt. No. 269-11/18

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Manchester Regional High School District, Passaic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision. In this matter, the petitioner is challenging the Manchester Regional Board of Education's determination that C.J. was not eligible to attend school in the District.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/06/19
Date of Mailing: 3/06/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 17954-18
AGENCY DKT. NO. 269-11/18

J.J. ON BEHALF OF C.J.,
Petitioner,
v.
MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, PASSAIC COUNTY,
Respondent.

J.J., petitioner, pro se

Rodney T. Hara, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: January 25, 2019 Decided: January 28, 2019

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Petitioner, J.J., filed a residency appeal on behalf of her child, C.J. Shortly thereafter the Board of Education of the Manchester Regional High School District

(Respondent) filed an Answer with the State Department of Education. The matter was transmitted to the Office of Administrative Law (OAL) on December 10, 2018, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was scheduled for April 3, 2018. Prior to the hearing date petitioner sent correspondence stating that C.J. has never missed a day and that she sent the required paperwork respondent requested. She also stated that she would like to close the case. On January 25, 2019, respondent sent correspondence stating that it will not seek tuition for C.J.'s attendance, unless the circumstances involving petitioners' residency subsequently changes. Said correspondence is attached hereto for reference.

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

January 28, 2019
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: January 28, 2019

Date Mailed to Parties:

ljb

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY
VITTORIO S. LAPIRA
STACEY THERESE CHERRY

JANET L. FIKE
AMY E. CANNING
NICHOLAS A. SOTO
ROBERT D. LORFINK
KERRY L. CUNNINGHAM
JOSEPH R. MARSICO

21-00 ROUTE 208 SOUTH
FAIR LAWN, NEW JERSEY 07410

(201) 791-3340
TELECOPIER (201) 791-3432

January 25, 2019

RECEIVED
2019 JAN 25 A 11:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Via E-Mail and Regular Mail

Honorable Joann LaSala Candido, A.L.J.
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: J.J. o/b/o a minor child, C.J. v. Passaic County Manchester Regional High School District Board of Education
OAL Docket No. EDU 17954-2018 N
Agency Ref. No. 269-11/18
Our File No. 73/1407

Dear Judge Candido:

We are in receipt of the petitioner's e-mail which informed the Passaic County Manchester Regional High School District Board of Education and Your Honor that she has decided to "close this case." In response, you had requested us to confirm that respondent will not be pursuing tuition for the student's attendance at Passaic County Manchester Regional High School. Please accept this letter as confirmation that respondent deems the matter resolved and will not seek tuition for C.J.'s attendance, unless the circumstances involving petitioner's residency subsequently changes.

If you should have any questions, please do not hesitate to contact us.

Thank you for your courtesies and cooperation.

With kind regards, we are

Respectfully Submitted,

FOGARTY & HARA

By: _____
Rodney T. Hara

RTH:lr
cc: Ms. Jenny Javier (via e-mail and regular mail)
Dr. Miguel Hernandez (via e-mail)
Superintendent of Schools
Mr. John A. Serapiglia, Jr. (via e-mail)
Business Administrator/Board Secretary

OAL Dkt. No. EDU 1517-18
Agency Dkt. No. 5-1/18

New Jersey Commissioner of Education

Decision

In the Matter of the Teaching Certificate of Sheila Tabonli, Central Jersey Prep Charter School, Somerset County.

This matter was returned to the Department for disposition as consequence of respondent's failure to appear at a January 28, 2019 telephone prehearing conference. Pursuant to *N.J.A.C.* 1:1-18.7(a), the Commissioner remands the matter to the Office of Administrative Law (OAL) for further action in accordance with *N.J.A.C.* 1:1-14.4(c), for the reasons stated herein.

In this case, the petitioner is seeking to have the respondent's certificate suspended pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her contract with petitioner. Notably, the clerk returned this matter to the Department because the respondent did not appear at the scheduled telephone conference. However, the petitioner – Central Jersey Prep Charter School, who was the appearing party – is entitled to a decision on the merits. *N.J.A.C.* 1:1-14.4(d).

Accordingly, this matter is remanded to the Office of Administrative Law for further action in accordance with *N.J.A.C.* 1:1-14.4(d).*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/07/19
Date of Mailing: 3/07/19

* If the petitioner no longer wishes to pursue this case, the petitioner should withdraw the matter once it is returned to the OAL.

61-19+

OAL Dkt. No. EDU 1517-18
Agency Dkt. No. 5-1/18

New Jersey Commissioner of Education

Corrected Decision

In the Matter of the Teaching Certificate of Sheila Tabanli, Central Jersey Prep Charter School, Somerset County.

This matter was returned to the Department for disposition as consequence of respondent's failure to appear at a January 28, 2019 telephone prehearing conference. Pursuant to *N.J.A.C.* 1:1-18.7(a), the Commissioner remands the matter to the Office of Administrative Law (OAL) for further action in accordance with *N.J.A.C.* 1:1-14.4(c), for the reasons stated herein.

In this case, the petitioner is seeking to have the respondent's certificate suspended pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her contract with petitioner. Notably, the clerk returned this matter to the Department because the respondent did not appear at the scheduled telephone conference. However, the petitioner – Central Jersey Prep Charter School, who was the appearing party – is entitled to a decision on the merits. *N.J.A.C.* 1:1-14.4(d).

Accordingly, this matter is remanded to the Office of Administrative Law for further action in accordance with *N.J.A.C.* 1:1-14.4(d).*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/09/19
Date of Mailing: 4/09/19

* If the petitioner no longer wishes to pursue this case, the petitioner should withdraw the matter once it is returned to the OAL.

OAL Dkt. No. EDU 15177-15
Agency Dkt. No. 246-9/15

New Jersey Commissioner of Education

Decision

Tom Zoccolo,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record, proposed 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 the Superintendent of Jersey City Public Schools signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the stipulation of settlement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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.

COMMISSIONER OF EDUCATION

Date of Decision: 3/07/19
Date of Mailing: 3/07/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 15177-15
AGENCY DKT. NO. 246-9/15

TOM ZOCCOLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorney)

John E. Croot, Esq., for respondent (Adams Gutierrez & Lattiboudere, attorneys)

Record Closed: September 12, 2018 Decided: January 18, 2019

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 18, 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. A copy of the Stipulation of Settlement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

January 18, 2019
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: _____

Mailed to Parties: _____

/mm

ADAMS GUTIERREZ & LATTIBOUDERE, LLC
The Legal Center
1037 Raymond Blvd, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Respondent,
Jersey City Public Schools

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2019 JAN 17 A 11: 55
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

TOM ZOCCOLO, Petitioner, v. JERSEY CITY PUBLIC SCHOOLS, Respondent.	OFFICE OF ADMINISTRATIVE LAW AGENCY REFERENCE NO.: 246-9/15 OAL DOCKET NO.: EDU 15177-2015N **STIPULATION OF SETTLEMENT**

The Jersey City Public Schools (the "District"), whose principal office is located at 346 Claremont Avenue, Jersey City, New Jersey 07305, and its successors, assignees, officers, employees, agents and representatives (collectively, "District"), and Tom Zoccolo ("Petitioner"), residing at 380 Line Road, Holmdel, New Jersey 07733, have voluntarily resolved all disputed matters in controversy between them and enter into the following Stipulation of Settlement in full and complete settlement of all outstanding issues as detailed below:

WHEREAS Petitioner is a tenured teaching staff member employed by the District as a teacher; and

WHEREAS the Parties intend to adopt, by way of compromise and accord, an amicable resolution of the Petition of Appeal; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties mutually agree as follows:

1. Upon final approval of the signed Stipulation of Settlement by the Judge, the Petitioner shall and hereby does withdraw the instant Petition of Appeal.
2. The District shall restore Petitioner's increment prospectively, thereby placing Petitioner on his proper step for the 2018-2019 school year as if his increment for the 2015-2016 school year had not been withheld.
3. Petitioner understands and agrees that, since this settlement is prospective, he will not be reimbursed for any salary he did not receive as a result of the increment withholding during the 2015-2016 through 2017-2018 school years.
4. This agreement shall not constitute a precedent in any matters involving other District employees.
5. The Parties each acknowledge that counsel has advised them regarding this Stipulation of Settlement and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.
6. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.
7. This Stipulation of Settlement shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education shall have exclusive jurisdiction

over any dispute arising from, in connection with, or related to this Stipulation of Settlement.

8. This Stipulation of Settlement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

9. This Stipulation of Settlement or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation of Settlement jointly prepared this Agreement.

10. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation of Settlement.

11. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

12. The parties agree that the terms of the settlement agreement are subject to approval by the Superintendent of Schools of the Jersey City Public Schools pursuant to authority given to her by the Jersey City Board of Education.

13. Additionally, this Stipulation of Settlement is subject to final approval by the Judge pursuant to N.J.A.C. 1:1-19.1, and will become effective only upon approval by the

Judge. Counsel for the Parties shall jointly request the Judge's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Petition of Appeal.

Dated: 10/3/18

TOM ZOCCOLO

Dated: 10/22/18

DR. MARCIA V. LYLES
SUPERINTENDENT OF SCHOOLS
JERSEY CITY PUBLIC SCHOOLS

63-19

OAL Dkt. No. EDU 4412-18
Agency Dkt. No. 75-3/18

New Jersey Commissioner of Education

Final Decision

Board of Education of the High Point Regional High School District, Sussex County,

Petitioner,

v.

Board of Education of the Township of Montague, Sussex County; Windsor Learning Center and School, Passaic County; and Willowglen Academy, Sussex County,

Respondents.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/07/19

Date of Mailing: 3/07/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04412-18
AGENCY DKT. NO. 75-3/18

BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY; WINDSOR LEARNING CENTER AND SCHOOL, PASSAIC COUNTY; WILLOWGLEN ACADEMY, SUSSEX COUNTY,

Respondents.

Douglas M. Silvestro, Esq., for petitioner (Busch Law Group, attorneys)

John B. Comegno, II, Esq., for respondent, BOE of the Twp. of Montague (Comegno Law Group)

Janelle Edwards-Stewart, Esq. for respondent Windsor Learning Center and School (Porzio, Bromberg & Newman, attorneys)

Richard Valenti, Esq., for respondent, Willowglen Academy (Morris, Downing and Sherred, attorneys)

Record Closed: February 11, 2019 Decided: February 14, 2019

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

On March 27, 2018, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

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

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

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

Alicia D'Anella, Esq., of The Comegno Law Group, P.C. provided a Stipulation of Dismissal with Prejudice for respondent BOE of The Twp. of Montague.

Janelle Edwards-Stewart, Esq., of Prozio Bromberg and Newman, P.C. provided a Stipulation of Dismissal with Prejudice as to respondent, The Windsor Learning Center and School.

Richard Valenti, Esq., of Morris, Downing and Sherred, LLP provided a Stipulation of Dismissal with Prejudice as to Willowglen Academy.

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

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

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

2/14/19
DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: 2/22/19

Date Mailed to Parties: 2/18/19

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND RELEASE

This Confidential Settlement Agreement and Release (the "Settlement") made this 20th day of November, 2018 by and among, MONTAGUE TOWNSHIP BOARD OF EDUCATION ("MONTAGUE"), together with its respective successors, assigns, attorneys, agents and all other persons or entities acting on its behalf,

and

HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION ("HIGH POINT"), together with its respective successors, assigns, attorneys, agents and all other persons or entities acting on its behalf. (High Point and Montague are hereinafter referred to as the "Parties".)

RECITALS

WHEREAS, on or about August 13, 2013, the Parties entered into a Sending/Receiving Agreement Contract ("Agreement") commencing with the 2014-2015 school year, and which was intended to run through the 2023-2024 school year, whereby Montague sends its students to High Point pursuant to the terms of the Agreement, and in exchange for the consideration set forth therein; and

WHEREAS, the Agreement provides that Montague will have financial responsibility for its special education students requiring placements outside the High Point Regional School District subject to certain pre-placement notice requirements; and

WHEREAS, a dispute has arisen with respect to whether Montague was responsible for the tuition for two of its students placed by High Point in out of district placements for the 17-18 school year, with one student placed at the Windsor Learning Center & School ("Windsor"), and the other student placed at the Willowglen Academy ("Willowglen"); and

WHEREAS, as a result of the dispute, High Point initiated a petition of appeal before the Commissioner of Education captioned High Point Regional School District Board of Education v. Montague Township School District, the Windsor Learning Center & School, and the Willowglen Academy, under OAL Docket No. EDU 04412-2018N (the "Litigation"); and

WHEREAS, as a result of the Litigation, both cross claims and counter claims have been asserted; and

WHEREAS, in addition to the Litigation, Windsor has brought a suit against High Point alleging breach of contract, and High Point has moved to add Montague to as a third party defendant, which action is presently pending in Superior Court under SSX-L-000379-18 (the "Windsor Litigation"); and

WHEREAS, High Point and Montague desire to amicably resolve the Litigation without further legal proceedings; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties agree as follows:

1. **Tuition Payment**

   A) Montague agrees to pay the 2017-2018 tuition for its student that attended Windsor, in the amount of $63,000.

   B) Montague agrees to pay the 2017-2018 tuition for its student that attended Willowglen, in the amount of $80,175.90.

   C) High Point agrees to pay the July 2018 tuition for Montague's student attendance at Willowglen, in the amount of $6,962.67.

D) Montague agrees to pay any increase in the 2017-2018 tuition amounts set forth herein should the certified tuition rate be determined to be higher than the amounts listed above, which reflect the estimated tuition rates, subject to compliance with the terms set forth in the respective tuition contracts, which are in the form promulgated by the New Jersey Department of Education.

E) Montague is responsible for and will pay the tuition for the student placed at Windsor for the 2018-2019 school year, contingent on the student remaining domiciled within the Montague Public School District. Montague reserves all rights, going forward, to object to the appropriateness of the placement, based on the student's needs in the future. Montague reserves all rights and waives no other claims, including but not limited to, claims arising from compliance with the student's IEP, compliance with the applicable tuition contract, and/or future compliance with the Agreement.

2. **Additional Consideration**. For the consideration contained herein, High Point Agrees not to oppose, hinder, or in any way obstruct any effort by Montague to terminate, withdraw from and/or not renew the Agreement, subject to the following terms:

A) Any action by Montague to terminate the Agreement shall not seek such termination prior to the end of the 2019-2020 school year.

B) High Point shall not be prohibited from providing data or documentation to the Commissioner of Education, requested as a result of Montague's efforts to terminate, withdraw from and/or not renew the Agreement.

3. **Release of Claims.** In consideration of the conditions and terms above, the Parties agrees as follows:

a. High Point, on its own behalf and on behalf of its officers, directors, shareholders, stockholders, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, employees, predecessors, successors in interest, and assigns, hereby completely releases and forever discharges Montague, and all of its respective past, present and future board members, officers, directors, attorneys, agents, insureds, servants, representatives, employees, administrators, managers, and assigns, from any and all claims, demands, obligations, actions, causes of action, rights, damages, costs, attorneys' fees, loss of services, loss of earnings, expenses and compensation of any nature whatsoever, whether based on tort, contract (express, implied or otherwise) or any other theory of recovery, and whether for compensatory or punitive damages, arising out of the tuition payments to Willowglen and Windsor for the 2017-2018 school year at issue in the Litigation and the Windsor Litigation.

b. Montague, on its own behalf and on behalf of its officers, directors, shareholders, stockholders, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, employees, predecessors, successors in interest, and assigns, hereby completely releases and forever discharges High Point, and all of its respective past, present and future board members, officers, directors, attorneys, agents, insureds, servants, representatives, employees, administrators, managers, and assigns, from any and

all claims, demands, obligations, actions, causes of action, rights, damages, costs, attorneys' fees, loss of services, loss of earnings, expenses and compensation of any nature whatsoever, whether based on tort, contract (express, implied or otherwise) or any other theory of recovery, and whether for compensatory or punitive damages, arising out of the tuition payments to Willowglen and Windsor for the 2017-2018 school year at issue in the Litigation and the Windsor Litigation.

4. **Successors and Assigns**. This Settlement shall bind and inure to the benefit of each Party, its officers, directors, shareholders, stockholders, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, employees, board members, predecessors, successors in interest, and assigns, separately and collectively.

5. **Warranties**. The Parties acknowledge, represent, warrant, affirm and confirm the following:

a. Each Party has read and understands the effect and scope of this Settlement, has relied and is relying solely upon its own judgment, belief and knowledge and/or upon the advice of its independent legal counsel as to the nature, extent, effect and consequences relating thereto.

b. This Settlement is being made without reliance upon any statement or representation by any other party hereto, except those expressly set forth herein.

c. No promise, inducement or agreement not herein expressed has been made to any of the Parties hereto.

d. Each individual signing this Settlement on behalf of a Party has the right, power and authority to sign and enter into this agreement on behalf of that Party and is competent to sign and enter into this agreement on behalf of that Party.

e. The Parties each execute and deliver this Settlement as a free and voluntary act, without any duress, coercion or undue influence exerted by or on behalf of any other party.

f. This Settlement is a valid, binding and enforceable agreement and does not violate any law, rule or regulation, or any contract or agreement to which any individual or entity on whose behalf this Settlement is executed is a party.

6. **Resolution of Other Claims**. The Parties agree that this Settlement is expressly contingent upon each party being able to fully and satisfactorily resolve any claims asserted against it by Willowglen and/or Windsor in the Litigation and/or the Windsor Litigation.

7. **Interpretation of Settlement**. This Settlement shall not be construed against any party on the basis that it or its attorney drafted it.

8. **Entire Agreement / Amendment**. This Settlement constitutes the entire agreement between the Parties with respect to its subject matter and there are no representations, warranties or agreements between the Parties not expressed herein. This Settlement supersedes and replaces all prior understandings and agreements between the Parties hereto, whether written or oral, express or implied, with respect to its subject matter. This Settlement may be amended or modified at any time or times only by written agreement of both Parties.

9. **Execution in Counterparts.** This Settlement may be executed simultaneously in several counterparts, each of which shall be deemed to be one and the same instrument.

10. **Facsimile/E-mail Signature.** Signature by facsimile or electronic mail transmission is acceptable and will be fully enforceable as an original document. Electronic facsimiles of signatures will have the same force and effect as original signatures.

11. **Forum Selection.** The Parties agree that all claims, disputes, and other matters arising out of or relating to this Settlement, or the breach thereof, will be decided by proceedings instituted and litigated in the Superior Court of the State of New Jersey, Sussex County Vicinage, or by Petition filed with the Commissioner of Education, as appropriate.

12. **Necessary Documents.** Prior to and at all times following the date of this Settlement, the Parties agree to execute and deliver, or to cause to be executed and delivered, such documents and to do, or cause to be done, such other acts and things as might reasonably be requested by the Parties, to assure that the benefits of this Settlement are realized by the Parties.

13. **Agreement Subject to Approval.** The Parties agree that this Settlement in contingent upon approval by both High Point and Montague.

14. **No Admission.** Both parties agree and acknowledge that this Settlement does not constitute an admission of any kind by either party.

[The remainder of this page is intentionally left blank]

THE UNDERSIGNED HAVE CAREFULLY READ THIS "SETTLMENT AGREEMENT AND RELEASE;" THEY HAVE READ, KNOW AND UNDERSTAND ITS CONTENTS; THEY FREELY AND VOLUNTARILY AGREE TO ABIDE BY ITS TERMS, AND ARE FULLY AUTHORIZED TO SO AGREE AND BE BOUND; AND THEY HAVE NOT BEEN COERCED INTO SIGNING THIS AGREEMENT.

MONTAGUE TOWNSHIP SCHOOL DISTRICT

Witness George Hagl
Print or type name:
Acting Bus Adm. /Bd. Secretary

By: Glen A. Piotsky, President

HIGH POINT REGIONAL SCHOOL DISTRICT

Witness JAMES MINKLEWICZ
Print or type name:

By: Kyle Vealey

EXTRACT FROM THE MINUTES OF
A MEETING OF THE BOARD OF EDUCATION
OF HIGH POINT REGIONAL HIGH SCHOOL
COUNTY OF SUSSEX, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of High Point Regional High School in the County of Sussex, NJ, convened in public session on November 20, 2018, in the High School Cafeteria:

Members Present: Mrs. Anderson, Mr. Dunn, Mr. Vealey, Mr. Voitcu, Mr. Notaro, Ms. Kymer
Members Absent: Mr. Miller, Mr. Kehoe, Mr. Antlciff

Board member, Mrs. Anderson made a motion seconded by Mr. Dunn and carried by a unanimous roll call vote, to approve the following:

I. LEGAL

1. BE IT RESOLVED, that the Board hereby approves the **settlement agreement** in the matter of High Point Regional School District Board of Education v. Montague Township School District, et al, OAL Docket No. EDU 04412-2018N, and authorizes the Board's administration and Board Attorney to take all appropriate steps necessary to carry out this action of the Board.

ROLL CALL VOTE:
AYES: 7
NOES: 0
ABSTENTIONS: 0
ABSENT: 2

STATE OF NEW JERSEY)
) ss.:
COUNTY OF SUSSEX)

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

James Minkewicz, being first duly sworn on oath, deposes and says:
That deponent is the Board Secretary of the Board of Education of High Point Regional High School in the County and State aforesaid and that the annexed extract from the minutes of a meeting of the Board of Education of the School District held on November 20, 2018 at the time and place therein stated has been compared by deponent with the original minutes of the meeting recorded in full in the official Minute Book of the Board and is a true copy thereof and of the whole of the original so far as it relates to the subject matters referred to in this extract.

SEAL

James Minkewicz
Business Administrator/Board Secretary

Sworn by me on this 20th day of November, 2018

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Agency Docket No.: 216-8/18

In the Matter of the TENURE Hearing between

The BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, NEW JERSEY

PETITIONER

and

ROXANNE JASTRZEMBSKI,

RESPONDENT

BEFORE: **Ira Cure, Esq.**
Arbitrator

APPEARANCES

For the Petitioner School District:
Joseph G. Antinori, Esq.
Brown & Connery, LLP

For the Respondent:
Cosmas P. Diamantis, Esq.
Zeller & Wieliczko, LLP

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges alleging inefficiency brought by the Petitioner Board of Education of the City of Camden ("District") against Roxanne Jastrzembski ("Respondent") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on August 30, 2018. An answer was filed by the Respondent with the DOE on September 11, 2018. On September 17,

2018 Samantha L. Price, the DOE's Director of the Office of Controversies and Disputes, appointed me to hear this dispute. I conducted hearings at the offices of the District's attorneys Brown & Connery, LLP 360 Haddon Avenue, Westmont, New Jersey on October 17, 19, 29, 31, November 2, 6 and December 3, 2018[1]

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted briefs and the record was closed as of February 11, 2018. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Joseph G. Antinori, of the firm of Brown & Connery, LLP represented the District. Cosmas P. Diamantis, Esq., of the firm of Zeller & Wieliczko, LLP represented the Respondent.

RELEVANT STATUTORY PROVISIONS

> 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) 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,

[1] A hearing scheduled for November 27, 2018 was adjourned at the request of the parties.

or other just cause, and then only after a hearing held pursuant to this sub-article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

N.J.S.A. 1SA:6-17.2. Considerations for arbitrator in rendering decision.

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

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

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

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

(4) the district's actions were arbitrary and capricious,

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed. The evaluator's determination as to the quality of an employee's classroom performance shall not be

subject to an arbitrator's review.

c. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

d. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

N.J.S.A. I 8A:6-I 7.3. Evaluation process, determination of charges.

25. a. Notwithstanding the provisions of N.J.S. I 8A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S. 18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the

commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.I 8A:6-117 et al.).

THE CHARGE

TENURE CHARGE AGAINST ROXANNE JASTRZEMBSKI

I, Katrina T. McCombs, M. Ed., Acting State Superintendent of the Camden City School District ("the District"), charge that Roxanne Jastrzembski ("Jastrzembski"), a tenured teacher, should be dismissed from employment for inefficiency.

Background

1. The Camden City Board of Education entered into a Consent Order with the Commissioner of Education in March of 2013 to allow for full State intervention to begin on the last day of the school year in June 2013. The State of New Jersey began operating the Camden City School District ("the District") on June 26, 2013. In accordance with the newly enacted "Teacher Effectiveness and Accountability for the Children of New Jersey Act" ("TEACHNJ"), one of the critical initiatives upon state intervention was a thorough assessment of all teachers within the District.

Charge: Inefficiency (TEACHNJ N.J.S.A. 18A:6-17.3)

2. The District brings this inefficiency charge against Jastrzembski pursuant to N.J.S.A. 18A:6-17.3 based on her two consecutive "partially effective" summative evaluations.

TEACHNJ Legislation

3. Beginning in the 2013-2014 academic year, the TEACHNJ legislation and accompanying regulations (AchieveNJ) were implemented statewide in New Jersey. In part, that law pertains to the evaluation process for tenured teachers and the subsequent process of removal for inefficiency.

4. On January 4, 2017, changes to the AchieveNJ requirements for the evaluation of tenured teachers were adopted for use in the 2016-2017 academic year.

Practical Portion: The Danielson Framework

5. The statute requires that only certain Department of Education approved practice evaluation rubrics be used in the evaluations of teachers. The Camden City School District has opted to use the Charlotte Danielson Framework for Teaching evaluation rubric which has been approved by the NJ State Department of Education.

6. The Charlotte Danielson Evaluation Rubric identifies four (4) domains which are to be evaluated: (1) planning and preparation; (2) classroom environment; (3) instruction; and (4) professional responsibilities. Each of these domains includes a number of subdomains. Under the rubric, employees are scored in each subdomain on a scale of 1 to 4, 1 being "ineffective," 2 being "partially effective," 3 being "effective," and 4 being "highly effective." All subdomain scores within a particular domain are then averaged, yielding the employee's score for that domain. In turn, the scores from each domain are averaged, yielding the employee's overall score for the practical portion of the summative evaluation score (Teacher Practice score). In the Camden City School District, the practical portion of the overall evaluation was weighted at 85% of the total summative rating for the 2016-2017 and 2017-2018 academic years.

7. Teachers and evaluators in the District received training and instruction with regard to the Danielson evaluation rubric.

8. During the 2016-2017 and 2017-2018 academic years, information regarding the evaluation process including observation information, pre- and post-conference information, summative ratings, etc. was recorded and stored in the TeachBoost software program.

9. All teachers and evaluators received training and instruction with regard to the TeachBoost program.

Student Growth Achievement Portion: Student Growth Objectives (SGOs) and Median Student Growth Percentile (mSGP)

10. In addition to the practical portion of the teacher's summative rating, N.J.A.C. 6A:10-4.1(c) and N.J.A.C. 6A:10-4.2 require that each rating also include a measure of student achievement, including mSGP and/or student growth objective(s) ("SGO") scores.

11. In the Camden City School District, the student growth achievement measure was weighted at 20% of the overall score for the 2015-2016 academic year and at 15% of the total rating for the 2016-2017 academic years.

Year 1: The 2016-2017 Evaluation Process and Requirements

Practical Portion

12. During the 2016-2017 academic year, N.J.A.C. 6A:10-4.4(c) required that tenured teachers be observed at least two (2) times in the first year with each observation lasting at least twenty (20) minutes.

13. Jastrzembski was observed two (2) times during the 2016-2017 academic year on the following dates by the following evaluators:

    a. Short Observation #1: 11/29/16 by Jonathan Taylor
    b. Short Observation #2: 5/17/17 by Jonathan Ogbonna

    See attached documents stamped CCSD RJ 000001 through CCSD RJ 0010.

14. Upon information and belief, each observation lasted for at least the required twenty minutes. Id.

15. N.J.A.C. 6A:10-4.4(b) requires that each evaluator conduct a post-observation conference not more than fifteen (15) teaching staff member working days after the observation.

16. It is the practice of District evaluators to conduct post-observation conferences within the timeframe required and, upon information and belief, each evaluator conducted post-observation conferences in accordance with the regulation. Id.

17. N.J.A.C. 6A:10-4.4(c) requires that at least one observation in an academic year be announced and preceded by a pre-observation conference.

18. Upon information and belief, in the 2016-2017 academic year, Jastrzembski participated in a pre-conference which was in compliance with the timing requirements set forth in the regulations.

19. N.J.A.C 6A:10-4.4(c) also requires that at least one teacher observation occur during the first half of the school year and that at least one occur during the second half of the school year.

20. At least one of Jastrzembski's observations occurred in the first half of the school year and at least one occurred in the second half.

21. All of Jastrzembski's evaluators electronically signed the observation reports they completed.

22. Finally, in addition to reviewing each of the observation reports at the post-observation conferences, all the teachers in the District, including Jastrzembski, had access to

them as soon as they were uploaded via Teachscape and continued to have such access throughout the remainder of the academic year.

23. Jastrzembski's summative calculation of the practical portion for the 2016-2017 academic year was a "2.36." See attached documents stamped CCSD RJ 0024.

Student Growth Achievement Portion

24. Pursuant to N.J.A.C. 6A:10-4.1(b)-(c) and N.J.A.C. 6A:10-4.2, each teacher shall have a measurement of student growth achievement, including MSGP and/or SGO scores.

25. Jastrzembski's summative calculation of SGO scores for the 2015-2016 academic year were a "3.27" and "2.35." See attached documents stamped CCSD RJ 0020 through 0024.

2016-2017 Summative Rating/Conference

26. After weighing each component of the evaluation, Jastrzembski's summative rating was calculated to be "2.52" which is only "partially effective." See attached documents stamped CCSD RJ 0024.

27. Pursuant to N.J.A.C 6A:10-2.4(f), a summative conference must be held and both the teacher and supervisor must sign the summative evaluation within five (5) days of such conference. In this case, a conference was held on June 20, 2017 and the summative form was signed by Jastrzembski's supervisor that same day.." See attached documents stamped CCSD RJ 0024-25.

Professional Development

28. During the 2016-2017 academic year, and in years prior thereto, all teachers were provided with professional development opportunities both generally and specific to the areas of improvement needed for each teacher individually.

Corrective Action Plan

29. A teacher rated "partially effective" or "ineffective" on his or her summative evaluation during an academic year is required to be placed on a corrective action plan ("CAP") pursuant to N.J.A.C 6A:10-2.5(a). During the 2016-2017 academic year, the CAP was required to be created prior to October 31st of the next academic year. Id.

30. Jastrzembski's CAP was created on June 20, 2017 and, upon information and belief, both the teacher and the supervisor participated in its creation. See attached documents stamped CCSD RJ 0026 through 0032.

Year 2: The 2017-2018 Evaluation Process and Requirements

Practical Portion

31. During the 2017-2018 academic year, N.J.A.C. 6A:10-2.5(h) required that teachers on a CAP be observed at least three (3) times with each observation lasting at least twenty (20) minutes. Additionally, multiple (more than one) evaluators must perform observations of a teacher on a CAP. N.J.A.C. 6A:10-2.5(i).

32. Jastrzembski's was observed three (3) times in the 2017-2018 academic year on the following dates by the following evaluators:

    a. Short Observation #1: 10/23/17 by Nichole Harrington
    b. Short Observation #2: 2/16/18 by Jonathan Taylor
    c. Short Observation #3: 4/11/18 by Lynn Price Jones

See attached documents stamped CCSD RJ 0033 through 0039-72.

33. Upon information and belief, each observation lasted at least the required twenty minutes and Jastrzembski's was evaluated by more than one evaluator during the 2017-2018 academic year. Id.

34. N.J.A.C. 6A:10-4.4(b) requires that each evaluator conduct a post-observation conference not more than fifteen (15) working days after the observation.

35. It is the practice of District evaluators to conduct post-observation conferences within the timeframe required and, upon information and belief, each evaluator conducted such post-observation conferences in accordance with the regulation. Id.

36. N.J.A.C. 6A:10-4.4(c) requires that at least one observation in an academic year be announced and preceded by a pre-observation conference.

37. Upon information and belief, in the 2017-2018 academic year, Jastrzembski's participated in a pre-conference, which was in compliance with the timing requirements set forth in the regulations. See attached documents Bates stamped CCSD RJ 0033 and 39-72.

38. N.J.A.C 6A:10-4.4(c) also requires that at least one teacher observation occur during the first half of the school year and that at least one occur during the second half of the school year.

39. Upon information and belief, at least one of Jastrzembski's observations occurred in the first half of the school year and at least one occurred in the second half.

40. All of Jastrzembski's evaluators electronically signed the observation reports they completed.

41. Finally, in addition to reviewing each of the observation reports at the post-observation conferences, all the teachers in the District, including Jastrzembski, had access to them as soon as they were uploaded via the TeachBoost program and continued to have such access throughout the remainder of the academic year.

42. Jastrzembski's summative calculation of the practical portion for the 2017-2018 academic year was a "2.24." See attached documents stamped CCSD RJ 0077-78.

Student Growth Achievement Portion

43. Pursuant to N.J.A.C. 6A:10-4.1(b)-(c) and N.J.A.C. 6A:10-4.2, each teacher shall have a measurement of student growth achievement, including mSGP and/or SGO scores.

44. Jastrzembski's summative calculation of SGO scores for the 2017-2018 academic year were a "1.87" and a "2.17." See attached documents stamped CCSD RJ 0077-78.

Corrective Action Plan

45. As previously indicated, a teacher who was rated "partially effective" or "ineffective" during an academic year is required to be placed on a corrective action plan ("CAP") pursuant to N.J.A.C. 6A:10-2.5(a) for the next academic year. During the year for which the CAP applies, the teacher and the supervisor are required to meet midway between the development of the CAP and the expected receipt of the annual summative rating in order to review the teacher's progress toward the goals outlined in the CAP. N.J.A.C. 6A:10-2.5(g).

46. Jastrzembski and her supervisor upon information and belief had a mid-year CAP conference.

Professional Development

47. During the 2016-2017 and 2017-2018 academic years, and in years prior thereto, all teachers were provided with professional development opportunities both generally and specific to the areas of improvement needed for each individual teacher.

2016-2017 Summative Rating/Conference

48. After weighing each component of the evaluation, Jastrzembski's summative rating was calculated to be "2.21," which is partially effective. See attached documents stamped CCSD RJ 0077-78.

49. Pursuant to N.J.A.C. 6A:10-2.4(f), a summative conference must be held and both the teacher and supervisor must sign the summative evaluation within five (5) days of such conference. In this case, a conference was held on 6/18/18 and the summative

form was signed by Jastrzembski and her supervisor on that same day. See attached documents stamped CCSD RJ 0077-90.

Conclusion: Inefficiency

50. The District has evaluated Jastrzembski in accordance with the law and provided her with the tools to be successful. Nonetheless, she has shown to be both unable or unwilling to improve.

51. Due to Jastrzembski's two consecutive "partially effective" rating for the 2016-2017 and 2017-2018 academic years, the District must bring this tenure charge against her. Accordingly, the District submits that Jastrzembski should be dismissed for inefficiency.

FACTS

A. Background

In 2012, the New Jersey State Legislature enacted TEACHNJ. *N.J.S.A.* 18A:6-117. The statute is designed to raise student achievement in part by requiring school districts to adopt evaluative techniques to provide feedback to teachers. *N.J.S.A.* 18A:6-118(b). Under TEACHNJ the State Board of Education was directed to set standards for the evaluation of teachers and requires boards of education to adopt "evaluation rubrics," for analyzing teacher effectiveness. The statute requires that educators be rated as "ineffective," "partially effective," "effective," or "highly effective." *N.J.S.A.* 18A:6-123(b)(1) & (c). The statute went into effect in the 2013-2014 school year. *N.J.S.A.* 18A:6-123(e).

The District adopted the Danielson Framework for evaluating teachers. Under the Danielson Framework, teachers are evaluated in four separate domains, with each domain having sub-domains. (D Ex. 173).[2] The four domains are: Domain 1: Planning and Preparation; Domain 2: The Classroom Environment; Domain 3: Instruction; and

[2] District's exhibits are denoted as: (D Ex. #). Respondent's exhibits are denoted as (R Ex. #). However, the "#" sign for the Respondent's exhibits refers to the bate stamp page and not a tab.

Domain 4: Professional Responsibilities. Under the Danielson Framework, teachers are scored in each subdomain on a scale of 1 to 4, 1 being "ineffective," 2 being "partially effective," 3 being "effective," and 4 being "highly effective." All subdomain scores within a particular domain are then averaged, yielding the employee's score for that domain. In turn, the scores from each domain are averaged, yielding the employee's overall score for the practical portion of the summative evaluation score which is generally calculated at the end of the school year.

Nicholas Pillsbury ("Pillsbury") is the District's Implementation Manager for Evaluation. Mr. Pillsbury's duties require him to manage the District's evaluation procedures. (Tr. 11-12). Mr. Pillsbury trains principals and lead educators[3] in the requirements of the Danielson Framework. (Tr. 64; P Ex. 9). There is also a document provided by the District entitled: "Camden City School District Teacher Evaluation Overview." (District Ex. 50). In order to create a certain consistency in scoring under the Danielson Framework, principals and lead educators are required to do two co-observations a year so that they may "norm" their results. (Tr. 97). Observations may be announced or unannounced. Generally, at least one observation must be announced. (Tr. 315).

In addition to the Danielson Framework, teachers are also evaluated on how successful they are in meeting student growth objectives or "SGOs." Teachers are required to create SGOs at the beginning of the school year, and they undergo training in creating the SGOs and in the Danielson Framework. (Tr. 19, 26-27, 62-63). SGOs are in part measured by how well students perform on quizzes ("District Office Quizlets" or

[3] Lead educators are similar to vice-principals. (Tr. 203).

"DOQs") and other examinations. (Tr. 17-19). In addition, the District utilizes web-based platforms to store and create evaluation documents. This proceeding concerns the 2016-2017 school year and the 2017-2018 school year. In 2016-2017, the District utilized a web-based platform called Teachscape and in the 2017-2018 school year the District utilized a web-based platform called TeachBoost. (Tr. 13, 24). These platforms were used to keep track of data for students and teachers.

B. The Respondent and the H.B. Wilson School

The Respondent has been employed by the District for 16 years. (Tr. 649). The Respondent has a bachelor's degree in psychology and elementary education and a master's degree in curriculum and instruction. (Tr. 647). The Respondent also holds an elementary education certificate, a middle school social studies certificate, a psychology certificate, and is highly qualified for middle school science. (Tr. 648). Since 2004, the Respondent has taught science to grades 6 through 8. (Tr. 650). Beginning in 2014, and at all times relevant to this proceeding, the Respondent was assigned to the H.B. Wilson School. ("H.B. Wilson"). (Tr. 651). H.B. Wilson is a family school that teaches students from pre-school to the eighth grade. (Tr. 651). H.B. Wilson occupies a two-story building with middle school students located on the second floor. (Tr. 674).

H.B. Wilson has 8 periods per day. There is no transition time between periods, and no bells signify the change of periods. (Tr. 654-655). Teachers are generally required to escort their students from one class to another. (Tr. 658).

During the period relevant to this proceeding, the following individuals had supervisory responsibility over the Respondent at H.B. Wilson: Janna Johnson ("Johnson"), Jonathan Taylor ("Taylor"), Jonathan Ogbonna ("Ogbonna"), Nicole Harrigan

("Harrigan"), and Lynne Price-Jones (Price-Jones). Mr. Taylor had been H.B. Wilson's Operations Manager and in January 2016, Mr. Taylor became a Lead Educator at H.B. Wilson. Mr Taylor observed the Respondent on November 29, 2016 and February 16, 2018. (Tr. 475-476, 488-489, 506). Ms. Harrigan is currently the Principal of H.B. Wilson. Ms. Harrigan observed the Respondent on October 23, 2017. (District Ex. 16). In the Spring of 2017, Ms. Johnson[4] the Principal of H.B. Wilson was on leave and Dr. Ogbonna was temporarily assigned as the Principal of H.B. Wilson from April to June 2017. Dr. Ogbonna observed the Respondent on May 17, 2017. (Tr. 312). Ms. Price-Jones is employed by the District as a Senior Lead-Educator of Math and Science for grades K-8 who observed the Respondent on April 11, 2018. (Tr. 202, 237).

In March of 2016, the Respondent broke her wrist at a school event. This resulted in a successful claim for Worker's Compensation. (Tr. 681). That summer, the Respondent broke her ankle. As a result of this second injury, the Respondent missed the first six weeks of school and did not begin teaching in the 2016-2017 school year until October 10, 2016. (Tr. 662). Also, as a result of this second injury, the Respondent had problems with mobility, and required the use of a knee scooter. (Tr. 671). Because of her injuries and the need for physical accommodations, the Respondent had a "504 Plan" in effect[5]. The Respondent testified that her physical limitations had a negative impact on some of her observations. (Tr. 868, 870-871). These observations are discussed below.

The Respondent is also active in her union, the Camden Education Association ("CEA"). During the 2016-2017 school year, the Respondent was the middle school representative to the CEA'S Executive Council. (Tr. 891). The Respondent was on the

[4] None of Ms. Johnson's observations of the Respondent are relevant to this proceeding.
[5] A "504 Plan" is a reference to § 504 of the Rehabilitation Act of 1973.

CEA's negotiating committee, and she took part in a class-wide grievance alleging that the members of the bargaining unit were not getting proper step increases. (Tr. 903-904). Members of the H.B. Wilson administration were aware of the Respondent's union activities. (Tr. 904-905).

C. The 2016-2017 School Year

When the Respondent returned to work on October 10, 2016, she was given a permanent classroom, and she was assigned to teach two fifth grade and two sixth grade science classes. (Tr. 661). Mr. Taylor observed the Respondent on November 29, 2016. Pursuant to the Danielson Framework and as a result of his observation Mr. Taylor gave the Respondent the following scores:

Domain 1: Demonstrating Knowledge of Content and Pedagogy	3
Demonstrating Knowledge of Students	2
Selecting Instructional Outcomes	3
Demonstrating Knowledge of Resources	3
Designing Coherent Instruction	2
Domain 2: Creating an Environment of Respect and Rapport	3
Establishing a Culture for Learning	2
Managing Classroom Procedures	2
Managing Student Behavior	2
Domain 3: Communicating with Students	3
Using Questioning and Discussion Techniques	1
Engaging Students in Learning	3
Using Assessment in Instruction	2

(D Ex. 2). Domain 4 concerns Professional Responsibilities and permits teachers to upload evidence of continued professional development and training. Domain 4 is generally not scored at the time of the observation. (Tr. 761).

The Respondent testified that she thought that her scores were inappropriate, because there was a lack of specified evidence for some of her scores, and that Mr. Taylor

ignored the fact that some of the Respondent's students were getting settled when Mr. Taylor began his observation[6]. (Tr. 720, 727-728, 730-731).

On February 21, 2017, Mr. Taylor provided the Respondent with her Domain 4 ratings. Mr. Taylor gave the Respondent the following scores:

Domain 4: Reflecting on Teaching	3
Maintaining Accurate Records	2
Communicating with Families	2
Participating in a Professional Community	3
Growing and Developing Professionally	3

(D Ex. 5 p. CCSD RJ 0016). The Respondent disputes the veracity of the evidence underlying some of these scores and notes that at the time she had not yet been trained on the TeachBoost system, so some documents had not been finalized. (Tr. 761-764).

On May 17, 2017, Dr. Ogbonna observed the Respondent. Pursuant to the Danielson Framework and as a result of his observation, Mr. Ogbonna gave the Respondent the following scores:

Domain 1: Demonstrating Knowledge of Content and Pedagogy	3
Demonstrating Knowledge of Students	3
Selecting Instructional Outcomes	3
Demonstrating Knowledge of Resources	3
Designing Coherent Instruction	3
Domain 2: Creating an Environment of Respect and Rapport	2
Establishing a Culture for Learning	1
Managing Classroom Procedures	1
Managing Student Behavior	1
Domain 3: Communicating with Students	3
Using Questioning and Discussion Techniques	1
Engaging Students in Learning	1
Using Assessment in Instruction	1

(D Ex. 3)

[6] I am aware that under TEACHNJ that I have only limited discretion in analyzing the content of any particular observation, unless there is evidence in support of the enumerated statutory defenses. *N.J.S.A.* 18a:6-124(b).

The Respondent testified regarding numerous problems concerning Dr. Ogbonna's observation. The Respondent contends that the start of her class was delayed because the teacher in the prior class was occupying the classroom. In addition, a technician was in the classroom repairing one of the computers that was supposed to be used in the lesson. This required the Respondent to reassign seats for her students. Next the Respondent had to hand out materials to some students who had forgotten their binders. Then it became apparent that the materials which were prepared by the District, had been inverted in some of the binders. The Respondent testified that even though she checked that the material was complete, she stated that there was no way that she could have known that certain binders had inverted materials. Within fifteen minutes of the class commencing, a surprise announcement came over the loudspeaker directing honor roll students to attend a special assembly. At that point, one third of the class left the room. The Respondent was required to write a hall pass for each of the students attending the assembly. The Respondent notes that the more computer savvy students were leaving the classroom. Next, the Respondent had to pass out laptop computers to certain students. The laptop computers had to be checked to make sure they were functional. In addition, certain students had difficulty logging in and others who were able to log in had problems with pop-up blockers. The pop-up blockers prevented the students from accessing the material. At this point, the class was almost over, so the Respondent was required to collect the laptops. The Respondent admits that during the twenty minutes that Dr. Ogbonna observed her class, she was unable to effectively teach her lesson and was unable to engage with her students as she intended. (Tr. 736-754).

In her post-observation discussion with Dr. Ogbonna in which she pointed out the difficulties she had in teaching the class Dr. Ogbonna observed, the Respondent asked Dr. Ogbonna to refocus his scores or to provide her with an additional observation. (Tr. 752, 756-757). The Respondent also provided a written rebuttal to Dr. Ogbonna's observation. (D Ex. 4). The Respondent testified that Dr. Ogbonna said he was not permitted to accommodate the Respondent's requests.

In his testimony, Dr. Ogbonna stated that he concluded that, at the time of his May 17, 2017 observation, the Respondent's classroom was disorganized, and that she was essentially unprepared. (Tr. 323-325). Dr. Ogbonna stated that a new observation was inappropriate, and that the reasons for a new observation posited by the Respondent "did not carry weight." Although he acknowledged in his testimony that students did leave the class, and that there was a technician present, Dr. Ogbonna reasoned that the Respondent still should have been able to instruct her class. He concluded that there was no need to change the scores on the observation. (Tr. 330-331). In his testimony Dr. Ogbonna posited that if there is a fire drill or some other emergency, then a re-observation should be conducted. However, Dr. Ogbonna rejected the notion that the interruptions experienced by the Respondent merited a re-observation. (Tr. 354).

On June 13, 2017, Mr. Taylor provided the Respondent with her year ending Domain 4 scores. Mr. Taylor provided these scores instead of H.B. Wilson Principal Janna Johnson ("Johnson") who was on leave. (Tr. 499). The Respondent's Domain 4 scores were:

Domain 4: Reflecting on Teaching	3
Maintaining Accurate Records	3
Communicating with Families	3
Participating in a Professional Community	4
Growing and Developing Professionally	3

(D Ex. 5 p. CCSD RJ 0018).

Regarding the Respondent's SGO's for the 2016-2017 school year, the Respondent was given a weighted score of 3.45 for both her fifth and sixth grade students. (D Ex. 6). The Respondent's SGO scores and her scores under the Danielson Framework are listed in their data form. The form, in turn, indicates the weight given to each piece of data in the calculation of the final rating: 85% for the Teacher Practice scores under the Danielson Framework and 15% for the SGO. Both scores are then combined in a "Summative Report." On June 20, 2017, Mr. Taylor provided the Respondent with her Summative Report which gave the Respondent a score of 2.52. The Summative Report stated in pertinent part:

Student Growth Score		
Component	Weight	Score
SGO Scores	100%	3.45
	15% (of total)	3.45
Teacher Practice Score		
Component	Weight	Score
Planning and Preparation	30%	2.82
Classroom Environment	20%	1.75
Instruction	30%	1.88
Professional Responsibilities	20%	3.00
	85%	2.36
Final Score-Partially Effective		2.52

(D Ex. 7).

Under TEACHNJ, teachers who are found to be partially effective are placed on a Corrective Action Plan or "CAP." *N.J.A.C.* 6A: 10-2.5. Had the Respondent scored a 2.65 or higher she would have been deemed effective, and not placed on a CAP. (Tr. 163).

D. The 2017-2018 School Year

The Respondent's CAP was prepared by Mr. Taylor on June 20, 2017. (D Ex. 8). The CAP set forth a number of areas in which the Respondent was required to improve. Throughout the 2017-2018 school year, the Respondent was to be coached by Ms. Harrigan, H.B. Wilson's new principal. In addition, the Respondent was expected to reduce disciplinary referrals. (Tr. 161). The Respondent testified that neither Ms. Harrigan nor Mr. Taylor complied with certain of the CAP requirements.

For example, the Respondent testified that her supervisors were supposed to check each of her lesson plans, and to make sure she provided exit tickets to her students[7]. The Respondent testified that she was supposed to receive a mid-year CAP review before February 15, 2018 in order to make any necessary adjustments in her teaching. She states however, that she did not receive the mid-year CAP review until April 9, 2018. (Tr. 781). The Respondent also testified that, although initially Ms. Harrigan provided weekly coaching sessions at the start of the 2017-2018 school year, these sessions soon stopped and were replaced by passing comments and emails. (Tr. 833-836). Ms. Harrigan testified that she communicated repeatedly with the Respondent, especially to address, the Respondent's classroom management deficiencies. (Tr. 160-162). Ms. Harrigan also testified that she frequently walked through the Respondent's classes. (Tr. 184). In addition, Ms. Harrigan stated that she provided additional

[7] Exit tickets are questions for students to determine if they understand the material for a particular lesson. (Tr. 599).

professional development to the Respondent, and arranged for the Respondent to observe other teachers, or have other teachers observe the Respondent. (Tr. 172-173, 188-189, 962, 1059, 1066).

In the 2017-2018 school year, the Respondent only taught two classes of sixth grade students[8]. (Tr. 644). H.B. Wilson's other science teacher taught four or five classes. (Tr. 1119). Respondent and witnesses who testified on behalf of the Respondent stated that the sixth-grade students had behavioral issues, and that behavior problems were in part exacerbated by Ms. Harrigan's apparent intention not to suspend students. (Tr. 697, 1017-1019, 1037-1039, 1061-1062). The Respondent also testified that she was given limited resources and students were unable to effectively access material. (Tr. 864-865).

Supervisors are to observe teachers under a CAP at least three times during the school year. The Respondent's first observation, in the 2017-2018 school year, was conducted by Ms. Harrigan on October 23, 2017. The Respondent testified that her students were not properly equipped for this lesson because they lacked the necessary math skills. In addition, the Respondent testified that the science curriculum was designed for students in the eighth grade not for students in the sixth grade. (Tr. 793-794). The Respondent testified that she informed Ms. Harrigan, Ms. Price-Jones and Mr. Taylor about these issues, but the issues were not addressed. (Tr. 795). In addition, prior to her observation, the Respondent alerted Ms. Harrigan that materials from the District arrived late and that her class was behind as a result. (Tr. 798-799). Pursuant to the Danielson Framework, Ms. Harrigan gave the Respondent the following scores:

[8] During the rest of the school day, Respondent assisted other teachers and ran the robotics club. (Tr. 665).

Domain 1: Demonstrating Knowledge of Content and Pedagogy	3
Demonstrating Knowledge of Students	3
Selecting Instructional Outcomes	3
Demonstrating Knowledge of Resources	3
Designing Coherent Instruction	2
Domain 2: Creating an Environment of Respect and Rapport	3
Establishing a Culture for Learning	2
Managing Classroom Procedures	2
Managing Student Behavior	2
Organizing Physical Space	3
Domain 3: Communicating with Students	2
Using Questioning and Discussion Techniques	2
Engaging Students in Learning	2
Using Assessment in Instruction	2
Demonstrating Flexibility and Responsiveness	2

(D Ex. 16).

Ms. Harrigan was critical of the Respondent's ability to control her class. Ms. Harrigan testified that the Respondent should have been able to correct the behavioral issues, and that the Respondent should have used the classroom strategies recommended by Ms. Harrigan in coaching sessions. (Tr. 409-412).

Mr. Taylor conducted the Respondent's next observation on February 16, 2018. (Tr. 801, D Ex. 18). This observation was unannounced. (Tr. 801). At the time the observation occurred, and as a result of her earlier injury, the Respondent was having difficulty walking up and down stairs. On that date, the Respondent's students had a gym class immediately before Respondent's class. Ms. Harrigan had previously instructed the gym teacher to escort the Respondent's students to the Respondent's classroom. However, on February 16th there was a substitute gym teacher who was apparently unable to or unaware that he was required to escort the students to the Respondent's classroom. After waiting some time for her students to arrive at her classroom, the

Respondent took the elevator down to the first floor to the gym where her students were playing. After some difficulty lining the students up, the students finally were transported to the Respondent's classroom. Thus, the class began twenty-two minutes late. Some students were already waiting for the Respondent in the classroom when she arrived with the students she had accompanied from the gym. (Tr. 807-809). The Respondent concedes that she was unable to properly instruct that day. (Tr. 810-811). Although the Respondent gave the class an exit ticket, the exit ticket had nothing to do with the aborted lesson but concerned behavior. (Tr. 811-813).

In response to questions posed during cross-examination, Mr. Taylor described why the class started twenty-two minutes late:

> Q. Was the respondent supposed to escort her students to this class?
>
> A. I have a question before I answer that. Was her 504 in effect during that this time?
>
> Q. I'm not – I can't – answer questions.
>
> A. Okay. So all right that's fine. Usually the gym teacher will walk the students up. So I know during this point in time Ms. J [the Respondent] wasn't picking students up.
>
> Q. So your testimony is she did not pick students up on this day?
>
> A. No in this lesson she did, but she wasn't directed to pick the students up.
>
> Q. Someone else was to bring them to class?
>
> A. Probably the gym [teacher] yes.
>
> Q. Do you know why they didn't bring them to class?
>
> A. I am not sure. I wasn't there.

Q. So the respondent had to go and get the students and bring them back to this class?

A. She went and got them. I don't know if she was directed to do that. But she went and got – she went and picked the students up.

Q. I guess my question is, why is the fact she had to go get her students and is now 20 minutes late to her class evidence of ineffective management procedures?

A. Because if you have students that are already inside the classroom without their teachers, students running in from the hallway, then when you come into the classroom, students not participating or on task, that is ineffective. That is classroom procedure. That's how your students.

Q. How is the fact that she is late to class with her students evidence of ineffectiveness?

A. Because a procedure, if she picked her students up, you have to be able to transport your students in the class. That's part of the procedure. So if its taking you 20 minutes to do that, then you're not, your procedures aren't clear.

Q. Even if it's not her responsibility to do that?

A. As I said, if she picked her students up, then she picked her students up. I can't go back and say I directed her to pick the students up, because that did not occur.

(Tr. 549-552).

Pursuant to the Danielson Framework, Mr. Taylor gave the Respondent the following scores:

Domain 1: Demonstrating Knowledge of Content and Pedagogy	3
Demonstrating Knowledge of Students	2
Selecting Instructional Outcomes	2
Designing Coherent Instruction	1
Designing Student Assessments	1
Domain 2: Creating an Environment of Respect and Rapport	1
Establishing a Culture for Learning	1
Managing Classroom Procedures	1

	Managing Student Behavior	1
	Organizing Physical Space	2
Domain 3:	Communicating with Students	2
	Using Questioning and Discussion Techniques	2
	Engaging Students in Learning	2
	Using Assessment in Instruction	1

(D Ex. 18).

In a post-observation report, Mr. Taylor was extremely critical of the Respondent's management of student behavior. (D Ex. 19). The Respondent testified that Mr. Taylor directed her to change her answers in her response to the post-observation report and threatened to give her an ineffective rating in Domain 4a. (Tr. 819-821; D Ex. 19). Mr. Taylor denies threatening the Respondent. (Tr. 563).

Ms. Price-Jones observed the Respondent on April 11, 2018. The observation was unannounced. At the time, the Respondent's class was split in two because it was easier to control behavior issues. The Respondent testified that on the day before the observation, Mr. Taylor asked her to change her lesson. The Respondent testified that this resulted in lower scores because Ms. Price-Jones determined that the Respondent failed to adhere to her lesson plan. (Tr. 821-824). The Respondent testified regarding certain mistakes of fact concerning complaints by parents that were purportedly contained in Ms. Price-Jones' Domain 4 scoring[9].

Pursuant to the Danielson Framework, Ms. Price-Jones gave the Respondent the following scores:

[9] The Respondent admitted that she had difficulty communicating with one parent. (Tr. 831).

Domain 1:	Demonstrating Knowledge of Content and Pedagogy	2
	Selecting Instructional Outcomes	2
	Designing Coherent Instruction	2
Domain 2:	Creating an Environment of Respect and Rapport	2
	Establishing a Culture for Learning	2
	Managing Classroom Procedures	3
	Managing Student Behavior	2
Domain 3:	Communicating with Students	3
	Using Questioning and Discussion Techniques	2
	Engaging Students in Learning	2
	Using Assessment in Instruction	3

(D Ex. 20).

The Respondent also testified about the measurement of her SGOs for the 2017-2018 school year. The Respondent attended a Professional Development class in which she was instructed in new methods for developing SGOs. The Respondent stated that the calculation of the SGOs was changed to reflect student achievement rather than growth. The Respondent stated that this was inappropriate because students in science classes were not given a base test against which to measure achievement. (Tr. 846). As noted above, SGOs were partially made up of DOQs, which were issued every two to three weeks. The Respondent testified that her class materials arrived late, and that her first DOQ was not issued until October. (Tr. 850). At the beginning of the 2017-2018 school year, the Respondent designed six separate SGOs. The Respondent testified that SGOs should be approved by October 31st of the school year, but that the Respondent did not learn whether her SGOs had been approved until the end of the year. (Tr. 855). However, the District required one simple SGO for the Respondent's classes. Mr. Pillsbury testified that all science teachers were held to the same standard. (Tr. 1070-1078), and that the

Respondent refused to adhere to the District's method for calculating SGOs. The District gave the Respondent an SGO score of 2.02. (D Ex. 25).

On June 18, 2018, Ms. Harrigan and Mr. Taylor provided the Respondent with her Summative Report and gave the Respondent a score of 2.21 or partially effective. The Summative Report stated in pertinent part:

Student Growth Score		
Component	Weight	Score
SGO Score	33.33%	1.87
SGO Score	33.33%	2.17
SGO Score	33.33%	
	15%	2.02
Teacher Practice Score		
Component	Weight	Score
Planning and Preparation	30%	2.21
Classroom Environment	20%	1.93
Instruction	30%	2.08
Professional Responsibilities	20%	2.85
	85%	2.24
Final Score	Partially Effective 100%	2.21

The Respondent did not agree with this evaluation and appealed. Nevertheless, because the Respondent was found to be only partially effective as a teacher for two consecutive years on August 16, 2018 the District as required by statute charged the Respondent with Inefficiency. *N.J.S.A.* 18A: 17.2(a)(1) and (b). (Joint Ex. 1). Respondent timely contested the charge of Inefficiency (Joint Ex. 2). On August 28, 2018, the District filed a Certificate of Determination with the Commissioner of Education crediting the evidence in support of the charge of Inefficiency, and this arbitration followed.

POSITIONS OF THE PARTIES

A. The Respondent's Position

i. General Arguments

The Respondent notes that under TEACHNJ, a pedagogue may challenge inefficiency charges based on whether the:

> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

N.J.S.A. 18A:6-17.2(A)(1)-(4). The Respondent also notes that in order to succeed under one or more of the statutory defenses, an arbitrator must find that the defenses materially affected the outcome of the evaluation. *N.J.S.A.* 18A:6-17.2 (b). The standard of proof is a preponderance of the credible evidence. (Respondent's Brief at 56 *citing, Pugliese v. State-Operated School District of the City of Newark, Essex County,* 2016 N.J. AGEN LEXIS 19).

In her defense, the Respondent emphasizes the "arbitrary and capricious" standard, and notes that the phrase has been defined by the Courts as having no rational basis, evidencing willful and unreasoning action, without consideration and in disregard of the circumstances. (Respondent's Brief at 56 *citing, Bayshore Sewage Co. v. Dept. of Envtl. Protection,* 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37

(App. Div. 1974)).

In addition, the Respondent cites three arbitration awards in which arbitrators refused to sustain charges of inefficiency against pedagogues because the employer's actions were arbitrary and capricious. (Respondent's Brief at 56-60 *citing, In re Gay Brown v. City of Camden,* Agency Docket No. 300-10/14 (Bucheit Arb.) (District did not adhere to its evaluation and support system before bringing tenure charges and evaluators evaluated the teacher "without any serious consideration [of] the context in which the performance occurred."); *Patsy Cuntera v. Passaic County Vocational School District,* Agency Docket No. 223-8/15 (Gandel Arb.) (District's failure to consider the circumstances underlying a teacher's performance was arbitrary and capricious); *Joel Dawkins v. City of Newark,* Agency Docket No. 277-9-15 (Bluth, Arb.) (method of observing teacher did not provide the teacher with the opportunity to implement change and was arbitrary and capricious)).

ii. Observations during the 2016-2017 School year

The Respondent next analyzes each of the observations in the 2016-2017 school year. Concerning Mr. Taylor's November 29, 2016 observation of the Respondent, the Respondent contends that the observation was arbitrary and capricious and contained numerous mistakes of fact. In addition, the Respondent contends that Mr. Taylor failed to support certain of his conclusions with any evidence. The Respondent also argues that Mr. Taylor failed to consider the magnitude of behavioral issues that the Respondent faced. The Respondent also asserts that Mr. Taylor failed to participate in the required two co-observations, a process which is designed to promote accuracy in scoring. (Respondent's Brief at 63 citing, *N.J.A.C.* 6A:10-2.2(B)(4)(i)). As such, the Respondent

calls Mr. Taylor's skill as an evaluator into question. Accordingly, the Respondent maintains that she did not receive a fair, accurate or comprehensive evaluation.

Regarding Dr. Ogbonna's May 17, 2017 observation, the Respondent contends it too was arbitrary and capricious because it violated evaluation procedures and contained numerous mistakes of fact. In addition, the Respondent maintains that Dr. Ogbonna "failed to properly consider significant disruptions that were out of Respondent's control and significantly compromised her lesson." (Respondent's Brief at 63). The Respondent notes that she received all effective scores from Dr. Ogbonna in Domain 1 for Planning and Preparation. The Respondent goes on to argue that serious disruptions prevented her from teaching her lesson as planned. These disruptions included: 1) a late start to the class; 2) a technician repairing a computer at a student's desk; 3) students' failure to bring their binders to school; 4) the inversion of the material prepared by the District in the binders; 5) the departure of honor roll students after the class began; 6) difficulties in passing out the laptop computers; and 7) attendant problems with logging in and pop ups. The Respondent contends that Dr. Ogbonna should have taken these issues into account and that he did not, and he refused to give the Respondent another observation. The Respondent also contends that student behavioral issues should have been considered by Dr. Ogbonna. Regarding Domain 3 "Instruction," the Respondent notes that Dr. Ogbonna was critical of the fact that no instruction or discussion occurred in the classroom but contends that Dr. Ogbonna failed to give any consideration to the disruptions in the classroom. The Respondent maintains that Dr. Ogbonna's evaluation was arbitrary and capricious.

As to the Respondent's Domain 4 scores, the Respondent contends that she was

treated unfairly. The Respondent notes that, because of her injury, she started school late in the year and was unable to upload documents into TeachBoost. The Respondent disputes some of the factual findings in her 2016-2017 Domain 4 scores.

iii. Observations in the 2017-2018 School Year

The Respondent contends that Ms. Harrigan's October 23, 2017 observation was arbitrary and capricious, violated evaluation procedures and contains mistakes of fact. Respondent contends that Ms. Harrigan did not consider the fact that the students received their materials late, and that the curriculum required Respondent's students to have math skills which they did not possess. The Respondent also maintains that Ms. Harrigan failed to provide evidence for several of her entries in the Danielson Framework.

With respect to Mr. Taylor's February 18, 2018 observation, the Respondent contends that it was arbitrary and capricious. The Respondent contends that Mr. Taylor failed to consider the significant disruptions that occurred during that particular class, and the fact that the class started twenty-minutes late, because the substitute gym teacher failed to transfer the students to the Respondent's classroom. The Respondent notes that Mr. Taylor gave negative Domain scores to the Respondent resulting from the tardy start to the class, even though the late start was not the Respondent's fault. The Respondent maintains that the lateness was caused by the Respondent's inability to use the stairs (as evidenced by the Respondent's 504 Plan), and that Mr. Taylor should have taken that into account. The Respondent also contends that Mr. Taylor relied on several mistakes of fact in analyzing the various Domains under the Danielson Framework. Finally, the Respondent asserts that Mr. Taylor was not properly trained in the Danielson Framework, because he did not partake in two co-observations where he could norm scores with his

fellow evaluators.

The Respondent also contends that the observation by Ms. Price-Jones was arbitrary and capricious. The Respondent notes that Ms. Price-Jones' observation was unannounced and that the Respondent had been directed to change her lesson just days prior to Ms. Price-Jones observation. As such, the Respondent's lesson plan did not conform to her lesson and the Respondent contends that this affected her scores. The Respondent also asserts that Ms. Price-Jones should have considered the behavioral problems in the class that Ms. Price-Jones was observing.

Finally, the Respondent contends that her Domain 4 scores for the 2017-2018 school year were based on mistakes of fact regarding the Respondent's interaction with a parent.

iv. The CAP

The Respondent maintains that the CAP was ineffective and was not followed by the administration. The Respondent notes that in the 2016-2017 school year the Respondent was found to be effective in sub-Domains 1E and 1F, and contends that the District required her to improve on this aspect of her CAP. The Respondent also notes that her supervisors in the 2107- 2018 school year – Mr. Taylor and Ms. Harrigan – were required to check each of the lesson plans and to collect exit tickets but failed to do so.

The Respondent also contends that she did not receive the coaching sessions called for under the CAP, and that sometime after October 2016, Ms. Harrigan stopped meeting weekly with the Respondent. In addition, the Respondent notes that under the CAP, she should have undergone a mid-year CAP review by February 15, 2017 but did not receive this review until April 9, 2018. This was just two days before her final

observation of the year by Ms. Price-Jones.

The Respondent also notes that she was expected to reduce disciplinary referrals, however, the Respondent contends that her classes had well-documented disciplinary problems. The Respondent maintains that her obligation to reduce disciplinary referrals was an effort to set her up for failure.

Respondent contends that, had she been provided with a meaningful opportunity to improve, she would not have received a partially ineffective score on her 2017-2018 Summative Report. Therefore, the Respondent contends that the application of the CAP was arbitrary and capricious.

v. Lack of Student Discipline

The Respondent also contends that the administration generally, and Ms. Harrigan's policies specifically, undermined her ability to receive higher scores under the Danielson Framework. The Respondent points to the testimony of several witnesses who support her conclusion that the 2017-2018 sixth grade class contained numerous students with discipline problems, and that this contributed to her inability to be scored as effective.

vi. The SGOs in the 2017-2018 School Year

The Respondent maintains that the District's evaluation policy regarding the SGOs in the 2017-2018 school year violated applicable state regulations. The Respondent notes that under *N.J.A.C.* 6A:10-4.2 (e) (3)-(4): "Each teacher shall develop in consultation with his or her supervisor or a principal's designee, each student growth objective [,] 'which shall be determined, recorded, and retained by the teacher and his or her supervisor by October 31 of each academic year.'" The Respondent contends that nothing limits the

teacher's discretion in formulating SGOs when the teacher is working on a CAP. (Respondent's Brief at 82). The Respondent notes that the *NJDOE SGO Guidebook* provides that multiple measures should be used to determine a student's starting points, and that assessments should be vetted so that students are not improperly advantaged or disadvantaged.

The Respondent contends that the District improperly predetermined the SGO for teachers regardless of grade or subject. The Respondent also contends that the SGOs should be customized to each student and should be adjusted over the course of a school year. The Respondent maintains that Mr. Taylor ignored the SGOs that the Respondent had created for her students and did not speak to the Respondent about the SGOs until the end of the school year.

The Respondent posits that had she been permitted to adopt her SGOs, she would have received higher scores in that category. The Respondent contends that because the District was not in compliance with the DOE guidance regarding SGOs that it acted arbitrarily and capriciously.

vii. Allegations that the Respondent was Terminated for Discriminatory Reasons

The Respondent contends that she was discriminated against because she: 1) successfully claimed Worker's Compensation Benefits; 2) worked under a 504 Plan; and 3) engaged in union activities.

The Respondent contends because of her physical restrictions she was placed on a 504 Plan, and that this directly affected her February 16, 2018 observation by Mr. Taylor. The Respondent contends that Mr. Taylor should have understood that Respondent's inability to escort her class resulted in her class starting twenty-two minutes

late. The Respondent also notes that Mr. Taylor was aware that the Respondent had filed a Worker's Compensation claim.

Finally, the Respondent vigorously argues that she is being penalized by Mr. Taylor and Ms. Harrigan for her active involvement in the CEA.

The Respondent contends that she should be reinstated to her position with full back-pay.

B. The District's Position

The District contends that it understood and applied the requirements of TEACHNJ when it made the determination to dismiss the Respondent. The District notes that the Respondent has the burden of proving both her statutory defenses and that any alleged deficiency "materially" affected the outcome of the evaluation process. The District contends that the Respondent is elevating form over substance by resorting to a rigid interpretation of TEACHNJ, that would not permit any deviation by the District. The District maintains that all the administrators who observed the Respondent came to the same conclusion that the Respondent could not manage her classroom and that students were regularly failing.

The District analyzed each of the Respondent's purported defenses.

i. Alleged Failure to Adhere to the Evaluation Process

The District maintains that the Respondent must demonstrate that the District substantially failed to adhere to the evaluation process. (District Brief at 10, *citing, N.J.S.A* 18a:17.2(b)). The District points to the testimony of each of its witnesses to argue that the District both understood the TEACHNJ evaluation process, and that it properly implemented the evaluation process. In addition, the District contends that it recognized

that the CAP is not a punishment for teachers but a tool to identify the support that a teacher requires.

As to the SGOs, the District notes that the Respondent contends that the SGOs: 1) were improperly prepared by the District; 2) were not finalized until the end of the school year; and 3) prohibited her from tiering her students for purposes of measurement. The District contends that the Respondent offered no evidence that the instructions that the District provided violated DOE regulations. The District contends that the Respondent refused to adhere to the instructions given to her at a Professional Development training in the fall of 2017 regarding the calculation of SGOs. Instead the Respondent created six different SGOs - none of which conformed to the instructions she received from the District. The District contends that a school principal has the final word on how SGO scores are calculated. The District notes that under the regulations:

> (e) Student growth objectives shall be developed and measured according to the following procedures:
>
> * * * * * * *
>
> 3. Each teacher shall develop, in consultation with his or her supervisor or a principal's designee, each student growth objective. If the teacher does not agree with the student growth objectives, the principal shall make the final determination.

N.J.A.C. 6A:10-4.2 (e)(3). The District also notes that all science teachers had the same growth objectives. The District relies on an arbitration award concerning this District. In the case cited by the District, a principal had approved a teacher's SGO. After the principal learned that the District had not approved this method for calculating the SGO, the principal began using the approved SGO. Use of the District's SGO resulted in the teacher

receiving a partially effective score[10]. The arbitrator found that even though the principal made a mistake in approving the original SGO, he nevertheless held that the District had the final say in determining how to calculate the SGO score. (District's brief at 17 *citing, In the Matter of the Proceeding Between Gerri A. Chapman and State Operated School District of the City of Camden,* Agency Docket No. 249-9/16 (Dec. 13, 2016) (Zirkel, Arb.)).

As to the CAP, the District contends that Ms. Harrigan in fact completed a mid-year CAP review with the Respondent. The District contends that Ms. Harrigan coached the Respondent both formally and informally. The District also points to certain inconsistencies in the Respondent's position. The District notes that the Respondent claimed that she was not getting enough support, but also complained that she received direction and coaching from Ms. Harrigan and others, and that she could not implement that advice because her students were so badly behaved. The District contends that the Respondent's assertion that she was not coached properly is a red herring.

The District posits that the discipline issues at H.B. Wilson were no more serious than at other Camden schools. The District maintains that it was the Respondent's classroom management that was the source of her problems. The District also notes that teachers who testified in support of the Respondent were able to manage their classes in an effective manner. (Tr. 1120-1122).

The District notes that the Respondent submitted rebuttals to her observations, and the Respondent contends that her rebuttals were not considered by the evaluators. The District contends, however, that this argument is a difference of opinion, and that evaluators took the Respondent's rebuttals seriously, and in fact Ms. Price-Jones

[10] Had the teacher been permitted to use the SGO she selected, she would have received an effective score.

changed one of the Respondent's scores. (T. 275). The District maintains that evaluators are not required to agree with the Respondent. The District also notes that the evaluators each gave the Respondent scores of "1" and "2." The District cites TEACHNJ for the proposition that arbitrators are required to defer to the evaluator's opinion. (District's brief at 21 *citing, N.J.S.A.* 18A: 6-17.2 (c).

The District also maintains that the Respondent received adequate training on TeachBoost. In addition, the District rejects the Respondent's contention that the CAP was insufficiently drafted, and notes that in answers to interrogatories that she submitted that the Respondent never actually identified the deficiencies in the CAP.

The District argues that it substantially adhered to the evaluation process.

ii. Allegations of Mistakes of Fact and Allegations of Arbitrary and Capricious Decision Making

The District denies that the evaluators made mistakes of fact or acted arbitrarily and capriciously. The District characterizes the Respondent's arguments as a kitchen sink approach. The District notes that the Respondent is particularly critical of the observations by Mr. Ogbonna and Mr. Taylor's observation dated February 16, 2018[11]. While conceding that disruptions occurred during their observations, the District notes that both observers concluded that the Respondent did not adequately manage the situation.

The District contends that both observers properly exercised their discretion in refusing to change the Respondent's score or to give her another observation. The District characterizes this as a difference of opinion. The District maintains that under the

[11] Mr. Taylor also observed the Respondent on November 29, 2016.

statutory scheme I am not empowered to dispute the determinations reached by Mr. Ogbonna and Mr. Taylor. The District notes that both Ms. Harrigan and Ms. Price-Jones reached similar conclusions regarding the Respondent's teaching skills.

The District also rejects the Respondent's contention that the various observations lacked evidence to support its conclusions. The District contends that the collection of evidence in observation reports is not a statutory or regulatory requirement under TEACHNJ. The District also contends that there is no obligation to present evidence contained in observation reports in a particular format. (District's brief at 24 *citing, N.J.A.C.* 6A:10-4.1 and *N.J.A.C.* 6A:10-4.4). The District also cites to testimony by Mr. Pillsbury, in which Mr. Pillsbury said that nothing in the "Camden City School District Teacher Evaluation Overview" for the period 2016-2017 requires the observer to write down evidence in an observation report. The District contends that if the Respondent's position is accepted, evaluators would be required to prepare lengthy evaluation reports, and arbitrators would have to sift through each report and determine if there is evidence to support each score.

The District also rejects the Respondent's argument that her evaluators had to engage in at least two co-observations per year. The District notes that the purpose of the co-observations is to "norm" the observers to prevent substantially different evaluation results and contends that the co-observation has nothing do with the scores of a particular teacher. The District concedes that Mr. Taylor mistakenly thought that he was required to have one co-observation but argues that all four of Respondent's observers came to similar conclusions about Respondent's classroom performance.

The District also notes that the Respondent raised issues concerning Mr.

Ogbonna's evaluation, and the fact that the honor roll students were removed from the class. The District cites testimony by Mr. Taylor who thought the removal of the students would have a positive effect because there were fewer students to teach. (District's brief at 25 *citing,* Tr. 566-567). The District also cites the testimony of Mr. Pillsbury who stated that the removal of the students midway through a lesson should have no effect on the scores since the Danielson Framework focuses on practice and delivery and not the quality of the student. (District's brief at 25 *citing,* Tr. 645-646).

iii. Alleged Union Activities and Discrimination

The District characterizes the Respondent's arguments that she was discriminated against because she received an accommodation for her physical condition, or because of her union activities as speculative and frivolous. Regarding her physical condition, the District notes that the Respondent only taught two classes in the 2017-2018 school year so that she could work on her CAP. In addition, the District notes that the Respondent was relieved of her lunchroom duties because of her injuries.

The District also contends that the evaluators were unaware of the Respondent's union activities or of her Worker's Compensation claim.

iv. The District's Conclusion

The District argues that the four evaluators all reached the same conclusion: that the Respondent was not effective in classroom management. The District also points out that the Respondent's students were receiving failing grades on tests and quizzes. The District notes that other teachers did not have the same degree of difficulty with these students. The District also contends that Ms. Harrigan provided the Respondent with support throughout the 2017-2018 school year when the Respondent was on the CAP.

The District maintains that it takes the TEACHNJ mandates seriously, and that it faithfully applied its mandate to the Respondent. Therefore, the District contends that the Respondent should be removed.

DISCUSSION

A. The Legal Standard

The burden in this case is on the District to prove by a preponderance of the evidence that the statutory criteria for the tenure charges have been met. The record evidence reveals that the District has met this burden. Where the District has met its burden, the burden then shifts to the Respondent to affirmatively prove that she has a defense to the Tenure charges brought against her. The Respondent must prove at least one of four defenses to successfully overcome a charge of Inefficiency.

The statute provides:

> 23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:
>
> (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;
>
> (2) there is a mistake of fact in the evaluation;
>
> (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
>
> (4) the district's actions were arbitrary and capricious.

N.J.S.A. 18A:6-17.2(A)(1)-(4).

This is a challenging burden for a Respondent. As the District has argued, an

arbitrator's role is limited, and he or she is not empowered to evaluate the quality of the evaluations. *Patsy Cuntera v. Passaic County Vocational School District,* Agency Docket No. 223-8/15 (Gandel Arb.). In reviewing the record evidence, I conclude that the Respondent has not met her burden and that she is not entitled to the benefit of any of the four statutory defenses. The Defenses raised by the Respondent will be discussed *seriatim.*

B. The Defense of Failing to Adhere to the Evaluation Plan

This defense fails because the District has convincingly established that it has adhered to the evaluation process mandated by TEACHNJ. The District has adopted the Danielson Framework for evaluating teachers. *N.J.S.A* 18a:17.2 The District has also established that both teachers and supervisors are trained in the application of the Danielson Framework. In addition, the District has established that, when it placed the Respondent on the CAP, it took its responsibilities seriously and worked with the Respondent to provide coaching and assistance.

Despite the contentions of the Respondent, the District has shown that Ms. Harrigan coached the Respondent during the 2017-2018 school year. In addition, the Respondent was only assigned two classes, instead of the four or five classes that other science teachers were assigned to teach. Ms. Harrigan also arranged for the Respondent to observe other teachers, and have other teachers work with the Respondent to improve the Respondent's performance.

The Respondent also challenged the way SGOs were calculated during the 2017-2018 school year. The Respondent argues that she should have been given flexibility to create her SGOs. The Respondent not unreasonably argues that unlike other subjects

there is no base line for measuring student achievement in science. However, as the District has shown, the final decision regarding SGOs rests with the school principal pursuant to guidance from the District. There is no dispute that all of the District's science teachers were given identical guidance for calculating SGOs. Therefore, the Respondent cannot successfully argue that she should have the discretion to create her own SGO. This is especially true because Respondent was working pursuant to a CAP and was required to comply with the requirements imposed by the District.

C. The Defense of Mistake of Fact During the Evaluation

The Respondent argues that her evaluations in both the 2016-2017 and 2017-2018 school years contained mistakes of fact. The burden is on the Respondent to establish that the mistakes of fact had a material impact on the evaluation. *N.J.S.A.* 18A:6-17.2 (b). Although the Respondent contends that her observers made mistakes of fact regarding her lessons, the Respondent has not shown that these purported mistakes had a material impact on any of her evaluations.

D. The Discrimination Defense

The burden is on the Respondent to show that the charges of Inefficiency would not have been brought but for discriminatory animus or for her union activities. In this case, the Respondent contends that she was discriminated against for: 1) successfully filing a Worker's Compensation claim; 2) exercising her right to seek accommodations and work under a 504 Plan; and 3) union activities.

Although the Respondent has established that she was a union member, and that at least some of her supervisors knew of her union activities, the Respondent has not shown that the District's knowledge of the Respondent's union activities motivated the

District to terminate the Respondent. Public sector employees are protected by the New Jersey Employer-Employee Relations Act. *N.J.S.A.* 34:13A-1 et. seq. Under the Act, it is illegal to discriminate against a public employee for union activities. However, if an employee is to successfully contend that his or termination was for Union activity, he or she must establish that the termination was substantially motivated by anti-union animus. *In re Bridgewater Tp.,* 95 N.J. 235 (1984). (Court adopts the *Wright Line* test applied under the National Labor Relations Act that employee must show that termination was made more likely than not by anti-union animus).

There is also no evidence that the District discriminated against the Respondent because she successfully brought a Worker's Compensation claim or because she was working under the 504 Plan. Indeed, the record shows a concerted effort by Ms. Harrigan and, to a lesser extent, by Mr. Taylor to accommodate the Respondent's physical limitations.

Accordingly, I conclude that the Respondent has not proved that she was discriminated against in violation of *N.J.S.A.* 18A:6-17.2(3).

E. The Arbitrary and Capricious Defense

As the Respondent notes, in order to meet the arbitrary and capricious standard, the Respondent must prove that the actions of the Department constituted "willful and unreasoning action, without consideration and in disregard of the circumstances." *Bayshore Sewage Co. v. Dept. of Envtl. Protection,* 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super 37 (App. Div. 1974). However, "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been

reached." *Id. citations omitted.* As noted above, by statute, I must defer to the conclusions of the evaluators, and I am precluded from substituting my judgment for that of the authors of the evaluations. The statute specifically states: "The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." *N.J.S.A.* 18a:6-17.2(23) (c).

As the District argues, the purpose of TEACHNJ is "to streamline the cumbersome tenure charge process which previously made it so difficult for school districts to remove non-performing teachers." (District Brief at 1). The District contends that it should not have to justify every decision nor should it have to defend every instance "where the 'i' was purportedly not dotted, or the 't' was supposedly not crossed." Id. The District is not required to create perfect laboratory conditions for each observation. The DOE makes it clear that in analyzing the arbitrary and capricious defense, arbitrators "may only consider . . . whether the **charge** is arbitrary and capricious." State of New Jersey, Department of Education, *Summary of Legal Requirements for Teacher Evaluation and Tenure Cases,* (emphasis supplied).

Therefore, although the Respondent has raised concerns regarding her evaluations, especially those conducted by Dr. Ogbonna and the February 16, 2018 evaluation conducted by Mr. Taylor, I am precluded from challenging their conclusions. My analysis is limited to whether the District acted arbitrarily and capriciously, not whether Dr. Ogbonna or Mr. Taylor should have been more reasonable in evaluating the Respondent or in providing the Respondent with another evaluation.

In the arbitration awards cited by the Respondent in which arbitrators found that a district acted arbitrarily and capriciously, the arbitrators avoided discussing the substance

of an individual evaluation. Instead, the arbitrators found serious structural problems in the way that a CAP was administered or in the way that the evaluations were structured.

For example, in *Patsy Cuntera v. Passaic County Vocational School District,* Agency Docket No. 223-8/15 (Gandel Arb.), Arbitrator Gandel found that a district acted arbitrarily and capriciously when it violated procedures by: 1) not having a post-observation conference with the teacher; 2) observing the teacher on the first day back in class following a lengthy illness; 3) failing to accommodate the teacher's medical problems; and 4) observing the teacher on two consecutive days without providing an opportunity for the teacher to improve.

Similarly, in *Joel Dawkins v. City of Newark,* Agency Docket No. 277-9-15 (Bluth, Arb.), Arbitrator Bluth found that a district acted arbitrarily and capriciously when in one year it observed a teacher on two consecutive days without giving the teacher the opportunity to absorb the lessons of the first evaluation. The arbitrator found that this arbitrary and capricious action was compounded in the second year. In the second year this seriously injured teacher, working under a CAP was supposed to have four evaluations. Arbitrator Bluth determined it was arbitrary and capricious to have two observers conduct the evaluations simultaneously in the same class in order to meet the requirements of the CAP. Arbitrator Bluth made other findings to support his determination that the district acted arbitrarily and capriciously. The district assigned the teacher to a middle school after a lengthy illness, even though the bulk of the teacher's experience was teaching high school. According to Arbitrator Bluth, the district also purposefully assigned the teacher to the most difficult class in a school. Finally, although the teacher taught both ninth and twelfth graders, he was only observed teaching the

of an individual evaluation. Instead, the arbitrators found serious structural problems in the way that a CAP was administered or in the way that the evaluations were structured.

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teaching the ninth-grade class which contained more challenging students. Similarly, Arbitrator Bucheit in *In re Gay Brown v. City of Camden,* Agency Docket No. 300-10/14 (Bucheit Arb.) found that a district was arbitrary and capricious when it did not adhere to its evaluation and support system before bringing tenure charges and evaluators evaluated the teacher "without any serious consideration [of] the context in which the performance occurred."

None of the procedural problems or the hostility to the individual teachers that were analyzed by Arbitrators Bucheit, Gandel and Bluth are present in this proceeding. The District complied with its obligations to the Respondent. The District placed the Respondent on the CAP, and complied with the terms of the CAP. The District also accommodated the Respondent's medical condition. Principal Harrigan worked with the Respondent while she was on the CAP. Accordingly, I must conclude that the Respondent has not established that the District acted arbitrarily and capriciously.

Based on the above, I render the following:

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-17.1(c), and AAA Labor Rule no. 27* hereby issues, and AWARDS as follows:

1. For the reasons set forth in this Decision and Award, the Arbitrator finds the District met its burden of proving that the Respondent receive "partially effective" annual summative evaluations for two consecutive school years: 2016-2017 and 2017-2018, and that the evaluations were properly conducted under the applicable laws and regulations. Therefore, the charge of "Inefficiency" is sustained, and the dismissal of the Respondent is upheld.

Dated: March 7, 2019

Ira Cure

State Of New York)
)
County of Kings)

On this 7th day of March 2019 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.

Notary Public

ELIZABETH ORFAN
Notary Public, State of New York
No. 02OR4976601
Qualified in Kings County
Commission Expires April 23, 2019

68-19

OAL Dkt. No. EDU 12381-18
Agency Dkt. No. 157-6/18

New Jersey Commissioner of Education

Final Decision

Denise Petersen,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

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

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

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/19

Date of Mailing: 3/18/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12381-18
AGENCY DKT. NO. 157-6/18

DENISE PETERSEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Denise Petersen petitioner pro se

Bernard Mercado, Esq. (Office of the General Counsel- Newark Public Schools) for respondent.

Record Closed: January 28, 2019 Decided: January 31, 2019

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

On August 27, 2018, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement.

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

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

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

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

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

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

January 31, 2019

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: 2-7-2019

Date Mailed to Parties: 2-4-2019

id

Newark Public Schools

OFFICE OF THE GENERAL COUNSEL
Brenda Liss, Esq. • General Counsel
Bernard Mercado, Esq. • Senior Associate Counsel

2019 JAN 28 P 2:36

A. Robert Gregory
Interim Superintendent

January 24, 2019

VIA CERTIFIED MAIL
Hon. Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

Re: Petersen v. Newark Public Schools
Agency Ref. No.: 157-6/18

Your Honor:

As you may recall, this office represents the Board of Education of the City of Newark (the "Board") in the above-referenced matter. Pursuant to the last phone conference in this matter, enclosed for filing is an original executed settlement agreement that fully resolves all issues in the above-mentioned matter. As such, the March 11, 2019 plenary hearing date will no longer be necessary.

Should you have any questions, please do not hesitate to contact me. Thank you once again for your attention to this matter.

Respectfully submitted,
The Newark Public Schools

By:_____
Bernard Mercado, Esq.

Encl.
cc: Denise Petersen (w/encl. via certified mail)

BOARD OF EDUCATION OF THE CITY OF NEWARK
Office of the General Counsel
765 Broad Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent Board of
Education of the City of Newark

2017 JUL 28 P 2:36

DENISE PETERSEN, Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 12381-18 AGENCY REF. NO.: 157-6/18 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Petitioner Denise Petersen ("Petitioner" or "Petersen") and Respondent Board of Education of the City of Newark, Essex County ("Respondent" or the "Board"), and Petitioner and Respondent intending to be legally bound, mutually agree as follows:

1. Petitioner will withdraw, with prejudice so that Petitioner will never be permitted to file again, her appeal and request for a hearing filed under OAL Docket No. EDU 12381-18, Agency Ref. No.: 157-6/18 including all claims which were raised or which could have been raised in relation thereto.

2. Petitioner also agrees to withdraw, with prejudice, any and all other suits or claims that she may have previously filed against the Board that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all of Petitioner's outstanding claims against the Board related to her employment. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Petitioner fail to submit a formal letter of withdrawal for each suit or claim.

3. In exchange, and for good consideration as hereby acknowledged by the parties, the Board shall permit Petitioner to resign her former position with the Board in good standing so that Petitioner's separation from employment effective June 30, 2017 will be converted to and deemed to be a voluntary and permanent "Resignation in Good Standing."

Petitioner's personnel records will be amended to conform to the terms of the settlement. Other than as required by law, upon inquiry from any third parties, the Board will only confirm Petitioner's employment, position, title, salary and dates of employment.

4. Other than permitting Petitioner to resign her former position, Petitioner will not receive any monies or emoluments from the Board as part of this Settlement Agreement.

5. Petitioner agrees that she will not apply for reemployment with the Board at any time. If Petitioner does apply for reemployment with the Board and is approved for employment, the terms of this Settlement Agreement will control and shall be grounds for immediate termination of Petitioner's employment.

6. As of the date of her resignation, all of Petitioner's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. Petitioner waives all claims of any nature, either known or unknown, against the Board with regard to this matter including all fees, back pay, front pay or any other monetary relief, except for workers compensation claims.

8. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Petitioner releases and discharges the Board, its Board of Education and its Board Members, Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the Board (the "Released Parties") with respect to all claims or rights that she may have against the Board and the Released Parties relating to her employment with the Board and/or separation from the Board. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Petitioner's employment with and separation from the Board, including but not limited to any and all rights or claims she may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state,

or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment with and separation from the Board, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Petitioner agrees to hold harmless and indemnify the Board and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should enforcement of this agreement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood by the parties that Petitioner is not waiving her rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Board based upon any of the above-released claims in Paragraph 8, Petitioner agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Petitioner of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Petitioner acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney or representative to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient and adequate time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Petitioner understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

11. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

12. Petitioner understands, agrees to and acknowledges that she is bound by this Release. Anyone who succeeds to Petitioner's rights and responsibilities, such as Petitioner's heirs or the executors of Petitioner's

estate, are also bound. This Settlement Agreement is made for the benefit of the Petitioner and the Board and all who succeed to their rights and responsibilities.

13. If any provision or portion of a provision of this Settlement Agreement is held by the Commissioner of Education or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

14. The parties respectively acknowledge that counsel and/or their representative has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

15. This Settlement Agreement constitutes the full agreement among the parties and shall be construed and enforced pursuant to New Jersey Law.

16. This Settlement Agreement is subject to the approval of the Board of Education of the City of Newark and will only become effective on the Board upon the execution of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

17. This Settlement Agreement is subject to final approval by Commissioner of Education and will only become final and binding on Petitioner and Respondent upon the approval of the Commissioner. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue the matter further

Dated: 11/8/2018

Denise Petersen
DENISE PETERSEN
Pro Se Petitioner

Dated: 1/23/2019

Josephine C. Garcia
JOSEPHINE GARCIA
Board Chairperson

Dated: 12-27-18

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, DENISE PETERSEN, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney/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 certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 11/8/2018

Denise Petersen
DENISE PETERSEN

New Jersey Commissioner of Education

Final Decision

Laura Kehoe,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that she had not met the requirements for issuance of a Teacher of English Certificate of Eligibility (CE). Specifically, petitioner failed to achieve a minimum score on the basic skills test required under *N.J.A.C.* 6A:9B-8.3(a)(5), which was in effect at the time the SBE received her application. The SBE filed a motion to dismiss and the matter was transmitted to the Office of Administrative Law for hearing. The SBE subsequently filed a motion of summary decision, which was held in abeyance pending the possibility of petitioner qualifying for the CE under an "exception criteria," which ultimately never happened.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; in order for petitioner to succeed in overturning the decision of the SBE, she needed to demonstrate by clear and convincing evidence that she is eligible for the requested CE within the confines of the regulations; petitioner has failed to meet this standard; the material facts in this record show that petitioner's application for the CE was submitted to the Department of Education on September 25, 2015, well after the regulations changed on September 1, 2015; and petitioner was therefore required to pass the mandated basic skills test in order to qualify for the CE, but never took or passed the test. The ALJ concluded that the SBE's decision denying petitioner's request for the CE was correct. Accordingly, the SBE's motion for summary decision was granted.

The Commissioner concurred with the findings and determination of the ALJ herein; accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

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

March 18, 2019

OAL Dkt. No. EDU 1343-17
Agency Dkt. No. 322-12/16

New Jersey Commissioner of Education

Final Decision

Laura Kehoe,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the New Jersey State Board of Examiners did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's application for a Teacher of English Certificate of Eligibility (CE). The Commissioner further concurs with the ALJ that petitioner did not meet the requirements for a CE because she failed to achieve a minimum score on the basic skills test required by *N.J.A.C.* 6A:9B-8.3(a)(5), which was in effect at the time the New Jersey State Board of Examiners received her application.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/19
Date of Mailing: 3/18/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 01343-17

AGY. REF. NO. 322-12/16

LAURA KEHOE,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

Laura Kehoe, Petitioner, pro se

Kerry Soranno, Deputy Attorney General, for Respondent (Gurbir Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 20, 2018 Decided: February 8, 2019

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

STATEMENT OF THE CASE

Petitioner, Laura Kehoe seeks an Order compelling the Department of Education (DOE), State Board of Examiners (SBOE or BOE), Office of Certification and Induction (OCI) to issue a Teaching Certificate of Eligibility (CE) to her.

PROCEDURAL HISTORY

On May 24, 2016 Kehoe submitted a Credentials Review Summary and Narrative Statement with supporting documents to the State Board of Examiners seeking issuance of a CE. On June 23, 2016, the Board of Examiners reviewed Kehoe's application for a CE. On September 16, 2016, the Board of Examiners issued its decision denying the application on the grounds that Kehoe did not pass the basic skills test required by N.J.A.C. 6A:9B-8.3(a)(5). (The requirement of passing the basic skills test went into effect on September 1, 2015, and her application was physically received by the DOE on September 25, 2015.) On November 3, 2016, Kehoe filed an appeal to the Commissioner of Education at the New Jersey Department of Education seeking issuance of the CE and monetary compensation. On January 23, 2017, before the matter was filed with the Office of Administrative Law, the DOE/SBOE filed a Motion to Dismiss Kehoe's appeal by mailing the Motion to the Acting Commissioner of Education. The DOE transmitted the appeal to the Office of Administrative Law on January 26, 2017, where it was filed on January 30, 2017, as a contested case.

On March 28, 2017, an initial telephone conference was held before John P. Scollo, ALJ. A Pre-Hearing Order was issued on March 30, 2017. On April 30, 2017, the DOE withdrew its Motion to Dismiss and filed its Answer. Thereafter, the parties conducted discovery. A series of telephone conferences were held regarding the status of discovery and settlement possibilities. The parties were encouraged to clarify their factual and legal contentions. They responded to the Tribunal with their outlines of facts and legal theories. They were encouraged to seek ways whereby a compromise might be reached.

On August 28, 2017, the Petitioner filed a "Motion For Declaratory Relief," which the Tribunal deemed to be a Motion for Summary Decision. The ALJ and the parties engaged in a telephone conference on September 8, 2017, during which a substantive discussion on the plausibility of an alternative route to the CE was set forth. DAG Lori Prapas made inquiries regarding the possibility of Kehoe qualifying for the CE by means of an "exception criteria" under N.J.A.C. 6A:9B-8.3(a)(5)(i)(1) and (2), which

involved Kehoe presenting her old SAT or ACT scores or by re-taking the SAT, ACT, or GRE exams in order to demonstrate that she has achieved high-enough scores to qualify for a CE without having to take the basic skills test that became a requirement on September 1, 2015, under N.J.A.C. 6A:9B-8.3(a)(5). In light of the need for time to explore the "exception criteria," the Tribunal held the pending Motion for Summary Decision in abeyance.

The parties and the Tribunal continued to discuss the alternative to taking the basic skills test during telephone conferences on September 29, 2017, and in October 2017. In November 2017 Kehoe attempted to obtain her old SAT scores from ETS, the official SAT testing service. On or about December 5, 2017, the testing service informed Kehoe that the old scores could not be obtained, but it would continue searching its records. The scores were never found. During a March 6, 2018, telephone conference Kehoe stated that she was considering re-taking the SATs but would require time to prepare for taking the SAT. Ultimately, Kehoe decided that she did not want to re-take the SAT, ACT, or GRE.

On April 20, 2018, Kehoe filed an "Amended Motion For Declaratory Relief" (received April 23, 2018). On May 7, 2018, a telephone conference was held. Following the telephone conference ALJ Scollo wrote a letter in which he stated that the Motion For Declaratory Relief and the Amended Motion For Declaratory Relief would be considered as one Motion for Summary Decision. On May 23, 2018, the DOE filed its Opposition to Kehoe's Motion For Summary Decision and it filed its own Cross-Motion for Summary Decision. On June 13, 2018, the Tribunal received Kehoe's Opposition to the DOE's Cross-Motion. An additional telephone conference was made to obtain clarification of statements within the submissions and to further explore whether there were any further opportunities for settlement. No further responses were received and so the tribunal decided to close the record on September 20, 2018. On October 13, 2018, Lori Prapas, DAG passed away and on October 25, 2018, Kerry Sorrano, DAG took over the handling of the file. The present motions were decided on the papers.

At the request of the undersigned and by previous orders of extension, the time for issuance of the Initial Decision Summary Decision was extended to February 3, 2019.

ISSUES

(1) Was a computer problem or "glitch" in the DOE's TCIS an issue of material fact applicable to the matter at hand?

(2) Can the DOE waive the requirements listed in the applicable regulations and thus issue a CE to Kehoe?

(3) Are there any issues of material fact present that preclude summary decision?

FACTUAL DISCUSSION

An analysis of the parties' submissions reveals that the parties are in agreement on the following facts.

On April 9, 2015 Kehoe registered with the DOE's "Teachers Certification Information System" (TCIS), a computerized system for the taking and processing of applications. On the same date Kehoe submitted required documents to her school, Passaic County Community College (PCCC), which assumed responsibility for the submission of documents to the DOE on behalf of its students. The person at PCCC (Joylynn Parnham) responsible for the submission of Kehoe's documents left her job and Kehoe's documents were not forwarded to the DOE. In July and August 2015 Kehoe tried to check the status of her application by logging-on the TCIS, but each time was informed that the system had no applications matching her social security number. Subsequently, in September 2015 (but after September 1, 2015), Kehoe met with a PCCC official named Andre Seyegh, who informed her that PCCC's Parnham did not submit her application to the DOE. However, in September 2015 (after September 1,

2015) Mr. Seyegh contacted the DOE and on Kehoe's behalf and submitted her application to the DOE.

The DOE received Kehoe's application from Mr. Seyegh on September 25, 2015. However, in the meantime, the requirements for a Certificate of Eligibility (CE) changed on September 1, 2015. As of September 1, 2015, N.J.A.C. 6A:9B-8.3(a)(5) required that all candidates for a CE must pass a Commissioner-approved basic skills test in order to be eligible for certification. Under N.J.A.C. 6A:9B-5.3(a) there is a provision that the issuance of certificates is subject to the candidate completing the certification requirements that are in effect on the date that the Board of Examiners receives the application. Kehoe's application was received by the DOE after September 1, 2015, and so the Board of Examiners, in its decision issued on September 16, 2016, ruled that Kehoe could not be granted the CE unless she passed the now-required basic skills test.

Kehoe believes that the genesis of the credentialing problem was a computer malfunction or "glitch" in the TCIS system. On May 24, 2016, Kehoe submitted a Credentials Review Summary and Narrative Statement with supporting documents to the State Board of Examiners. Kehoe's argument to the Board of Examiners was that she properly put her name, social security number, and other required information into TCIS, but, somehow, TCIS, unbeknownst to her, recorded her name as "5918, Laura" and as "Laura, 5918." Kehoe argued that the recording of her name as "Laura 5918" and/or "5918, Laura" made it impossible for her to discover information about her application and made it impossible for the TCIS system to inform her that there was a problem with her application. On June 23, 2016, the Board of Examiners reviewed Kehoe's application and on September 16, 2016, issued its decision denying Kehoe's application on the grounds that since her application was received after the change in the regulations went into effect on September 1, 2015, she was required to pass the basic skills test and she had not yet done so.

APPLICABLE LAW

Regulations Governing the Issuance of Certificates of Eligibility

N.J.S.A. 18A:6-9 gives to the Commissioner of the Department of Education the jurisdiction to hear and determine all controversies and disputes arising under the school laws.

N.J.A.C. 6A:9B-4.18 provides that a party may appeal the decision of the Board of Examiners pursuant to N.J.A.C. 6A-3.

N.J.A.C. 6A:9B-5.3 uses the word "Office," as defined in N.J.A.C. 6A:9B-2.1, to refer to the office within the Department of Education that is assigned to provide staff support to the Board of Examiners. N.J.A.C. 6A:9B-5.3(a) authorizes the Board of Examiners to issue three categories of educational certificates: Instructional, Administrative, and Educational Services. N.J.A.C. 6A:9B-5.3(b) directs the Board of Examiners to issue certificates upon the candidate's completion of all certification requirements in effect at the time the Office receives the application. N.J.A.C. 6A:9B-5.3(c) requires the Office, in the event of a candidate is not eligible for the certificate he/she seeks, to issue a written evaluation that identifies the deficiency(ies) for certification.

N.J.A.C. 6A:9B-4.12(a) states that a candidate for certification may appeal to the Board of Examiners an adverse decision of the Office regarding his or her certification eligibility. N.J.A.C. 6A:9B-4.12(b) states that when a candidate receives an adverse decision, the candidate may provide the Board of Examiners with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency. N.J.A.C. 6A:9B-4.12 (c) states:

> The Board of Examiners shall not:
>
> 1. waive any test, GPA, degree completion, or approved educator preparation program completion requirements; or

> 2. permit a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements . . . .

N.J.A.C. 6A:9B-4.12(d) states that upon receipt of a candidate's appeal, the Secretary must provide the candidate with a copy of the appeals procedures, which procedures must include advising the appealing candidate that (1) the appeal must be in the form of a sworn statement attesting to the facts in the appeal. N.J.A.C. 6A:9B-4.12 goes on to state:

> The candidate shall be responsible for demonstrating by clear and convincing evidence that he or she is eligible for the requested certificate pursuant to this chapter.

N.J.A.C. 6A:9B-8.3(a) sets forth the requirements for a certificate of eligibility. N.J.A.C. 6A:9B-8.3(a)(1) requires that the candidate must hold a bachelor's degree from an accredited college. N.J.A.C. 6A:9B-8.3(a)(2) requires that the candidate must be an American citizen and must meet age and health requirements. N.J.A.C. 6A:9B-8.3(a)(3) sets forth the achievement of certain minimum requirement for the attainment of a satisfactory undergraduate GPA. N.J.A.C. 6A:9B-8.3(a)(4) states that the candidate must satisfy the endorsement requirements and exceptions pursuant to N.J.A.C. 6A:9B-9 through 11 including, but not limited to passing appropriate subject matter knowledge tests and required subject-area course requirements.

N.J.A.C. 6A:9B-8.3(a)(5)—which went into effect on September 1, 2015—states that the candidate must achieve a minimum score established by the DOE on a Commissioner-approved test of basic reading, writing, and mathematical skills. However, N.J.A.C. 6A:9B-8.3(a)(5) provides that in lieu of a candidate achieving the minimum score on the Commissioner-approved test of basic reading, writing, and mathematical skills, he/she may, pursuant to N.J.A.C. 6A:9B-8.3(a)(5)(i), demonstrate proficiency in the use of the English language and in mathematics by achieving a minimum score on the SAT, ACT, or GRE, as those scores are set forth by the Commissioner on the DOE website, as stated in N.J.A.C. 6A:9B-8.3(a)(5)(i)(1).

The Standard for Summary Decision

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact. R. 4:46-2.

The burden of showing that no genuine of material fact exists rests initially on the moving party. However, this "burden . . . may not be discharged by showing . . . that there is an absence of evidence to support the non-moving party's case." Celotex Corp.v. Catrett, 477 U.S. 317 (1986). Moreover, in order to defeat a properly supported motion for summary judgment, a party may not rely upon self-serving conclusions, unsupported by specific facts in the record. Ibid. Instead, the non-moving party must point to concrete evidence in the record, which supports each essential element of his case. Ibid.

Moving parties in summary judgment motions are required to submit a Statement of Facts that contains a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. R. 4:46-2(a). A party that opposes a summary judgment motion must submit a responding statement "either admitting or disputing each of the facts in the movant's statement." R. 4:46-2(b). "All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact." R. 4:46-2(b). Moreover, 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.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Supreme Court adopted a standard that requires the motion judge to engage in an analytical process essentially determining whether the competent evidence presented, when viewed in the light most favorable to the non-moving party, 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 533 (quoting Anderson v. Liberty Lobby, 477 U.S. 477 (1986)). To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, 142 N.J. at 541.

LEGAL ANALYSIS AND CONCLUSIONS

In regard to the first issue, the petitioner, Laura Kehoe, claims that it is the DOE's fault that her application was not properly received and processed. Kehoe contends that, since she is not responsible for the alleged computer glitch in the DOE's TCIS computer system, she is entitled to a Certificate of Eligibility in accordance with the requirements that were in place at the time when she submitted her credentials to PCCC (April 2015), rather than the date when the DOE actually received her application (September 25, 2015).

There is a critical difference between candidates whose applications were received by the DOE before September 1, 2015, and those whose applications were received by the DOE on or after September 1, 2015. Candidates whose applications were received by DOE on or after September 1, 2015, were subject to a new requirement—the passing of a Commissioner-approved test of basic reading, writing, and mathematical skills. Therefore, I **CONCLUDE** that the facts that are material to the decision of the motions at bar are facts dealing with *what* credentials were received and *when* they were received. See N.J.A.C. 6A:9B-8.3(a) and N.J.A.C. 6A:9B-5.3(b).

I further **CONCLUDE** that facts which offer an explanation as to *why* credentials were not submitted or received in a timely fashion are not material to the decision-

making process of the SBOE and are not material to the decision-making process of the OAL in the motions at bar.

In this matter, in order to overturn the decision of the SBOE according to N.J.A.C. 6A:9B-4.12(d), Kehoe is responsible for demonstrating by clear and convincing evidence that she is eligible for the requested CE within the confines of the regulations. In reviewing Kehoe's proofs, the Tribunal observes that Kehoe has not offered evidence proving that a computer error or "glitch" actually existed in TCIS. Kehoe offers no direct proof of a defect in the system either by expert opinion or by other empirical evidence. Kehoe merely offers indirect and immaterial evidence regarding *why* her application was not received by the DOE until after September 1, 2015. Kehoe points to the fact that the words "Laura, 5918" and "5918, Laura" appear on the TCIS system and argues that she would not have entered her information into the system using only her first name and last four digits of her Social Security Number. In doing so, she asks the Tribunal to accept as fact that she or her school (PCCC) could not possibly have entered her information incorrectly. The Tribunal sees no reason to indulge Kehoe on this point. While it would be likely that Kehoe herself would not likely mis-spell her own name, it does not prove that there was a computer error or computer "glitch." Kehoe has offered mere allegations and conclusory statements as proof that the DOE's TCIS system was malfunctioning. Under the Brill standard, self-serving conclusions, unsupported by facts in the record cannot defeat a motion (here a cross-motion) for summary decision. See Brill at p. 529.

The material facts in the record are (1) that Kehoe's application was submitted to the DOE on September 25, 2015, well after the date that the regulations changed (September 1, 2015) so as to add the requirement that a candidate pass the Commissioner-approved test of basic reading, writing, and mathematical skills; and (2) that Kehoe did not take and pass the now-required test. Here, even viewing the evidence that Kehoe offers (i.e. that somehow the computer system contains the words "Laura 5918" and "5918, Laura") in the light most favorable to her, I **CONCLUDE** that she has not demonstrated a sufficient disagreement on the material facts to require submission to a trier of fact.

In regard to the timing of the DOE's receipt of Kehoe's application, the applicable regulation (N.J.A.C. 6A:9B-5.3(b)) categorically states:

> The Board of Examiners shall issue the appropriate certification upon the candidate's completion of all certification requirements *in effect at the time the Office receives the application.*

It is an undisputed material fact that the DOE received Kehoe's application from Mr. Seyegh on September 25, 2015, which was after September 1, 2015. The regulation requires all candidates whose applications are received after September 1, 2015, to pass the Commissioner-approved test. It follows, and I **CONCLUDE**, that the Board of Examiners' September 16, 2016, decision denying the CE to Kehoe due to the fact that she had not passed the Commissioner-approved test of basic reading, writing, and mathematical skills was a correct decision.

Moving on to the second issue, the applicable regulation (N.J.A.C. 6A:9B-4.12(c)(1)) categorically states:

> (c) That the Board of Examiners shall not: (1) Waive any test, GPA, degree, or approved educator preparation program completion requirements.

The above-cited regulation contains no exceptions. Therefore, Kehoe's computer-glitch allegations are not material to the issue at hand. I **CONCLUDE** that the SBOE has no authority to waive any of the requirements governing the issuance of a CE.

Moving-on to the third issue, I **CONCLUDE** that any factual disagreements that may exist do not pertain to the issue of *what* credentials were received by the Board of Examiners and *when* they were received by the Board of Examiners. I **CONCLUDE** that there are no issues of material fact outstanding in the matter at hand.

ORDER

Based upon the foregoing, I hereby **ORDER** that respondent's Cross-Motion for Summary Decision seeking to uphold the SBOE's September 16, 2016, decision is **GRANTED**. I further **ORDER** that petitioner's Motion for Summary Decision seeking to overturn the SBOE's September 16, 2016, decision is **DENIED**. I further **ORDER** that no monetary relief can or should be granted to the petitioner in this forum.

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

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

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

February 8, 2019

John P. Scollo ALJ

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: February 8, 2019

Date Mailed to Parties: February 11, 2019

db

OAL Dkt. No. EDU 17892-17
Agency Dkt. No. 247-10/17

New Jersey Commissioner of Education

Final Decision

Lauren Greenfield,

Petitioner,

v.

Board of Education of the Township of Irvington, Essex County,

Respondent.

The record, proposed 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 review, the Commissioner observes that the Superintendent of the Irvington School District signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Superintendent to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/19
Date of Mailing: 3/18/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION APPROVING SETTLEMENT
OAL DKT. NO. EDU 17892-17
AGENCY DKT. NO. 247-10/17

LAUREN GREENFIELD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Yadira Cristal Duran, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: February 7, 2019 Decided: February 7, 2019

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 5, 2017 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 September 21, 2018 but was adjourned because the parties agreed to settle the matter. The Settlement Agreement indicating the terms of the settlement was signed by the parties and is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

February 7, 2019

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

Mailed to Parties:
sej
2/11/2019

HUNT, HAMLIN & RIDLEY
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Attorneys for Respondent

LAUREN GREENFIELD,	) BEFORE THE COMMISSION OF
	) EDUCATION OF THE
Petitioner,	) STATE OF NEW JERSEY
	)
	) AGENCY DKT. NO.: 247-10/17
	)
	)
v.	) **SETTLEMENT AGREEMENT**
	)
	)
IRVINGTON BOARD OF EDUCATION	)
	)
Respondent.	)

This Settlement Agreement ("Agreement") is entered into by the Irvington Board of Education ("Respondent") on the one hand, and Lauren Greenfield ("Petitioner"), on the other hand, (collectively, "Parties") with regard to the above-captioned matter, Agency Docket No.: 247-10/17. The Parties, having agreed to resolve this matter without a hearing, herein agree as follows:

1. Petitioner, a tenured employee of Respondent, will complete training on workmen's compensation policies and procedures no later than December 31, 2018. Training shall be completed during Petitioner's preparation period. Respondent shall provide date and time of training to Petitioner by November 16, 2018.
2. Upon completing training, Petitioner shall sign a Training Acknowledgment Form acknowledging understanding of Respondent's workmen's compensation policies and procedures.

3. Once training is complete Respondent agrees to restore five (5) days to Petitioner's sick bank. Although being restored, Petitioner understands that the five (5) days are not approved workmen's compensation days.
4. Respondent expressly denies any wrongdoing in connection with or relating to Petitioner's employment relationship with Respondent. Nothing contained in this Agreement shall constitute or be treated as an admission that Respondent violated any federal, state or local law, statute, rule or regulation or any common law right sounding in tort, contract or otherwise.
5. Each Party to this Agreement shall cooperate fully in the execution of any and all other documents and the completion of any additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.
6. This Agreement contains the entire Agreement between the Parties, and supersedes all prior negotiations and/or agreements proposed or otherwise, written or oral, concerning the subject matter herein. The terms of this Agreement are fully understood and voluntarily accepted by the Parties, and other than the consideration set forth herein, no promises or representations of any kind have been made by either Party. Furthermore, no modification of this Agreement shall be binding unless in writing and signed by each of the Parties.
7. The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

THE UNDERSIGNED HAVE READ AND AGREE WITH THE ABOVE TERMS:

PETITIONER

Lauren Greenfield

11/12/18
Date

RESPONDENT

Irvington Board of Education

10/30/18
Date

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

In the Matter of Tenure Hearing
of Joshua Rosenbaum, Board of Education
of the City of East Orange, Essex County.

Agency Docket No. 259-10/18

APPROVAL OF SETTLEMENT

Issued: March 19, 2019

----------X

ARBITRATOR
Joseph Licata, Esq.

FOR THE PETITIONER
Jennifer L. Personette, Esq.
Decotiis, Fitzpatrick, Cole & Giblin, LLP

FOR THE RESPONDENT
William P. Hannan, Esq.
Oxfeld Cohen, P.C.

HEARING INFORMATION
Dates: February 26, 2019
Time: 10:00 a.m.
Location: Law Offices of Decotiis, Fitzpatrick, Cole & Giblin, LLP

INTRODUCTION

On October 18, 2018, Dr. Kevin R. West Superintendent of Schools filed Sworn Tenure Charges, supported by a Sworn Statement of Evidence, on behalf of the East Orange Board of Education, Essex County, New Jersey ("Petitioner") against Joshua Rosenbaum ("Respondent"), a teacher for the District's Sojourner Truth Middle School. The Tenure Charges are set forth verbatim as follows:

CHARGE I

UNBECOMING CONDUCT AND OTHER SUFFICIENT CAUSE

On various occasions while employed as a teacher in the East Orange School District, Rosenbaum violated the public trust by engaging in conduct unbecoming as follows:

Count 1

On or about January 24, 2012, Rosenbaum acted in a manner which is unbecoming of a teacher when he physically assaulted a student in his class.

Count 2

On or about May 13, 2016, Rosenbaum acted in a manner which is unbecoming of a teacher when he physically assaulted a student in his class.

Count 3

On or about June 4, 2018, Rosenbaum acted in a manner which is unbecoming of a teacher when he physically assaulted a student in his class.

CHARGE II

INEFFICIENCY, INEFFECTIVENESS AND INSUBORDINATION

On various occasions while employed as a teacher in the East Orange School District, Rosenbaum has been inefficient and ineffective in performing her duties as follows:

Count 1

On or about September 27, 2012, Rosenbaum was ineffectual in his management of his class when he responded to a student's misbehavior by sending him out of the classroom.

Count 2

In the Fall of 2012, Rosenbaum was reprimanded on three times for his repeated failure to display his student's work on the hallway bulletin board in compliance with the directives of his superiors.

Count 3

In the Fall of 2012, Rosenbaum was twice reprimanded for his repeated failure to submit his parent contact log as required by all teaching staff members.

Count 4

In September 2012, Rosenbaum did not attend a mandatory staff meeting.

CHARGE IV

CHRONIC ABSENTEEISM

Rosenbaum has displayed chronic absenteeism throughout almost the entirety of his employment at the East Orange School District, which has adversely affected the proper operation of the school, summarized as follows:

Count 1

Rosenbaum was reprimanded in 2010 for his Unsatisfactory attendance throughout the preceding three years. Specifically, he had been absent thirty-seven and a half (37.5) days over that period of time, averaging twelve (12) absences per school year.

Count 2

In 2013 Rosenbaum's attendance was deemed unsatisfactory to such an extent that it required a meeting to discuss an attendance improvement plan with Santoro. (Note: Rosembaum ignored Santoro's directive to schedule a meeting).

Count 3

Despite numerous reprimands in the past, Rosenbaum opted to take a three (3) week leave of absence in December 2013.
"In the Fall of 2012, Rosenbaum was twice reprimanded for his repeated failure to submit his"

CHARGE V

SUBSTANDARD TECHER EVALUATIONS

Observations and assessments of Rosenbaum's teaching repeatedly resulted in ratings of "Unsatisfactory".

Count 1

Rosenbaum's performance was rated Unsatisfactory in December 2012.

Count 2

Rosenbaum's performance was rated Unsatisfactory in March 2013.

Count 3

Rosenbaum's performance was rated Unsatisfactory in November 2013.

CHARGE VI

Each of the foregoing allegations, as well as the Sworn Statement of Evidence and all accompanying documents attached thereto, are incorporated by reference, as if fully set forth herein.

All of the foregoing actions and/or inactions as exhibited by Joshua Rosenbaum amount to inefficiency, unbecoming conduct, and/or other sufficient cause for dismissal, including but not necessarily limited to insubordination and chronic absenteeism. By virtue thereof, it is evident that Rosenbaum has been engaged in a course of misconduct extending over a period of time, such that, his pattern of misconduct, jointly and severally, constitutes unbecoming conduct and manifestly demonstrates his unfitness to serve in a position of educational leadership, warranting his dismissal.

On November 2, 2018, Respondent, through his attorneys, filed an Answer to the Tenure Charges with the Office of Controversies and Disputes, New Jersey Department of Education.

On November 9, 2018, Samantha L. Price, Director Office of Controversies and Disputes notified the parties' respective representatives (1) that the Tenure Charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary and (2) that the dispute was referred to the undersigned Arbitrator for resolution in accordance with N.J.S.A. 18A:6-16. A hearing date is currently set for Tuesday, February 26-27, 2019.

On December 20, 2018, Respondent, through his attorneys, filed with the undersigned Arbitrator a motion to dismiss the tenure charges, together with a supporting brief and Certification of Counsel attaching Exhibits 1-21. On January 9, 2019, Petitioner, through its

attorneys, filed an opposition to the motion. On January 10, 2019, Respondent, through its attorneys, filed a reply letter, upon which the record for purposes of deciding this Motion was closed.

On January 25, 2019, the undersigned granted Respondent's motion to dismiss the Sworn Tenure Charges, except for Charge I, Count 3 and Charge VI (to the extent it encompassed Charge I, Count 3 of the Charges). The decision was filed with the Bureau of Controversies and Disputes.

On February 26, 2019, the undersigned presided over a hearing in accordance with N.J.S.A. 18A:6-10 and 18A: 6-117. The hearing was transcribed by a certified court stenographer. The Petitioner completed its case in chief and Respondent, after the undersigned's denial of Respondent's request for judgment in its favor, elected to rest on the record without presenting witness testimony. The record was held open for the purpose of receiving post-hearing briefs. However, prior to the due date for the submission of briefs, the parties' representatives informed the undersigned that on March 12, 2019 they had entered into a settlement agreement resolving all aspects of the instant tenure dismissal dispute (Attached hereto).

DISCUSSION

Pursuant to N.J.A.C. 6A:3-5.6 and In re Cardonick, State Board (1990 School Law Decisions (S.L.D., 842, 846), the undersigned must consider the following criteria in connection with the approval or denial of a settlement agreement:

> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, 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 the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing the agreement is in the public interest; and

6. If the charged party is a teaching staff member, a showing 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.

(b) A settlement agreement shall not propose terms that would restrict access to information or records deemed public by law or result in misrepresentation of the reason for an employee's separation from service. If tenure charges have been certified to the Commissioner by a district board of education, any proposed settlement shall indicate, by signature of the district board of education 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.

(c) A proposed withdrawal or settlement of tenure charges shall be submitted to the Commissioner prior to transmittal of such charges to the arbitrator; thereafter, it shall be submitted to the arbitrator.

(d) If tenure proceedings against a teaching staff member are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, when such referral is warranted under the provisions governing resignation or retirement prior to conclusion of tenure charges as set forth in N.J.A.C. 6A:9B-4.3(a).

(e) If a proposed settlement requires the tenured employee to relinquish a certificate issued by the State Board of Examiners, upon approval of the settlement agreement, the Commissioner shall forward the matter to the State Board of Examiners for proceedings in accordance with N.J.A.C. 6A:9B-4.11.

In evaluating the terms of the settlement agreement and with due regard for the record evidence, I find and conclude that the nature of the charges filed against Respondent does not warrant a determination on the merits in order to protect the public interest;

I further find and conclude that both parties will mutually benefit from the settlement agreement terms with respect to avoiding additional costs and fees, as well as avoiding the uncertainty of the outcome of the instant tenure dismissal proceeding;

I further find and conclude that the settlement agreement is beneficial to the school district and its' students;

I further find and conclude that the terms of the settlement agreement reflect that both parties fully understood their respective rights and obligations under the settlement and that they voluntarily entered into same;

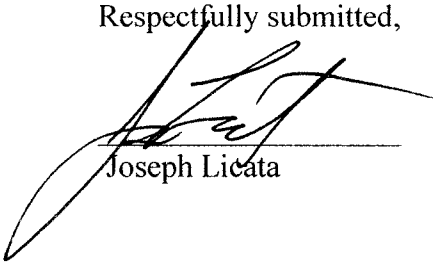
I further find and conclude that the terms of the settlement agreement reflect that Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate; and,

Lastly, I find and conclude that the settlement agreement does not propose terms that would restrict access to information or records deemed public by law or result in misrepresentation of the reason for an employee's separation from service.

CONCLUSION

For the reasons set forth more thoroughly herein, I hereby approve the March 12, 2019 settlement agreement in full resolution of the parties' dispute under Agency Docket No. 259-10/18

Respectfully submitted,



Joseph Licata

Dated: March 19, 2019

SEPARATION, SETTLEMENT, AND GENERAL RELEASE AGREEMENT

This Separation, Settlement, and General Release Agreement ("Agreement") is made and entered into by and between Joshua Rosenbaum ("Rosenbaum") and the East Orange Board of Education (the "Board") (collectively, the "Parties").

RECITALS

WHEREAS, on or about June 4, 2018, an incident involving Rosenbaum resulted in an investigation by the Board; and

WHEREAS, as a result of the investigation, on October 18, 2018, the Board filed tenure charges against Rosenbaum, pursuant to N.J.S.A. 18A:6-11 (the "Charges") and Rosenbaum was suspended without pay pursuant to N.J.S.A. 18A:14; and

WHEREAS, Rosenbaum contested the Charges and arbitration occurred on February 26, 2019; and

WHEREAS, at the conclusion of the arbitration the parties agreed it was mutually beneficial to amicably resolve the Charges in dispute in order to avoid further protracted adjudication and expense.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Board shall withdraw the Charges.

2. In response to the Board's withdrawal of the Charges, Rosenbaum shall submit an irrevocable letter of resignation. The Board shall accept Rosenbaum's resignation of employment effective February 26, 2019.

3. The Board shall compensate Rosenbaum in the amount of $29,545.20, reflective of 120 days of back-pay. This payment is subject to regular taxes and withholdings and shall be made within ten (10) days of the Board's approval of this Agreement.

4. Rosenbaum shall waive any and all additional claims to back-pay, front-pay, health benefit coverage, sick leave, and accrued time off terminal payouts, except for the amount required by N.J.S.A. 18A:6-14.

5. Rosenbaum waives all other claims against the Board regarding or arising from this matter, including counsel fees or other monetary relief, except as provided herein.

6. The Parties expressly agree that this Agreement shall have no mitigating precedential effect on any other pending or future disciplinary actions. Rosenbaum, with full understanding of his legal rights, voluntarily and unconditionally releases and forever discharges the Board, as well as the Board's past and present employees, officers, insurers, reinsurers,

directors, agents, attorneys, representatives, predecessors, successors and assigns (collectively, the "Releasees") from all contracts, agreements, promises, liabilities, claims, causes of action, charges, complaints, grievances, obligations, costs, losses, damages, injuries, attorneys' fees and other legal responsibilities (collectively, the "Claims") of any form whatsoever arising from the beginning of time through the date Rosenbaum signs this Agreement, whether known, unknown, unforeseen, unanticipated, unsuspected or latent, which Rosenbaum ever had or now has against any of the Releasees.

7. Rosenbaum's release of Claims against the Releasees includes but is not limited to: any and all Claims arising out of and/or related to Rosenbaum's employment with the Board; any and all Claims under any federal, state and/or local statutory, constitutional, common law or tort cause of action for battery, assault, pain and suffering, lost wages, bonus, sick leave, vacation leave and other paid-time-off, intentional or negligent infliction of emotional distress, defamation, breach of collective bargaining agreement, breach of contract or implied contract, breach of public policy, wrongful discharge and/or for benefits owed (except for vested benefits); any and all Claims under the National Labor Relations Act, the Labor Management Relations Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 and/or 1991, the federal False Claims Act, the Reconstruction Era Civil Rights Acts, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Fair Credit Reporting Act, the Occupational Safety and Health Act, the Immigration Reform and Control Act, the federal Whistleblower Protection Statutes, the Worker Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Constitution, the Millville Dallas Airmotive Plant Job Loss Notification Act, and the New Jersey Wage and Hour Laws and any and all amendments to each of the foregoing laws; and any and all Claims under any other federal, state and/or city laws, codes, rules or regulations. This Agreement applies to all Claims through the date of Rosenbaum's execution of this Agreement and not to Claims arising thereafter. The release of Claims in this Paragraph does not apply to Claims that cannot, as a matter of law, be waived by private agreement.

8. Rosenbaum represents he has not filed any Claims against the Board. To the extent any such Claims have been filed, Rosenbaum agrees to promptly withdraw and/or direct the pertinent court or agency to dismiss their respective matters with prejudice. Nothing in this Agreement is intended to interfere with (a) the Equal Employment Opportunity Commission's ("EEOC") or any comparable state or local agency's ability to enforce any anti-discrimination law within their jurisdiction, or (b) Rosenbaum's ability to participate in an investigation, file a charge, or otherwise communicate with the EEOC or comparable state or local agency responsible for enforcing anti-discrimination laws. Rosenbaum has not filed and shall not hereafter file any claim, charge or complaint of any nature with the New Jersey Public Employment Relations Commission (PERC) or with any Federal, State or local court or agency against the Board or the Releasees.

9. If Rosenbaum violates the General Release detailed herein by filing any claim,

charge or complaints as prohibited above, Rosenbaum agrees to pay all costs and expenses of defending against the suit incurred by the Board and/or the Releasees, including reasonable attorney's fees and costs.

10. **NON-PRECEDENTIAL.** The Parties agree that this Agreement shall be non-precedential, is limited to specific and unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other Board employee.

11. **MUTUAL NON-DISPARAGEMENT.** Rosenbaum agrees that, in any communications with the press, other media or any other individual, he shall not criticize, ridicule or make any statement which disparages or is derogatory of the Board or its employees, elected officials, directors or senior officials. Likewise, the Board and its senior officials shall not criticize, ridicule or make any statement which disparages or is derogatory of Rosenbaum. Nothing herein shall infringe upon the Parties' respective rights to express constitutionally protected-speech.

12. **INQUIRES FROM THIRD PARTIES**. In the event of any inquiries into this matter, the Parties shall respond that Rosenbaum resigned from his employment, except as otherwise required by law, including but not limited to N.J.S.A. 18A:6-7.7. Should a prospective employer that is subject to the requirements of N.J.S.A. 18A:6-7.7 contact the Board, the Board shall accurately and truthfully fill out any required forms and attach this Agreement thereto in lieu of further explanation. The Board shall advise any prospective employer that is not subject to N.J.S.A. 18A:6-7.7 that it is the Board's policy to only provide dates of employment, last job title held, and reason for separation, which shall be designated as a resignation.

13. **ASSIGNMENT.** The Parties shall not assign or transfer any of its rights under this Agreement.

14. **SUCCESSORS AND ASSIGNS.** This Agreement shall be binding upon and inure to the benefit of the heirs, assigns, and successors in interests of the Parties hereto.

15. **NO ADMISSIONS.** The Parties expressly agree that by settling the matter referenced herein neither party admits or accepts any guilt or liability for any claims made or that could have been made by Rosenbaum or the Board arising from their employment relationship. No statement made or agreed to by either Party in this Agreement shall be deemed an admission by said Party. Rosenbaum expressly denies the allegations contained in the Charges.

16. **NO WAIVER**. No failure or delay on the part of any Party in exercising any right, power, or remedy under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any such right, power, or remedy preclude any other or further exercise thereof of the exercise of any other right, power or remedy hereunder. The rights and remedies provided in this Agreement are cumulative and are not exclusive of any other rights, powers, or remedies existing in law, in equity or otherwise.

17. **CONFIDENTIALITY.** The Parties acknowledge that this Agreement is

considered a government record subject to the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., and that nothing herein shall exempt this Agreement from being made publicly accessible pursuant to an appropriately filed OPRA request subject to any lawfully permitted redactions.

18. **SEVERABILITY.** Should any provisions 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, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

19. **GOVERNING LAW**. This Agreement has been negotiated and entered into in the State of New Jersey, and shall be governed by the laws of the State of New Jersey, without regard to any principles of choice of law that may otherwise be applicable.

20. **VENUE.** Any controversies or disagreements arising out of, or relating to this Agreement or breach thereof, shall be resolved in the Essex County Vicinage of the Superior Court of New Jersey.

21. **COMPLETE AGREEMENT.** This Agreement contains the entire agreement between the Parties with respect to the subject matter referenced herein and supersedes all other prior agreements, understandings, and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the Board to anything other than what is expressly stated in this Agreement. Rosenbaum represents and acknowledges that in executing this Agreement, he has not relied upon any representation or statement made by the Board regarding the subject matter, basis, or effect of this Agreement other than as specifically stated in this Agreement. The terms in this Agreement can only be modified in a written document signed by Rosenbaum and the Board's authorized representative.

22. **NEUTRAL CONSTRUCTION**. In the event of any dispute concerning the construction or interpretation of this Agreement, this Agreement shall be construed neutrally and without regard to events of authorship or negotiations, each Party having been represented by independent legal counsel.

23. **ATTESTATION.** The Parties represent and warrant that they have carefully read each and every provision of this Agreement and that they fully understand all of the terms and conditions contained in each provisions of this Agreement. The Parties further represent and warrant that they have entered into this Agreement voluntarily, of their own free will, without any pressure or coercion from any person or entity including, but not limited to, a Party to this Agreement.

24. **PRECATORY PHRASES.** The precatory phrases ("whereas clauses") are not mere recitals, but are specifically agreed to by the parties and are incorporated herein by reference.

25. **HEADINGS.** The headings contained in the Agreement are for reference

purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

26. **CONSULTATION WITH ATTORNEY AND/OR UNION REPRESENTATION.** Rosenbaum has consulted with his attorney and/or Union representatives with respect to this Agreement and has reviewed with his attorney and/or Union representatives all of the terms and conditions of this Agreement prior to executing this Agreement.

27. **AUTHORIZATION.** By executing this Agreement, each signatory represents that she or he is a party or has been duly authorized by a party to sign on that party's behalf.

28. **REVOCATION PERIOD.** Rosenbaum may revoke this Agreement within seven (7) days after the date this Agreement is signed by Rosenbaum. This revocation must take the form of written notice by Rosenbaum that he intends to revoke this Agreement. This revocation must be provided directly to the Board. This seven (7) day revocation period may not be waived by Rosenbaum.

29. **REASONABLE CONSIDERATION PERIOD.** Rosenbaum agrees that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but that he may knowingly and voluntarily waive this twenty-one (21) day period by signing and dating in the space provided at the end of this Agreement.

30. **ACKNOWLEDGEMENT.** Joshua Rosenbaum affirmatively agrees to and acknowledges the following:

a. I have read this Agreement completely.

b. I have had the opportunity to consider the terms of this Agreement.

c. I agree and acknowledge that I was represented by and consulted with counsel throughout both the negotiation and execution of this Agreement. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement before signing it. Rosenbaum further acknowledges and agrees that he has been fully and fairly represented by counsel in the negotiation of this Agreement.

d. I understand and agree to all of the terms of this Agreement.

e. I have not relied upon any representation, written or oral, not set forth in this Agreement.

f. I have signed this Agreement voluntarily and entirely of my own free will.

g. I represent and agree that I am not under the influence of any illness,

including mental or emotional illness, medical condition, disability or impairment, or of prescription or other medication that would affect my ability to review this Agreement in its entirety, understand it and knowingly and voluntarily agree to it.

h. I agree and acknowledge that I have the right to reflect upon this Agreement for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) business days after executing this Agreement to revoke it under the terms of the Older Workers Benefit Protection Act by notifying the Board.

i. I understand and acknowledge that if I sign this Agreement, prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

31. **COUNTERPARTS.** This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which will constitute one and the same agreement. A signature affixed by a party to a counterpart of this Agreement and delivered by electronic transmission is valid, binding and enforceable against such party.

Date: 3/12/19

By: _____
Joshua Rosenbaum

Date: _____

By: _____
Dr. Kevin West, Superintendent

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the twenty-one (21) day period referred to in Paragraph 28 of this Agreement.

Date: 3/12/19

By: _____
Joshua Rosenbaum

March 12, 2019

Dr. Kevin R. West, Superintendent
East Orange School District
199 4th Avenue
East Orange, NJ 07017

Re: Resignation from Employment

Dear Dr. West:

I hereby resign my employment as a tenured teaching staff member for the East Orange Board of Education, effective February 26, 2019. I am thankful for the opportunity to have served the students of the East Orange School District.

Joshua Rosenbaum

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against
Paul Carratura

SCHOOL DISTRICT OF THE TOWN OF KEARNEY,
HUDSON COUNTY

Docket #:
205 8-18

Petitioner

Opinion and Award

- and -

PAUL CARRATURA,

Respondent

Before: Deborah M. Gaines, Arbitrator

APPEARANCES:

FOR THE PETITIONER:
Kenneth Lindenfelser, Esq.

FOR THE RESPONDENT:
Oxfeld Cohen, P.C.
By: Jesse Humphries, Esq.

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 and P.L. 2015, c. 109("TEACHNJ"), the tenure charges brought by the Town of Kearney ("the District" or "Petitioner") against Paul Carratura ("Carratura" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and Decision on September 21, 2018. I conducted hearings at the District's Offices in Kearney, New Jersey on December 14, 2018 and January 14, 2019.

At the hearing, the parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The hearings were transcribed. The parties' written statements were received by the undersigned by February 18, 2019, whereupon the record was closed.

THE CHARGES

Respondent is charged with excessive absenteeism, incapacity, insubordination, conduct unbecoming an employee and other just cause for dismissal pursuant to 18A:6-10 as described in 23 paragraphs in the Board's Sworn Tenure Charges. The substance of these charges allege that, from January 1, 2018 until the date Respondent was charged, he missed 73 days of work (54 sick days and 19 taken as compensatory time) and that he called in only 21 times for all his absences; Respondent failed to respond to written notices and failed to report to work to formulate a corrective action plan; that Respondents actions resulted in work being left undone and endangered the health and safety of the students by preventing the District from being able to fully complete all custodial duties each day.

BACKGROUND

The following summarizes the relevant testimony and facts adduced during the hearing. Respondent began employment with the Kearney School District on May 4, 2000. He was promoted soon thereafter to head custodian of Garfield Elementary School.

The Respondent had no prior disciplinary history. However, for the period beginning January 1, 2018 through July 31, 2018, the Respondent was absent 73 days. Of those days, he called in sick only 21 times. [See Absence Records, District Exhibit E].

The record evidence establishes the District attempted to contact Respondent by phone on numerous occasions. Director of Plant Operations, Mark Bruscino also sent him a letter on May 8, 2018 stating that the letter would serve as "formal written notice and to confirm in writing [his] telephone messages concerning your unacceptable job attendance and absence notifications." [District Exhibit G]. The letter informed Respondent that disciplinary action would follow if he failed to notify the school on a daily basis of his absence and that he needed to provide medical documentation for his absences. [Id.]. A second letter was sent to him by Mr. Bruscino on May 15, 2018. [District Exhibit H]. The letter provided in pertinent part:

> Please provide this office with a doctor's note by Friday, May 18, 2018 for all of the dates you have not been present at your job. If I do not receive a doctor's note by the

> above date, it will be determined that you have abandoned your position. [Id.]

Respondent failed to respond to any of the communications. Mr. Bruscino testified that he made numerous phone calls to the Respondent. He testified that from January 1, 2018 to June 18, 2018 the Respondent had no contact with the District. He testified that he sent people to the Respondent's home to try to find out what was wrong. On June 7, 2018 Respondent met with Bruscino and his Union Representative. Bruscino advised Respondent to obtain a doctor's note by Monday. He testified that he never received any notes from Respondent nor did the Respondent call or email the school to advise them he would be out.

Bruscino testified Respondent's absences had a negative impact on the school. He noted he could not hire a new custodian, and, therefore, had to cover the custodial duties with the staff he had and pay others to cover for Respondent. That included overtime and premium pay for the custodian who had to be given a temporary increase in level pay.

The policies introduced into evidence demonstrate that Employees are advised that attendance is essential for the efficient operation of the schools and that it is part of their performance expectations. Policy 4212 also requires employees to provide prompt notice of absence and to verify their absences

if excessive. The school also requires medical documentation after three consecutive days of absence for illness.

Respondent acknowledged the absences charged and his failure to properly notify the school. He testified that he was incapacitated by depression beginning in January 2018. He testified three of his friends had recently died and he also found a lump of some kind, and feared he had cancer. He testified that he had never experienced anything similar and did not understand what was happening to him. He could not leave the house and was unable to cope. Eventually he went to therapy and testified he now understands what was wrong and believes such an incident will not reoccur. He testified he does not take any medication for depression, but is continuing in therapy and ,therefore, would be able to recognize the signs in the future. He submitted a note from his social worker from whom he currently sees for counseling. [Respondent Exhibit 1]

Positions of the Parties

Position of the District

The District argues it has proven the charges against Respondent and met the standard for sustaining termination for absenteeism under the applicable statutory framework. It notes Respondents absences are extreme. It argues Respondent missed 73 days of work during the applicable time period and no reasons

or medical documentation was provided until well after the charges were served.

The District argues the credible record evidence shows it was required to pay overtime to people to cover Respondent's assignments. In addition, there were times his duties went undone.

The District maintains Respondent was provided notice of discipline and ample opportunity to supply documentation and receive any accommodation he may need.

Position of the Respondent

Respondent acknowledges the absences and his failure to provide timely notification and medical documentation. However, Respondent maintains the absenteeism he experienced was a singular event that has been resolved and is unlikely to occur again. Respondent maintains the mental trauma he experienced has been resolved and, if something similar were to occur in the future, his regular therapy sessions will be able to assist him. Respondent cites the Matter of Leslie Ramos to support his position. Respondent argues the hearing officer in that case provided the teacher who had a longer history of excessive absence another chance after determining that her serious health issues had been resolved. Respondent maintains his mental health issues should be viewed in the same light.

Moreover, Respondent maintains progressive discipline should be applied in this case because Respondent lacks any prior disciplinary record, has a positive employment history, and in fact, had never used any major amount of sick time previously as demonstrated by the fact he accumulated 220 sick days. Respondent argues a suspension would be the appropriate penalty in this case, citing other case law.

Decision

After carefully considering the entire record before me, including my assessment of witness credibility and the probative value of evidence, I find the Board has met its burden under the statute to sustain the charges. My reasons follow.

There is no dispute Respondent was absent from work for 73 days between January 1, 2018 to July 1, 2018 or that he failed to call in or provide any medical documentation in a timely manner. In fact, Respondent acknowledges he violated the District's policies regarding attendance.

Regular and predicable attendance is required for all employees in the District and, certainly, is a critical component of the employment relationship. Respondent's absences were excessive by any measure.

While attendance issues normally require progressive discipline to escalate to termination, in this case, Respondent's absences were so numerous, and his failure to even

contact the school, even after he met in person with his supervisor on June 7,2018, demonstrate the ineffectiveness of any corrective measures.

The record evidence demonstrates the school made every effort to retain Respondent. They called, they wrote, and sent people to his home. He failed to communicate with the District, even after they met with him on June 7, 2018. In fact, no one heard from him until the first day of hearing in December.

While Respondent has now, during the instant proceeding, offered a note from the social worker with whom he now receives counseling, it is insufficient to explain why Respondent could not even call in to work. It merely states that it "appears" he could not come work. This practitioner was not involved in his care during the relevant time period.

While I credit Respondent's testimony that he went through a period of depression that he found debilitating beginning in January, it does explain why he could not make a phone call. Moreover, the school provided him the opportunity to resolve the situation and he still failed to obtain medical information to excuse his absence and to call in to inform the school he would be absent. Respondent's situation is distinct from the situation in Ramos. I do not find that case persuasive.

Under these circumstances, I find no reason to disturb the District's judgment regarding penalty in this matter. As a result, I make the following

AWARD

The charges of excessive absenteeism, incapacity, insubordination, conduct unbecoming an employee. The District has demonstrated just cause for termination.

Deborah Gaines

Dated: March 21, 2019

Deborah Gaines, Arbitrator

Affirmation
State of New York }
County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: March 21, 2019

Deborah Gaines

78-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

March 27, 2019

Beth L. Finkelstein, Esq.
920 West State Street
Trenton, New Jersey 08618-5328

Daniel H. Long, Esq.
Wade, Long, Wood & Long, LLC
1250 Chews Landing Road, Suite 1
Laurel Springs, New Jersey 08021

Re: *Kristen Martello v. Board of Education of the Borough of Berlin, Camden County, Agency Docket No. 43-2/19.*

Dear Counsel:

I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent's answer to the petition. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

Sincerely,

Lemont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

LOR/SLP/JKH

New Jersey Commissioner of Education

Final Decision

S.H. and C.H., on behalf of minor children, C.H., S.H., and S.H.,

Petitioner,

v.

Board of Education of the Township of Alloway, Salem County,

Respondent.

Synopsis

Petitioners filed an appeal on behalf of their minor children, C.H., S.H., and S.H., challenging the determination of the respondent Board that they did not reside in Alloway Township after August 25, 2017, and that the children were therefore ineligible to attend school in respondent's school district during the 2017-2018 school year. The Board sought payment of tuition for the number of days that the children attended school in Alloway while ineligible to do so.

The ALJ found, *inter alia*, that: petitioners in this matter are in the business of purchasing, renovating and selling or renting properties, and own nineteen properties in total; from 2007 until August 2017, petitioners resided at a home on Neil Court in Alloway; in July 2017, petitioners moved to a larger house in Elmer, but never disenrolled the children from respondent's school district; the children continued to attend school in Alloway; petitioners represented that the move was temporary pending the completion of renovations to one of their properties in Alloway; petitioners did not move back to Alloway until October 2, 2018; it is undisputed that petitioners did not reside in Alloway between August 25, 2017 and October 2, 2018; the testimony and documentary evidence presented by petitioners herein was not credible, while the testimony of representatives of the Board was consistent and credible; petitioner's children attended school in respondent's district during the 2017-2018 school year, and from September 5, 2018 through October 2, 2018, while domiciled outside of the district; pursuant to *N.J.S.A.* 18A:38-1(b)(1), petitioners shall be assessed tuition for the period of ineligible attendance of their children. The ALJ concluded that petitioners failed to satisfy their burden of proving that their children were entitled to a free public education in the respondent's district during the period at issue herein. Accordingly, the ALJ affirmed the Board's residency determination and ordered petitioners to pay the Board tuition in the total amount of $ 36,333.60 for the unauthorized attendance by their children in Alloway Township schools during the 2017-2018 and 2018-2019 school years.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and – finding petitioners' exceptions wholly unpersuasive – 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.

March 26, 2019

79-19

OAL Dkt. No. EDU 16589-17
Agency Dkt. No. 241-10/17

New Jersey Commissioner of Education

Final Decision

S.H. and C.H., on behalf of minor children, C.H., S.H., and S.H.,

Petitioner,

v.

Board of Education of the Township of Alloway, Salem County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, petitioners are challenging the Board's determination that they did not reside in Alloway Township after August 25, 2017, and that the minor children were therefore ineligible to attend school in the district. The Administrative Law Judge (ALJ) found that petitioners did not meet their burden of demonstrating that they were residents of Alloway Township during the 2017-18 school year and during the period of September 5, 2018 through October 2, 2018. Accordingly, the ALJ ordered tuition reimbursement in the amount of $36,333.60.

In their exceptions, petitioners argue that the ALJ ordered petitioners to redact personal identification information as part of a protective order, but then held it against them by finding that the redactions were suspect and weighed against their credibility. Petitioners

contend that the ALJ's determination that C.H. was not a credible witness was erroneous, not based on any other factor, and should be set aside.

Petitioners also take exception to the ALJ's conclusion that the Board provided petitioners with due process. Petitioners argue that the ALJ did not address the adequacy of the Board's *ex parte* hearing, in which they failed to call C.H. into a closed session of the Board meeting for the residency hearing. Instead, the ALJ blamed petitioners for not inviting themselves into the closed session and cited no legal support for her conclusion that the Board had provided due process. Petitioners maintain that the Board failed to create a record of the hearing, refused to tell them who was going to testify, and did not permit them to attend, thus violating their due process rights at every juncture. Petitioners urge the Commissioner to therefore reject the Initial Decision because the ALJ disregarded the Board's failure to conduct a proper hearing on the record, as well as the fact that petitioners were not given a chance to present additional evidence.

Additionally, petitioners argue that the ALJ erred in finding that they were not domiciled in Alloway Township. Petitioners maintain that they lived in Alloway Township from 2007 to the present, except for a short period between August 25, 2017 and November 6, 2017. Specifically, petitioners sold their home on Neil Court in Alloway Township on August 25, 2017 and moved into a house that they owned in Elmer. They entered into a contract on September 22, 2017 for another house in Alloway Township but the sale fell through on September 26, 2017. Thereafter, petitioners purchased a house on Aldine Road on November 6, 2017 and another house on Greenwich Street on February 9, 2018, but both Alloway Township properties required extensive renovations. Petitioners moved into the Greenwich house on October 2, 2018. As such, petitioners argue that they paid property and

school taxes for the last 12 years, with the exception of the short gap between selling the Neil Court house and purchasing the Aldine Road house. Accordingly, petitioners maintain that their intent was always to live in Alloway Township, not Elmer, but they were unable to move into their Alloway house until renovations were made to make it habitable.

Finally, petitioners contend that the ALJ erred in ordering reimbursement of $36,333.60 in tuition. One of the minor children, C.H., only attended school for half-day prekindergarten, so petitioners argue that they should not be assessed the full $60.56 per day for C.H. Additionally, petitioners are aware of a student who attends the school and pays tuition at a reduced rate, so they question why their tuition assessment should be $10,900 per year rather than $6,500, the amount paid by the other student. Petitioners point out that the Board Secretary who testified regarding the tuition calculation seemed unsure of the tuition policies. Moreover, petitioners contend that the tuition should be reduced to cover the time that the ALJ took to issue an Initial Decision because "the ALJ's untimely decision deprived [petitioners] of the option to send their children to school in Elmer long before the conclusion of the 2017-18 school [year]." (Petitioners' Exceptions at 16[1])

In reply, the Board contends that petitioners' exceptions do not meet the requirements of *N.J.A.C.* 1:1-18.4(b) as they do not take exception to specific findings of fact or conclusions of law, but rather reiterate the same arguments made before the ALJ. The Board also argues that the ALJ was correct in finding that petitioner's redacted text messages were suspect in that she was purposefully concealing information. Further, the ALJ only used the redacted text messages as one factor when rendering C.H. a non-credible witness.

The Board argues that the residency hearing conducted during the September 26, 2017 Board meeting was proper and did not deprive petitioners of due process.

[1] Citation is to the first set of exceptions filed by petitioners, which were dated February 25, 2019.

The Board explains that extensive testimony was taken at trial regarding the Board meeting, which makes clear that C.H. arrived late to the meeting, sat in the back of the room, and did not sign in until the very end of the meeting when she was leaving. C.H. did not tell anyone she was there, despite numerous opportunities to do so, and did not speak up when the Board announced that it was going into executive session to discuss a student residency matter. The sign in sheet was double checked before executive session, and the Superintendent also came out from executive session to check for petitioners but did not see C.H. in the audience. C.H. did not say anything when the Board announced its decision on the matter after executive session, at the end of the meeting, or in the following days. As such, the Board urges the Commissioner to adopt the ALJ's finding that "C.H.'s refusal to identify her presence at the board meeting resulted in [petitioners'] failing to exercise their due process rights and participate in the hearing." (Initial Decision at 20)

The Board contends that the Initial Decision was well-reasoned and correctly found that petitioners were not domiciled in the district during the dates in question. The Board explains that petitioners are in the business of purchasing investment houses to remodel and either rent or sell, and they have 19 properties. The Board contends that the two foreclosure properties petitioners bought in Alloway Township after selling their Neil Court home were an impractical size for their seven-person family, as they were both significantly smaller than the large house they had moved into in Elmer. Instead, the Board maintains that the Elmer home is where petitioners slept at night, ate their meals, intended to return to when they left, and where they parked their cars and trucks. Accordingly, the Board agrees with the ALJ that petitioners were domiciled in Elmer during the 2017-18 school year and until October 2, 2018.

Finally, the Board contends that the ALJ's assessment of tuition was correct. With respect to petitioners' argument regarding their half-day student being charged for a full day, the Board explains that the Business Administrator testified that the district charges a higher tuition for kindergarten students, whether full day or half day. In this case, the Board instead used the elementary student tuition amount when calculating tuition for petitioners' kindergarten student, so it was assessing a lower amount of tuition than it could have. Further, with respect to the other student who attends school on a tuition contract, the Board argues that petitioners are not privy to the circumstances surrounding that situation, and it is irrelevant to this matter.

Upon review, the Commissioner concurs with the ALJ's finding that petitioners failed to sustain their burden of establishing that they were domiciled in Alloway Township during the 2017-18 school year and until October 2, 2018. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during that time. It is undisputed that petitioners moved out of Alloway Township on August 25, 2017 and into a property that they owned in Elmer. Although petitioners claim they were domiciled again in Alloway Township as of the date they purchased their Aldine Road house on November 6, 2017, there is no evidence in the record that they ever lived in this house; petitioners admit that they could not move in due to the amount of work the property needed. The record makes clear that petitioners' true, fixed and permanent home was in Elmer -- where they ate, slept, and returned each day – until petitioners moved back to Alloway Township and into their Greenwich Street home on October 2, 2018.

In *K.L. v. Board of Education of the Borough of Kinnelon*, 2010 *N.J. Super. Unpub.* LEXIS 11 (App Div. January 4, 2010), the Appellate Division found that although the

petitioners in that case had purchased a home in Kinnelon, they did not reside in the district as they could not occupy the home during renovations. The court explained:

> We think it obvious from these general principles that petitioners and their children were never domiciled in Kinnelon. While they may have possessed a present intention to reside there when the renovations were complete, it is undisputed that petitioners and their children never did reside in the district during the 2007-2008 school year. As such, their intention to do so is irrelevant. They had never established an "actual and physical . . . abode" in Kinnelon, and therefore they lacked the "necessary concurrence of physical presence and an intention to make that place one's home" upon which the legal concept of domicile rests.
>
> [*Id.* at *13-14 (quoting *In re Unanue*, 255 *N.J. Supra.* 362, 376 (Law. Div. 1991), *aff'd*, 311 *N.J. Super.* 589 (App Div.), *certif. denied*, 157 *N.J.* 541 (1998), *cert. denied*, 526 *U.S.* 1051 (1999)).]

As such, petitioners' argument that they "intended" to live in Alloway Township, while actually living in their Elmer home, lacks merit. Whether or not petitioners hoped to return to Alloway Township does not change the fact that they sold their home and moved out of the school district. The mere purchase of additional houses in the district or the payment of property taxes does not establish domiciliary intent, as petitioners had not taken up an actual and physical abode in those houses. Accordingly, petitioners did not meet their burden of demonstrating that they were domiciled in Alloway Township during the 2017-18 school year and during the period from September 5, 2018 through October 2, 2018.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioners for the period during which the minor children were ineligible to attend school in Alloway Township. The Board's Business Administrator (BA) testified regarding the tuition rates and indicated that the Board was seeking reimbursement for the minor children in the amount of $60.56 per day, totaling an annual tuition rate of $10,900 each. Evidence in the record shows that the actual annual tuition rate was $11,139 for prekindergarten and

kindergarten, $11,216 for grades 1-5, and $10,949 for grades 6-8, and that the minor children were in 7th grade, 2nd grade, and prekindergarten during the 2017-18 school year. (Est. Tuition Calculated Rates for Regular Programs, Exhibit R-15). The BA testified that the Board took the lowest of those rates and "rounded it down" to establish a tuition rate of $10,900. (Testimony of Rebecca Joyce, T2 at 167) Although petitioners argue that the rate for C.H. should be lower because that child was only in half-day prekindergarten, the BA explained that the tuition rates for grades are an established rate and are not broken down by the hours of attendance. (T2 at 186-187) Accordingly, the Board is entitled to tuition reimbursement in the amount of $36,333.60 – $10,900 each for the 2017-18 school year, and $60.56 each for the 20 school days from September 5, 2018 through October 2, 2018, during which time petitioners' minor children were ineligible to attend school in Alloway Township.

The Commissioner does not find petitioners' additional exceptions to be persuasive. The Commissioner notes that the ALJ had the opportunity to assess the credibility of the witnesses who appeared before her and make findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> 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. [*N.J.S.A.* 52:14B-10(c)].

As such, the Commissioner finds no basis in the record to disturb the ALJ's credibility assessments. Contrary to petitioners' assertion, the ALJ did not base her finding that C.H. was not credible solely on her unilateral redactions of text messages, but rather on a multitude of reasons that were detailed by the ALJ in the Initial Decision. Additionally, the Commissioner agrees with the ALJ that petitioners were not deprived of their due process rights and instead

failed to exercise their rights and participate in the board hearing. With respect to tuition, any arguments regarding the tuition rate another student has contracted to pay are irrelevant. Finally, tuition should not be reduced by the length of time the ALJ took to issue an Initial Decision. Petitioners were not prohibited from removing their children from the district while their appeal was pending.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $36,333.60 for tuition costs incurred during the period in which C.H, S.H., and S.H. were ineligible to attend school in Alloway Township. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/26/19
Date of Mailing: 3/26/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16589-17
AGENCY DKT. NO. 241-10/17

S.H AND C.H. ON BEHALF OF C.H.,
S.H. AND S.H.,
Appellants,
v.
TOWNSHIP OF ALLOWAY BOARD OF EDUCATION, SALEM COUNTY,
Respondent.

Jamie Epstein, Esq., for appellants

Victoria Beck, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: November 13, 2018 Decided: February 11, 2019

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Appellants, S.H. and C.H., on behalf of C.H., S.H., and S.H., challenge the determination made by the respondent, Township of Alloway Board of Education, that they did not reside in Alloway Township after August 25, 2017. The respondent seeks

PROCEDURAL HISTORY

On September 27, 2017, the respondent, through a Final Notice of Ineligibility, advised the appellants that their children, C.H., S.H., and S.H., were unauthorized to attend school in the Alloway Township School district, due to their non-residency. Appellants appealed the decision on October 18, 2017. The Department of Education Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on November 8, 2017, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14 F-1 et seq. On November 3, 2017, respondent filed an answer and cross-petitioner for tuition reimbursement and costs.

On December 22, 2017, respondent filed a Motion for Summary Decision in its favor relative to the residency issue and tuition and costs reimbursement, on the grounds that appellants had sold their home on August 25, 2017, purchased a new home outside respondent's school district, and did not own any property within its district.

On January 8, 2018, a Prehearing Order was entered which established filing deadlines for appellants' Motion for a Protective Order and respondent's opposition to same. On March 28, 2018, an Order was entered denying appellants' Motion for a Protective Order. Pursuant to that Order, appellants' opposition to respondent's December 22, 2017 Summary Decision Motion was filed by May 15, 2018. Respondent's filed a response to the opposition and appellants filed a sur-reply. Respondent's motion for summary decision was denied.

The hearing in this matter was heard on July 24, 2018 and July 31, 2018.

On July 31, 2018, at the beginning of respondent's presentation of their case, a piece of paper with notes written on it dropped out of the exhibit binder that was presented by appellants to the witnesses for their use during their testimony. (D-1.) The paper was given to the undersigned ALJ, when it fell out of the book. The paper

appeared to have notes regarding questions and testimony presented at the previous hearing by C.H. The ALJ took testimony from C.H. about the paper and allowed counsel for the parties to question C.H.. She admitted it was hers. She had taken the exhibit binders with her after the last day of hearing.[1] She had written notes on pieces of paper and they must have mixed with the binders in her bag after the hearing. She denied utilizing the notes during her testimony. There was insufficient evidence to conclude that C.H. had acted in an inappropriate manner. As a result, a motion for an adverse inference against appellants and specifically C.H.'s testimony was denied. (T 145:23-25, 146-147:1-20, 155-159:1-10.)

After the July 31, 2018 hearing, the record remained open until September 14, 2018.

By correspondence dated October 9, 2018, appellants provided a certification, dated October 8, 2018, indicating that they moved back to Alloway Township on October 2, 2018. Subsequently, the undersigned re-opened the record to allow respondent thirty days to provide a responsive submission. The undersigned indicated the record would close on November 13, 2018. Respondent provided a responsive certification with supporting documentation on November 13, 2018. The appellants objected indicating that the thirty-day deadline expired on November 12, 2018, and therefore, the respondent's submission was untimely. The thirty-day extension and the November 13, 2018, were inadvertently inconsistent. The extension of time was contemplated to end on November 13, 2018. Therefore, respondent's submission was timely.

Respondent's November 13, 2018 submission includes an investigative report in which the children are shown in a photograph at such great distance that their faces are not recognizable. However, appellants objected to the picture being accepted as part of

[1] Curiously, C.H. appears to have prepared the exhibit book. Exhibit R in the appellants' exhibit book is labeled as follows: "3 affidavits by mtg (sic) attendees confirming **my** presence." A review of the exhibit indicates the affiants were confirming C.H.'s presence at the respondent's Board meeting on September 26, 2017. During her testimony about this issue, C.H. stated that she took the exhibit binders home with her after the first day of hearing. While not prohibited, it is odd that C.H. prepared the exhibit book which was utilized on behalf of appellants during trial. This fact coupled with C.H.'s unilateral redaction of content from other evidence admitted during the hearing is troubling.

the record without being redacted. That page of the report is hereby **SEALED** and has been placed in a separate sealed envelope.

On December 28, 2018, an Order for Extension was entered extending the time for filing the initial decision until February 11, 2019.

SUMMARY OF TESTIMONY

For Appellant

Courtney Hitchner (Hitchner) is an acquaintance of C.H. Hitchner's son attends respondent's school with C.H.'s children and the children play together. On September 26, 2017, Hitchner attended the respondent's board meeting because she wanted to be active in the community and keep current with changes at the school. Upon her arrival, she walked into the meeting with C.H. and took a seat in the back of the room near C.H. The meeting had already commenced and Hitchner stated that she missed the meeting's beginning formalities. Hitchner testified that she could observe C.H. throughout the meeting, and that C.H. never left her seat. C.H. never told anyone she was present or arrived late. Hitchner testified that she could hear what the Board was saying throughout the meeting.

When the Board went into executive session they did not announce the purpose of the closed session. Hitchner did not know that the closed session involved C.H.'s children. The students involved were referred to by numbers. No one called for C.H. to join the closed session. The closed session lasted about half an hour. When the Board returned from closed session they announced their decision "[d]enying children coming into the school, or staying in the school." C.H. was also present when this decision was announced. Hitchner denied that C.H. ever asked her about their decision because C.H. could not hear the tuition number. C.H. remained in her seat until the end of the meeting. After the meeting, Hitchner and C.H. walked to the front of the room and signed the sign-in sheet. (P-17.) Hitchner then went home.

C.H., testified on her own behalf. The appellants have five children, to wit: C.H. who is seventeen years old and graduated from Woodstown High School in June 2018;[2] S.H. who is thirteen years old; S.H. who is eight years old; C.H. who is five years old; and S.H. who is two years old. The thirteen, eight, and five years old children are the subjects of this appeal.

Appellants resided at XX Neil Court, Alloway Township, (Alloway), New Jersey for approximately ten years prior to August 25, 2017, at which time they moved out of Alloway.[3] The family moved to XXX Woodstown Deer Town Road in Elmer, New Jersey, (Elmer),[4] which was a property they had purchased in November 2016. Appellants purchased the property for investment and development. C.H. insisted that it was never the family's plan to leave Alloway. C.H. testified that appellants moved their personal belongings to the Elmer home. They entertain at the Elmer home. They use the lake on the property. They park their recreational vehicles (RVs) and their other vehicles at the property.

C.H. alleged that at the time of their move, they were in the process of purchasing another property in Alloway on Main Street. They had been negotiating to buy this property since July 2017. However, the sale fell through eventually. (P-N.) Appellants are engaged in the business of purchasing, renovating, and renting or selling properties. They own nineteen properties. C.H. stated that their mailing address, a post office box, remained the same after they moved. (P-A, pp. 1-37.)[5] They obtained a post office box because they had difficulty receiving their mail at the XX Neil Court residence.

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[2] C.H. was a student at Woodstown High School, which serves as the high school district for Alloway Township. Appellants did not appeal any decision made about C.H. in this matter. However, respondent's business administrator testified that tuition costs were paid by respondent to the high school district for the 2017-2018 school year. (P-U.) Any change in her domicile would result in an adjustment to the number of students sent from Alloway to the high school district and a corresponding change to the number of students sent from C.H.'s new school district to the high school district.

[3] Appellants requested that all address numbers be redacted. Therefore, although public information, the property numbers are not used in this Initial Decision.

[4] This property is designated as being in Elmer but is part of the Upper Pittsgrove school district.

[5] C.H. unilaterally redacted the documents in P-A without the advice of counsel. This made the documents suspect.

C.H. stated that she received a letter from the Alloway superintendent, Kristen Schell, (Schell), on September 5, 2017, two days before the start of the school year, which she understood to say that her children were not allowed to attend respondent's school because they had moved out of the district, although C.H. admitted during cross-examination that this was not stated in that letter. The letter did not advise of a right to appeal this decision or that her children could remain in school while the decision was challenged. When she received the letter, C.H. went to the school and spoke with Schell. C.H. admitted the family had moved out of the district. C.H. stated that she explained that they "had sold their house but were in the process of purchasing a new one with only a couple of days, possibly weeks overlap and that their education shouldn't be disrupted for only a couple of days or a couple of weeks." Schell asked for the address of the property. C.H. refused to provide the address because they were still going through inspections and the contract was not final. C. H. asked to speak with the respondent and Schell said she would check the policy and respond.

On September 6, 2017, Schell responded. C.H. stated that Schell advised her that the children were disenrolled and that their transfer papers were at the school office and ready to be retrieved. C.H. alleged that Schell indicated that if the children showed up to school the next day, then they would be physically removed. Schell did not mention any right to appeal the decision. C.H. immediately contacted her attorney who wrote a letter to the school. (P-G.) Thereafter, C.H. received an email from Schell stating that the children could attend school the next day. C.H. also received a notice of ineligibility from Schell. Appellants requested an appeal hearing from respondent, which was scheduled for the next board hearing on September 26, 2017.

Subsequently, appellants requested a copy of any evidence that the respondent was introducing or considering at the appeal hearing. This information was provided on September 21, 2017. (P-L.) On September 22, 2017, appellants sent a correspondence to each of the board members. (P-M.) Appellants conveyed that they had no desire to leave Alloway. C.H. stated their "house sold quickly" and they temporarily located to another property, which they owned. However, C.H. also testified that their XX Neil Court home had been placed on the market for sale initially in 2007

and continued to be offered in the Multiple Listing Service (MLS) for sale through 2017. C.H. indicated that the "quick sale" reference meant the buyers moved in, in a matter of weeks. They were in the process of purchasing another Alloway property and needed ninety days to complete the purchase. Appellants offered to pay tuition for the time frame during which they did not have a house in Alloway. No response was received from respondent.

On September 26, 2017, C.H. arrived at the board meeting at approximately 6:30 p.m., and waited for Hitchner before entering the meeting. They sat near each other towards the back of the room. C.H. stated that she was present for the roll call at the beginning of the meeting. She heard an award being given to a student for an accomplishment achieved over the summer and the public comment, including a teacher who praised that student.

C.H. texted her husband, S.H., from the meeting. (R-19; P-T.) C.H. printed out the text messages and redacted them before she provided them to her attorney. C.H. alleged she redacted information that did not pertain to the meeting and the names of her children. In this regard, C.H. first blacked out certain information with a black Sharpie marker and then went over it with the redaction produced through the Cute PDF application. C.H. destroyed the paper she marked with the Sharpie. The text messages were deleted by her phone due to storage restrictions without her knowing it would occur.

Thereafter, the board announced their exit to executive session. C.H. heard them read this from the agenda. C.H. alleged that they did not say it related to any student's domicile. Respondent did not invite C.H. into the executive session or call her name. C.H. texted her husband as follows: "Went into executive session as soon as I got here. Not out yet." (R-19.)

When the respondent returned from executive session, C.H. heard the respondent read the resolution regarding the executive session. C.H. testified that the resolution, (P-S), was consistent with what she heard at the meeting, when the board

returned from executive session. The respondent's determination was to disenroll four students because they were not domiciled in Alloway. C.H. alleged that she did not think it was her children because there were four students listed and they were only referred to by numbers. Then, she was "shocked" that she was not part of the hearing.

C.H. also testified that at 7:33 p.m., C.H. texted her husband as follows: "[t]hey said I wasn't here and I didn't participate and voted we are not domiciled." She did not present herself to the respondent at this time. At 7:53 p.m., C.H. texted her husband as follows:

> It's in the resolution, they use numbers to represent the kids, so I was trying to write, I think they said $60 a day, but that can't be right. I couldn't hear. I'm in the back of the library. They are in the front.

In response, S.H. texted C.H. at 7:55 p.m. as follows: "[y]ou should make public that you want it on the record you were there," to which C.H. responded, "[m]aybe leave it alone now."

Several other texts were exchanged between C.H. and S.H. At 7:59 p.m., S.H. texted "[p]art of appeal, I guess," to which, C.H. responded, "[y]ep." (R-19.) C.H. acknowledged that they knew on September 8, 2017, that they could appeal the respondent's decision, if they did not agree with it. She testified that she knew her children would remain in the school district during the pendency of this appeal.

C.H. stated that she signed the respondent's sign-in sheet at the end of the meeting. She then approached one of the board members and said "Hi, how are you?" and had a brief conversation. C.H. did not say to that board member, "Hey by the way I was here." That board member also spoke to Hitchner. After the meeting, C.H. never advised the school she was at the meeting and that an error in procedure might have occurred.

C.H. testified that her family had been surveilled by Schell from September 2017 through December 2017. Schell would park outside their residence in Elmer, take

pictures, and follow the family on their drive to the respondent's school. C.H. felt harassed. (P-BB.) C.H. stated it upset her children.

Relative to appellants' search for a new Alloway residence, C.H. testified that the Main Street property negotiations ended on the third day of attorney review in September 2017. Subsequently, on November 6, 2017, the appellants purchased a property located at XX Alloway Aldine Road, (Aldine), in Alloway, for which they paid property taxes in 2017 and 2018. The contract to purchase this property was signed in the middle of October 2017. Appellants never advised respondent they had purchased a property in Alloway.

The Aldine property was in foreclosure when it was purchased by appellants. When they began working on the property they found that there were major structural and systemic problems, which they had to correct. C.H. alleged the renovation was delayed by permitting issues, inspections, and utility company issues. Appellants had intended to move into the home by January 1, 2018. At the time of the hearing, they had not moved into the Aldine property because it was "not habitable."

Appellants also purchased a property located at XX North Greenwich Street, (Greenwich), in Alloway on January 23, 2017. (P-CC.) This property was also in foreclosure when appellants purchased it. Appellants intended to move into this property temporarily until the Aldine home was ready. Appellants never advised respondent they had purchased a second property in Alloway. At the time of the hearing, appellants had not moved into the Greenwich property.

In addition to the Elmer, Aldine, and Greenwich properties, appellants own nineteen properties, including a tri-plex in North Wildwood, New Jersey. Their vehicles have Florida license plates.

On cross-examination, C.H. stated that their Elmer home is known as the Seabrook Mansion. It has eight bedrooms and six bathrooms and at the time of the hearing, appellants' seven-person family continued to reside there. The Aldine property

had two bedrooms when it was purchased, although appellants' renovation plans include four bedrooms. (R-23.) The Greenwich property has four bedrooms. C.H. acknowledged that the certificate for work at the Greenwich property indicated and use of the property indicated the buyers were S.H. and C.H., "0 children," and "no occupancy." (R-8.)

For Respondent

Kristen Schell, (Schell), is the respondent's chief school administrator, who goes by the title, Superintendent of Schools. Schell testified that she first became aware that the appellants' move out of the school district in the summer when her assistant, Barbara Rishel (Rishel), relayed a couple of conversations and interactions she had relating to the appellants. C.H. advised they had sold their XX Neil Court house. They further indicated that they had purchased a home in Upper Pittsgrove. Rishel said C.H. called the school and said she was changing her mailing address to a post office box because of an issue getting their mail at their XX Neil Court home. Thereafter, C.H. was in the school's main office and was overheard saying the family had outgrown their house and were moving into a new home.

In the Spring of 2017, C.H. registered her pre-K child, at which time Rishel questioned her about the family's move. C.H. denied the move and said, "[w]e have 19 properties and we fix them up and rent them out." In August, a retired teacher shared with Rishel that she had taken a plate of cookies to the appellants' new home in Upper Pittsgove (Elmer property). Then, a district bus driver questioned why the children we on a roster for the bus, despite the fact that they had sold their XX Neil Court property.

To ensure residency, which is one of Schell's duties as superintendent, she wrote a letter to the appellants, dated August 31, 2017, to make an informal attempt to start the transfer process for the appellants' children, so they could start school on the first day in the district in which they live. This is an action the district always takes. In response to this letter, C.H. came into the office and admitted to moving out of Alloway. However, she insisted the move from Alloway was temporary. When Schell asked C.H.

for the address of the property they were purchasing in Alloway, she refused to provide it. C.H. added that their house sold "quickly." Schell stated the real estate sheet indicated the house had been on the market for 427 days. Schell told C.H she would look into the policy and get back to her about the situation.

Schell responded to C.H. and indicated that she would have to provide documentation about their new Alloway purchase. C.H. inquired about what would happen if she had a hardship. Schell indicated that the hardship provisions were inapplicable to the appellants' situation. Schell told C.H. they needed to start the transfer process because it was in the children's best interests to start school on the first day in their new school. (R-I.) Schell advised C.H. that she would pull the children off the rosters, so that no attention would be drawn to the fact that they had moved. Schell advised the appellants that their children could not attend the first day of school. However, Schell never disenrolled the children.

Schell then reversed this decision on September 6, 2017, when she received a letter from appellants' attorney saying they were domiciled in Alloway. (R-2.) At this point, Schell realized her informal attempt to have appellants' transfer their children was not going to occur. As a result, respondent sent the formal notice of ineligibility letter, to Elmer and the appellants' post office box in Alloway, and via email. (R-3.) Schell investigated the appellants' claim of a continuing to be domiciled in Alloway. On the advice of counsel, Schell documented their commute to school from Elmer, on a weekly basis, by observing the family leaving the Elmer residence and driving to school. Schell documented this through photographs. Schell did not park on the appellants' property, and did not photograph the children. Schell explained smaller districts often do this, because they do not have the staff and resources to hire investigator. (R-31.) The respondent then decided to hire an investigator after an uncomfortable incident with S.H. Schell explained a report from Robert Brown, Investigative Services, who was hired to document the fact that the appellants were no longer domiciled in Alloway as they claimed they were.

Schell explained the district's admission policy and what documents are required as proof of eligibility to attend. (R-13 and 14.) Respondent has a policy to accept non-resident tuition students consistent with New Jersey law. (R-32.) Schell explained that domicile is where the family lives, where your children sleep at night and eat their meals, and where they consider their primary residence to be located. Had the appellants had documentation to substantiate their statement that they were moving back to Alloway in days or weeks, Schell would have accepted that they intended to remain domiciled in Alloway.

The appellants asked to postpone the hearing, which was rejected by the respondent. By correspondence, dated September 22, 2017, the appellants made a settlement offer, which included paying tuition until they purchased a home in Alloway. (A-M.) The correspondence stated:

> If the Board gives us the requested reasonable amount of time of 90 days to relocate back into Alloway Township and we do not, then we agree to pay tuition for our three children for the remainder of the school year or until such time as we relocate into a permanent residence in Alloway Township.

On September 26, 2017, the respondent held its board meeting and the residence hearing. Schell testified that she looked for C.H. before the executive session and also asked Becky Joyce, the business administrator, and Cathy Caltabiano, a board member, who is friendly with the appellants, if C.H. was present. That board member replied that C.H. was not present and that C.H. was not coming. Schell checked the sign-in sheet. C.H.'s name was not on it and Schell never saw C.H. enter the meeting.

The closed session began at 6:38 p.m. The board president announced the two matters for executive session. While in executive session, the board's attorney had Schell go out and double check to determine if C.H. had arrived while they were in the session. C.H.'s name was not on the sign-in sheet. The last name was Oliveri and Schell did not see C.H. in the room. After the closed session, respondent took formal action determining that the appellants were no longer domiciled in the district. Schell

explained the executive minutes reflect that there was no residency hearing because only Schell presented documents and the appellants did not participate.

After the meeting, Schell and the board president spoke in the parking lot for a "good amount of time." When Schell started her car to leave, the board president advised that the board member who had said C.H. was not attending, had just let him know that C.H. was there at the meeting. Schell denied knowing what time those texts were exchanged. Appellants did not reach out to Schell about the meeting. Her next contact with them was when she received the appeal information. Appellants never advised Schell they had purchased a property in Alloway subsequent to the hearing.

Rebecca Joyce (Joyce) is employed as the respondent's Business Administrator. In August, Joyce sent an email to Alloway Township inquiring, who owned XX Neill Court, and was advised that the appellants sold it on August 25, 2017. (R-6.) Joyce attended the September 26, 2017, board meeting. There is a sign in the meeting room that instructs members of the public to please sign in and take an agenda. The board went into closed session at the beginning of the meeting. Joyce had never seen C.H. before, so she asked board member Caltabiano if C.H. was in attendance. Caltabiano said "She's not here and she will not be coming." Joyce asked Caltabiano to let her know if C.H. did come into the meeting. Caltabiano stated "I know for a fact that she's not coming."[6]

Approximately ten minutes into the meeting, the board went into executive session for the residency hearing and a separate personnel matter. The board solicitor asked Schell to go back into the library and look at the sign-in sheet to verify that C.H. had not appeared. Schell did that, although Joyce acknowledged she did not see Schell actually do that. The solicitor explained the process and prepared the resolution. Joyce explained the document relating to the established tuition rate and the methodology used to determine the tuition rate of $10,900 per pupil. (R-15.) Respondent took the lowest tuition rate and divided it by 180 days to calculate the daily tuition rate that was

[6] Board Member Caltabiano recused herself from participating in the residency hearing and voting on the issue, because she and the appellants have a personal relationship.

going to be charged to the appellants. The 6th to 8th grades tuition rate was lower than the elementary school rate and the pre-K rate.

In response to cross-examination, Joyce testified that $10,900 was the certified rate per pupil for the 2017-2018 school year per the budget software. Joyce was only aware of one other voluntary tuition contract in the last twenty-three years. It was in 2015 and the rate charged, as determined by the board in that situation, was $6,500.

Joyce testified that she wrote that the appellants did not attend the hearing and so there was no residency hearing on the minutes. (R-18.) Joyce explained that because the appellants did not participate in the hearing Schell presented the documents relating to the residency investigation and the solicitor had to walk the board through the process and facts as if the parents were there. She wrote no residency hearing occurred because it was not a "two-way" hearing.

Joyce stated that the appellants never reached out to the respondent after the meeting to indicate there was a mistake with what occurred. Appellants never advised they purchased a property in Alloway during the 2017-2018 school year.

Barbara Rishel (Rishel), is employed by respondent as an Administrative Secretary to the Superintendent and is familiar with C.H. In the Spring of 2017, Rishel was in the office where C.H. was telling others that they were moving because they had outgrown their house. In June 2017, C.H. brought in her registration papers for her pre-K student. Rishel asked why she was registering the child because they were moving. C.H. insisted they were not moving. Rishel told C.H. that she remembered C.H. speaking about the move in the office. C.H. said she had rental properties and that this house was not necessarily going to be their residence. Rishel then registered the student. Also, during this June meeting, C.H. stated that she was changing her address from Neil Court to a post office box and that she would not need bus service at Neil Court any longer because she was making other transportation arrangements for her children. In July, a former teacher came to visit the school. She advised that the

appellants just became her new neighbors in Upper Pittsgrove, where the Elmer house is located.

After not receiving any additional transfer or moving information, Rishel left the children on the bus roster. The bus driver called Rishel and questioned why the appellants' children were still on the bus runs, because they had moved.

Schell had Rishel mail the Notice of Ineligibility letter, dated September 8, 2017, to the appellant's Elmer property by certified and regular mail, and to their post office box in Alloway by regular mail. (R-3.)

FINDINGS OF FACT

The following facts of this case have been stipulated to by the parties (J-1.) and are not in dispute and as such, I **FIND** the following facts:

A. On August 25, 2017, appellants sold their home located at XX Neil Court Alloway Township;
B. On August 25, 2018, appellants moved into Elmer property which they own;
C. On November 6, 2017, appellants purchased the Aldine property;
D. On February 9, 2018, appellants purchased a second home in Alloway Township located at XX Greenwich Street;
E. Appellants do not allege that they have moved back into the District and admit that they have nor resided in the District since August 25, 2017.

Based on the law, the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. Appellants are in the business of purchasing, renovating, and selling or renting properties. They own nineteen properties.

2. Appellants have five children. This seven person family includes three school aged children who attend the respondent's Alloway Township school to wit: S.H. who is thirteen years old; S.H. who is eight years old; C.H. who is five years old.[7]

3. Appellants oldest child, C.H., graduated from Woodstown High School in June, 2018.

4. Appellants resided at XX Neil Court, Alloway Township since 2007.

5. The XX Neil Court property was advertised for sale since 2007, and placed in the MLS.

6. In the Spring of 2017, the appellants' family had admittedly outgrown their home at XX Neil Court, Alloway Township, and had decided to move. C.H. stated this in the school's office in front of Rishel.

7. In June 2017, in contemplation of their move out of the district, appellants changed their mailing address from XX Neil Court to a post office box in Alloway Township and advised they would no longer required school bus transportation from their XX Neil Court address.

8. This was an unsuccessful attempt to maintain the position that they continued to be domiciled in Alloway.

9. In July 2017, appellants moved to Elmer to the Seabrook Mansion property, which has eight bedrooms and six bathrooms, a lake on the property, and grounds large enough to park their vehicles and 2 RVs.

10. In July 2017, a former Alloway teacher told Rishel she had taken cookies to the appellants because they were her new neighbors in Elmer.

11. Appellants sold their XX Neil Court residence on August 25, 2017, having previously moved their personal property and family to the Elmer property.

[7] These were the ages of the children during the 2017-2018 school year.

12. Appellants have resided since at least August 25, 2017 at the Elmer property.

13. Respondent was advised by several independent sources that appellants no longer resided in their district as of August 25, 2017. As a result, Schell and respondent had good cause to initiate a residency investigation.

14. Respondent informally proceeded to determine, through a correspondence to appellants dated August 31, 2017, if appellants had moved out of the district. It was a genuine attempt to ensure that the children could be transferred to their new school district in time for the first day of school. In taking this action, Schell was attempting to act in the best interest of the children, so that their education was not disrupted.

15. In response C.H. admitted they moved out of the district, but refused to transfer her children to the new district. C.H. alleged the move was temporary; however, she refused to produce any documentation substantiating that they were moving back to Alloway in days or weeks or cooperate to provide any documents required by respondent's policies to show they resided in Alloway.

16. When the informal procedure failed to work, Schell followed the formal procedures and conducted a residency investigation, in good faith.

17. Respondent never disenrolled the children from school.

18. Any upset or concern of the children was unnecessarily caused by appellants sharing information about the respondent's position that they had to be enrolled in the Upper Pittsgrove district in which their Elmer home was located.

19. By notice, dated September 8, 2017, respondent initially notified appellants of their ineligibility to continue to enroll their children in Alloway.

20. Appellants requested a hearing before the respondent to contest its residency determination.

21. Schell was directed to document the appellants' commute from their Elmer home to school and continued to do so weekly through the fall of 2017 because C.H. alleged they were moving back into Alloway in days or weeks. Schell did not harass the appellants or their children, and took care to park on the public road, and not appellants' property, and not take photographs of the children.

22. Although they admitted they had moved to Elmer, C.H. put the issue of their relocation back to Alloway in issue, and this necessitated the ongoing residency investigation.

23. Ultimately, respondent hired Investigator Robert Brown to document where appellants resided. The investigation concluded they resided and were domiciled at Elmer.

24. On September 22, 2017, appellants sent correspondence to respondent admitting they no longer resided in Alloway, but arguing that they continued to be and intended to be domiciled in Alloway. Appellants further requested ninety days to move back into Alloway. They offered to pay tuition after the ninety day period, if they had not moved back into Alloway.

25. On September 26,2017, the respondent held its monthly board meeting which included appellants' residency hearing.

26. C.H. knew the appellants' residency hearing was to be conducted at that meeting.

27. Schell asked Joyce and board member Caltabiano to look for C.H. Caltabiano, who is friendly with appellants, indicated before the meeting C.H. was not there and was not coming to the meeting.

28. C.H. is very concerned about protecting the privacy of her children; however, this was not an excuse to fail to identify her presence or to participate in the September 26, 2017 residency hearing.

29. Despite the importance of the meeting, C.H. arrived late to the meeting. Hitchner also separately arrived late. They took seats toward the back of the meeting room. They did not sign in on the sign-in sheet upon entering the meeting.

30. There is a sign in the meeting room that instructs members of the public to please sign in and take an agenda.

31. C.H. did not make her presence known to respondent at any time during the meeting, despite numerous opportunities to do so.

32. There was no issue hearing the board members' announcements or them speaking. C.H. heard the roll call at the beginning of the meeting and an award being given to a student for an accomplishment achieved over the summer. She also heard the public comment, including a teacher who praised that student.

33. C.H. heard the announcement that the board was going into closed session. C.H. did not identify herself to respondent as present.

34. At 7:13 p.m., C.H. texted her husband as follows: "Went into executive session as soon as I got here. Not out yet." (R-19.)

35. Schell left the executive session to double check the sign-in sheet to determine if appellants had come to the meeting late. C.H. did not present herself to Schell and had not signed the sign-in sheet.

36. Based on the evidence presented by Schell and the board's solicitor, the respondent concluded that appellants did not reside and were not domiciled in Alloway and that their children were ineligible to attend the respondent's school.

37. At 7:33 p.m., C.H. texted her husband as follows: "They said I wasn't here and I didn't participate and voted we are not domiciled."

38. C.H. did not present herself to the respondent at this time.

39. At 7:53 p.m., C.H. texted her husband as follows: "It's in the resolution, they use numbers to represent the kids, so I was trying to write, I think they said $60 a day, but that can't be right. I couldn't hear. I'm in the back of the library. They are in the front."

40. Despite this text, C.H. never asked Hitchner about their decision because C.H. could not hear the tuition number. Hitchner expressed no difficulty hearing anything throughout the meeting.

41. In response, S.H. texted C.H. at 7:55 p.m. as follows: "You should make public that you want it on the record you were there," to which C.H. responded, "Maybe leave it alone now."

42. Several other texts were exchanged. At 7:59 p.m., S.H. texted: "[p]art of appeal, I guess," to which, C.H. responded, "[y]ep." (R-19.)

43. C.H. never let respondent or the administrators know she was at the September 26, 2017 meeting, despite her husband even advising her she should. By design, C.H. refused to participate, knowing the children would remain enrolled in respondent's school district pending the outcome of this appeal.

44. On October 18, 2017, petitioner filed an appeal from the respondent's final determination of ineligibility.

45. Respondent provided appellants with their hearing and due process. Appellants' failure to participate and C.H.'s refusal to identify her presence at the board meeting resulted in appellants failing to exercise their due process rights and participate in the hearing. C.H.'s testimony that she was not provided with the required residency hearing is not supported by

the facts and is not credible under these circumstances. No pattern of failing to provide due process to appellants or their children existed.

46. Respondent conducted a residency hearing and based on the information presented by Schell appropriately determined that appellants' domicile and residency was at the Elmer property.

47. The documents, including personal bills and mortgage and tax documents, appellants submitted to support their argument that they continued to be domiciled in Alloway Township after their move to Elmer are insignificant because they do not prove actual residency. Moreover, those documents, similar to the text messages, were unilaterally redacted by C.H., without legal advice or direction, and therefore were suspect. No testimony or corroborating information rehabilitated the motive for the redaction or resolved the suspicion.

48. The Elmer property was the property to which appellants intended to return each day, and in which they and their children slept and ate their meals between August 25, 2017 and October 2, 2018. It was their domicile and residence.

49. Consistent with their business, petitioners bought a property with a small two-bedroom house improvement on it which was in foreclosure on Aldine on November 6, 2017.

50. It was not credible that the appellants, who are in the business of purchasing, renovating, and selling or renting the properties, did not know that this property would require extensive renovations to its system and structure. Further it was not credible that the parties intended to move into this home with their family of seven.

51. Appellants purchased the Greenwich property on January 23, 2018. For business purposes they purchased the property, which was also subject to a bank foreclosure. While the Greenwich property has four bedrooms appellant advised Alloway Township that C.H. that they were the buyers

and there would be no children inhabiting the residence and no occupancy. Appellants never intended this to be their residence.

52. C.H.'s statements that the family was going to move into the Greenwich property during the 2017-2018 school year was also not credible.

53. C.H. affirmed in an Affidavit, dated October 8, 2018, that the appellants' family moved into the Greenwich property on October 2, 2018. Therefore, C.H. admitted that from at least August 25, 2017 through October 2, 2018, the family did not reside and was not domiciled in Alloway.

54. Appellants were required to enroll their children in the district in which the Elmer property is located for the 2017-2018 school year, because they were ineligible to attend school in respondent's district. Appellants were required to enroll their children in that district for the period of time between September 5, 2018 and October 2, 2018, which totals twenty school days, because they were ineligible to attend school in the respondent's district.

55. After considering respondent's November 13, 2018 submission, insufficient evidence exists to make a determination, at this time, whether appellants became residents and domiciled in Alloway at the Greenwich property after October 2, 2018. Therefore, no conclusions are determined herein for any period past October 2, 2018. The respondent may take any appropriate action and make any determinations relative to the appellant's residency and domicile. Nothing herein shall bar the respondent from instituting an appropriate residency investigation, proceeding, or action, and seeking allowable appropriate relief including, but not limited to, tuition reimbursement against appellants, for the period of time after October 2, 2018.

56. Tuition for the 2017-2018 school year was $60.56 per day for 180 days, equaling $10,900 per annum.

57. Tuition for the period from September 5, 2018 through October 2, 2018, was $60.56 per day for 180 days equaling $1,211.20

58. Appellants must reimburse respondent $32,700 for tuition for the 2017-2018 school year, plus $3,633.60 for tuition for the period between September 5, 2018 through October 2, 2018.

59. Appellants' oldest child, C.H., who graduated from Woodstown High School in June 2018, was domiciled with her family in Elmer during the 2017-2018 school year.

Credibility

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part,

rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence, I **FIND** as **FACT** that the testimony presented by Schell, Joyce, and Rishel about their actions, taken in relation to this matter, and their observations of C.H's statements and actions were consistent and credible. Collectively, their testimony of the events and the conclusions and determinations they made sense and hung together to logically describe what occurred. It is undisputed that the appellants did not reside in Alloway Township between August 25, 2017 and October 2, 2018.

Rishel credibly testified relative to her observations about C.H.'s statements about the appellants' family having outgrown their XX Neil Court home and that they were moving in 2017. Rishel credibly testified that C.H. advised she no longer needed bus transportation for the children for the 2017-2018 school year and that the appellants had changed their mailing address in the Spring of 2017 to a post office in Alloway Township from the XX Neil Court residence. Rishel credibly relayed that a former teacher advised her in July 2017 that the appellants had moved to their Elmer residence. Rishel showed no pre-existing issues with or animosity towards C.H. Despite the fact that Rishel, based on the information provided to her, had reason to believe that the appellants no longer resided in Alloway, she took no action to prevent C.H. from registering her child for pre-K in the district. Rishel took no punitive actions against appellants.

Similarly, Joyce and Schell reasonably investigated the issue of the appellants' residency, only after multiple independent sources of information were relayed to them indicating that the appellants had moved from the district. Their version of events relating to the September 26, 2017 board residency hearing were consistent and made sense. Additionally, their rendition of that night's events including their reasonable reliance upon Caltabiano's statement that she knew C.H. was not attending the hearing, the fact that C.H. did not sign the sign-in sheet until after the meeting's conclusion, and the fact that C.H. refused to disclose to them that she was at the hearing, provided a

greater "ring of truth" than the scenario offered by C.H., who plainly had a greater interest in the outcome of this proceeding.

I further **FIND** as **FACT** that C.H.'s version of the events lacked a ring of truth. C.H.'s statement that her house sold quickly was disingenuous and unsupported by the facts and her actions. The residence had been on the market since 2007. Knowing in the spring of 2017 the appellants were relocating to Elmer, C.H. changed the appellants' address to a post office box. She told others that her seven-person family had outgrown their home and they were moving. She requested the bus service be discontinued for her children, so that the school would not know the location from which they were commuting to school. Consistent with these statements she moved to a larger home in Elmer, which has eight bedrooms and six bathrooms. This was to be the appellants' residence.

The appellants purchase, renovate, and sell or rent properties for a living. They own nineteen rental properties. When they moved to Elmer they had no property in Alloway under contract to purchase and serve as their new residence, contrary to C.H.'s representations to Schell. This was supported by C.H.'s refusal to provide documentation to support her representations that the family would be moving back into Alloway within days or weeks at the most. Moreover, the testimony presented supported a relocation to Elmer on a date in June or July, when the former teacher took cookies to their Elmer home, and not late in August.

The appellants' purchase of the Greenwich property was for their business purposes, although appellants allege post October 2, 2018 they reside in the property. The purchase of the Aldine property as a residence makes little sense. It strains credulity to believe that after broadcasting that her family had outgrown their home and were moving to a larger home, appellants were actually intending to occupy a smaller

two bedroom home.[8] It further is not credible that, in light of their business, the appellants were taken by surprise that their Aldine property, a bank foreclosure property, required such extensive work to make it habitable.

Similarly, C.H.'s "shock" that the residency hearing occurred without her participation was not believable. This allegation was undermined by her testimony and her text messages with her husband. C.H. heard the meeting's roll call, the award given by the board to a student and the public comment, during which a teacher praised that student. C.H. knew why she was attending the September 26, 2017 meeting. C.H. heard the board state why they were going into executive session. C.H. heard their decision when then re-entered the meeting after executive session. In fact, Hitchner's testimony contradicted C.H.'s testimony. Hitchner, who was seated next to C.H., could hear the entire meeting. Hitchner denied that C.H. ever asked her about the respondent's decision, because C.H. could not hear the tuition number.

Although C.H.'s text messages are suspect, because she unilaterally redacted parts of them without legal advice to conceal portions of the conversations, the statements she left remaining are inconsistent with her being shocked. There was no such expression of astonishment or startlement that respondent had held the hearing or had rendered a decision without her participation. She chose not to participate or let the respondent know she was at the meeting, even after her husband advised she should make her presence known to them. This created an issue for her appeal and was done so intentionally. C.H.'s actions were calculated and intentional.

Further, C.H.'s positions about what occurred at the meeting showed further inconsistencies in her testimony. First, C.H. indicated that respondent failed to call her into executive session or make clear that the residency hearing was about her children. She believed that was wrong. Later, C.H. indicated that the privacy of her family would

[8] At this time, insufficient evidence exists to find or conclude that after October 2, 2018, the appellants did not commence residing in the Aldine property. Therefore, no conclusions are determined for any period past October 2, 2018. The respondent may take any appropriate action and make any determinations relative to the appellant's residency and domicile. Nothing herein shall bar the respondent from instituting an appropriate residency investigation, proceeding, or action, and seeking allowable appropriate relief including, but not limited to, tuition reimbursement against appellants, for the period of time after October 2, 2018.

have been violated, if they had done that because then everyone there would have known it was about her. That too would have been an issue for C.H. However, C.H. took no actions to rectify this situation. C.H. morphed her testimony as she attempted to cast herself in the best light or predict the line of questioning by respondent.

Finally, C.H. redacted information on the documentation she submitted to support the appellants' position that the mailing address on the family's bills, tax information, and financial information demonstrated they had an intention to remain domiciled in Alloway. Her unilateral redaction of this information, without input from legal counsel, made the evidence completely suspect and rendered their weight insignificant. This concealing of information disabled C.H.'s credibility.

Based on the foregoing, I **FIND** as **FACT** that C.H.'s testimony and appellants' documentary evidence was not credible.

LEGAL DISCUSSION

At issue is whether appellants children, S.H. who is thirteen years old, S.H. who is eight years old, and C.H. who is five years old, were entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

A person who meets age requirements and is domiciled within a school **district** may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to

which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that appellants' children attended school within the respondent's district during the 2017-2018 school year and from September 5, 2018 through October 2, 2018, while domiciled outside of the District in Elmer. They were not authorized to attend respondent's school.

C.H.'s statements and actions showed a course of conduct designed and engaged in intentionally to keep her children enrolled in Alloway for its free education, when she knew they no longer resided in the district. In this regard, in contemplation of their move in the summer of 2017, appellants changed their mailing address for their bills to an Alloway Township post office box, in the spring, in an attempt to give the appearance that they still resided in Alloway Township. C.H. misrepresented that the sale of the residence was quick. Appellants also removed their children from the bus transportation roster ahead of time, knowing they did not reside in the district. C.H. refused to participate in the September 26, 2017, residency hearing, knowing that her children would remain enrolled in the district for free pending the resolution of this instant appeal.

Appellants' arguments that they intended to remain domiciled in Alloway Township and that their relocation to their Elmer residence was temporary during the 2017-2018 school year was unpersuasive and unsupported by any credible evidence. Given the appellants' business of purchasing, renovating and either selling or renting the properties, appellants' alleged involuntary delays in relocating to the Aldine property

lacked support. The tax payments made by them for properties owned by them within Alloway Township or the bills mailed to a post office box in Alloway were insufficient to establish an intent to remain or be domiciled in Alloway Township.

As indicated above, appellants' arguments that they intended to relocate and reside to the Aldine or Greenwich properties during the 2017-2018 school year were not credible.

The appellants did not reside in the district for the entire 2017-2018 school year. Elmer was their true, fixed, and permanent home. Elmer was the property to which, whenever they were absent, they intended to, and did, return. This is where the family ate, slept, and resided. Elmer was their domicile from which they presented no intention of moving.

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that S.H., S.H., and C.H. were not entitled to a free public education in the respondent's district. Appellants failed to satisfy their burden of proof that respondent acted in an arbitrary and capricious manner.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The record reflects that the actual cost of each of appellants' child's attendance in-district during the 2017-2018 school year was $60.56 per day equaling $10,900 per annum.

Accordingly, I **CONCLUDE** that the District is entitled to reimbursement for tuition by the appellant in the amount of $10,900 for each of their three children. I **CONCLUDE** the total reimbursement appellants owe to respondent for the 2017-2018 school year is $32,700. I further **CONCLUDE** that the respondent is entitled to

reimbursement for tuition by the appellant in the sum of $1,211.20 for each of their three children for the period of September 5, 2018 through October 2, 2018. I further **CONCLUDE** that the total reimbursement appellants owe to respondent for the period between September 5, 2018 and October 2, 2018 is $3,633.60.

I further **CONCLUDE** that petitioner's appeal should be dismissed.

ORDER

It is **ORDERED** that the determination of the respondent, Alloway Township Board of Education that S.H., S.H., and C.H. were not domiciled in the Alloway Township School District for the 2017-2018 school year and the period between September 5, 2018 through October 2, 2018, is **AFFIRMED.**

It is, therefore, **ORDERED** that appellants pay respondent, Alloway Township Board of Education, tuition in the total amount of $36,333.60 for unauthorized attendance in the District schools for the periods stated above.

It is further **ORDERED** that appellants' oldest child's, C.H.'s domicile be changed from Alloway Township to Upper Pittsgrove for the 2017-2018 school year, so that the proper adjustment may be made for purposes of the tuition paid for her to attend Woodstown High School during that school year.

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, 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.

2/11/19 _____
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 2/11/19

Date Mailed to Parties: 2/11/19

APPENDIX

WITNESSES

For Appellant:

1. Courtney Hitchner
2. C.H., appellant

For Respondent:

1. Kristen Schell, Superintendent
2. Rebecca Joyce, Business Administrator
3. Barbara Rishel, Administrative Assistant to the Superintendent

EXHIBITS

Joint Exhibits:

J-1 Five stipulated facts

For Appellants:

P-A Redacted Domicile Documents
P-B Email regarding ownership of XX Neil Court
P-C Open House School Letter (Not admitted)
P-D School bag tag for pre-K bus/walker (Not admitted)
P-E Schell Informal eligibility letter, dated August 31, 2017
P-F School policy
P-G Attorney letter, dated September 6, 2017
P-H Schell email, dated September 6, 2017
P-I Second Schell email, dated September 6, 2017
P-J Initial Ineligibility Letter, dated September 8, 2017
P-K Email to Schell requesting disclosure of witnesses
P-L Schell email denying request to postpone the hearing

P-M Appellants letter conveying settlement offer, dated September 22, 2017
P-N Email regarding Aldine property sale, dated September 25, 2017
P-O Email to Joyce, dated September 22, 2017
P-P C.W. email to Joyce, dated September 25, 2017
P-Q September 26, 2017 Board Meeting Sign in Sheet
P-R Three affidavits of meeting attendees
P-S Respondent's meeting minutes and resolution
P-T Redacted text messages
P-U Joyce email regarding Appellants' Woodstown High School student
P-V Final Notice of Ineligibility
P-W Record of Deed Transfer Aldine property
P-X taxes paid record for Aldine property
P-Y post office box receipt
P-Z Alloway Township Resolution 18-45
P-AA Executive Session Minutes from September 26, 2017 board meeting
P-BB Attorney correspondence to V. Beck, Esq., dated December 15, 2017
P-CC Record of Deed Transfer Greenwich property
P-DD Letter from appellants to respondent re: public documents case

For Respondent:

R-1 August 31, 2017 letter to from Schell to appellants
R-2 September 6, 2017 letter from J. Epstein, Esq. to Schell
R-3 September 8, 2017 letter from Schell to appellants regarding hearing
R-4 September 28, 2017 letter regarding Notice of Final Ineligibility
R-5 Coldwell Banker Homes.com Website for Elmer property (not admitted)
R-6 September 13, 2017 email exchange between Assessor and Business Administrator
R-7 November 2, 2017 letter from Zoning, Housing Code Office Alloway Township (not admitted)
R-8 Certificate of Continued Occupancy Greenwich property
R-9 Pre-Occupancy Application Information Greenwich property (not admitted)
R-10 Certificate of Occupancy Application Greenwich property(not admitted)

R-11 Alloway Township Housing Ordinance (not admitted)

R-12 Report of Robert M. Browne, Private Investigative Services

R-13 District Policy 5111-Student Admissions

R-14 District Policy 5118-Nonresident Students

R-15 Est. Tuition Calculated Rates for Regular Programs

R-16 Open Session Minutes Board Meeting September 26, 2017

R-17 September 27, 2017 Board Meeting Sign in sheet

R-18 Executive Session Minutes Board Meeting September 26, 2017

R-19 Redacted text messages

R-20 Photo of Elmer residence (not admitted)

R-21 HUD 1, Tax Assessment, Elmer property (not admitted)

R-22 HUD 1, Tax Assessment, Neil Court property (not admitted)

R-23 HUD 1, Tax Assessment, Aldine property (not admitted)

R-24 Floor Plan Aldine Property (not admitted)

R-25 Aldine Construction permits (not admitted)

R-26 Photographs Aldine property (not admitted)

R-27 2016 Tax Returns (not admitted)

R-28 2017 Tax Returns(not admitted)

R-29 NJ Court Public Access Page—14 suits involving appellants

R-30 Motor Vehicle Change of Address Forms(not admitted)

R-31 Surveillance Report

R-32 Respondent's Non-resident tuition student rules and procedures

R-33 Registration Information Inquiry for Vehicle (not admitted)

R-34 Resume of R. Joyce (not admitted)

R-35 Resume of K. Schell(not admitted)

Court Documents

D-1 C.H.'s note found in the exhibit binder

New Jersey Commissioner of Education

Final Decision

T.W., on behalf of minor child, M.W.,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

Synopsis

Petitioner filed an appeal on behalf of her minor child, M.W., seeking a determination that the cost of M.W.'s tuition to attend the Mercer County Technical School's (MCTS) Electrical Construction Program is the responsibility of the Freehold Regional High School District (Board), M.W.'s resident district board of education. M.W. was denied admission to the Monmouth County Vocational School District's (MCVSD) Electricity Program, but was admitted to MCTS's Electrical Construction Program, which has the same classification of instruction program code as MCVSD's Electricity Program. Petitioner alleged that the Board's decision to deny her request for tuition reimbursement under *N.J.A.C.* 6A:19-2.3(a)2 was arbitrary, capricious and unreasonable. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: petitioner's appeal was timely filed under *N.J.A.C.* 6A:3-1.3(i); *N.J.S.A.* 18A:54-1 *et seq* authorized the creation of local, county and regional vocational schools and set forth funding and enrollment requirements to deliver vocational education to interested students; an examination of the rules and regulations promulgated to foster access to county vocational schools shows that these provisions do not guarantee enrollment or tuition-free attendance; a student's right to attend a county vocational school is subject to admissions standards and available space, and only guarantees equal opportunity for enrollment, not enrollment for all; even if admitted to a county vocational school, a right to tuition-free attendance is not absolute; a county vocational school is permitted to establish admission requirements based on academic qualifications and space considerations; thus, *N.J.A.C.* 6A:19-2.3(a)2 is appropriately read to absolve a local school board of an obligation to fund a resident student's attendance at a non-resident county vocational school *if* a resident county vocational school has the same program, whether or not the student has been admitted to the resident county school; under *N.J.A.C.* 6A:19-2.3(b), every child is assured an equal opportunity to pursue an education at their county vocational school, but not every child is assured admission. The ALJ concluded that the Board is not obligated to pay for M.W.'s attendance at MCTS, and granted its motion for summary decision.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter.

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 27, 2019

OAL Dkt. No. EDU 11522-18
Agency Dkt. No. 192-8/18

New Jersey Commissioner of Education

Final Decision

T.W., on behalf of minor child, M.W.,

Petitioner,

v.

Board of Education of the Freehold Regional High School District, Monmouth County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, T.W., and the Freehold Regional High School Board of Education's (Board) reply thereto.[1] In this matter, the petitioner alleges that the Board's decision to deny her request for tuition reimbursement under *N.J.A.C.* 6A:19-2.3(a)2 was arbitrary, capricious and unreasonable. Petitioner's minor child, M.W., is a Monmouth County resident who was denied admission to the Monmouth County Vocational School District's (MCVSD) electrical program; M.W. therefore applied to the Mercer County Technical School's (MCTS) electrical program and was admitted. The petitioner contends that the respondent Board – M.W.'s resident school district – must pay tuition for M.W. to attend MCTS. Pursuant to *N.J.A.C.* 6A:19-2.3(a)2:

> The resident district board of education shall be responsible for the tuition and transportation costs, and nonresident fee (where applicable) of any resident student admitted to a county vocational school outside the county in which the resident school district is located unless the district board of education maintains a

[1] The petitioner submitted a response to the Board's reply exceptions that was not considered because replies to reply exceptions are not permitted.

> vocational school pursuant to *N.J.S.A.* 18A:54-5 *et seq.*, or the county in which the resident school district is located maintains a county vocational school, and either of these school offers the same program as the non-resident county vocational school where the resident was accepted.

The petitioner does not appear to dispute the fact that MCVSD has the same electrical program as MCTS, but instead states that MCVSD did not offer its program to M.W.[2] The Administrative Law Judge (ALJ) granted the board's motion for summary decision and recommended that the petition of appeal be dismissed. In so doing, the ALJ found that the Board is not responsible for the cost of M.W.'s attendance at MCTS because MCVSD offers the same electrical program.[3]

The petitioner's exceptions substantially reiterated the substance of her submissions at the OAL, recasting the arguments therein to support the contention that the ALJ erroneously granted summary decision in favor of the Board. Specifically, the petitioner maintains that the ALJ wrongfully applied a strict reading of the word "offer" in *N.J.A.C.* 6A:19-2.3(a)(2) to find that the Board is not responsible for M.W.'s tuition at MCTS. M.W. was not accepted into MCVSD's program and as such MCVSD's program was not offered or made available to M.W. The ALJ's narrow interpretation of "offer" is inconsistent with public policy that encourages a vocational education.

Petitioner also takes exception to the ALJ's failure to address her argument that the Board has paid for other students' tuition at vocational schools despite the same programs offered through an in-county program. The Board's willingness to pay tuition for other students in similar circumstances demonstrates that there exists a factual issue as to whether the Board's decision was arbitrary, capricious or unreasonable. Accordingly, summary decision was not appropriate, and a hearing is required. Therefore, the Initial Decision should be rejected.

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[2] The electrician programs at both MCTS and MCVSD have the same classification of instruction program code of 460302.

[3] The ALJ also determined that the petition of appeal was timely filed in accordance with *N.J.A.C.* 6A:3-1.3.

In reply, the Board also reiterated the positions advanced in its submissions at the OAL, maintaining that the ALJ properly granted its motion for summary decision. The ALJ correctly found that the Board has no responsibility to pay for an out-of-district vocational program when an in-county vocational school has the same program. M.W. is free to attend the out-of-county program at MCTS, but the Board has no obligation to pay for M.W.'s tuition. The fact that M.W. did not get accepted into MCVSD is irrelevant for purposes of *N.J.A.C.* 6A:19-2.3 and does not change the fact that the program was "offered" as envisioned by the regulation. Moreover, the ALJ conducted an extensive examination of the meaning of "offer" before concluding that the Board has no obligation to pay for M.W.'s tuition at MCTS. The Board also stresses that, despite the petitioner's assertion that it paid tuition for other students in circumstances similar to those of M.W., it has never paid for a general education student to attend a vocational program at MCTS where the same program is offered at MCVSD. Finally, the ALJ properly found that there are no material facts in dispute and the Board is entitled to summary decision. Therefore, the Commissioner should adopt the Initial Decision as the final decision in this matter.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly stated in the Initial Decision – that the Board's decision to deny the petitioner's request for tuition was not arbitrary, capricious or unreasonable.[4] The ALJ correctly found that, "*N.J.A.C.* 6A:19-2.3(a)(2) is appropriately read to absolve a local school board of an obligation to fund a resident student's attendance at a non-resident county vocational school if a resident county vocational school has the same program, whether or not the student has also been admitted to the resident county school." Initial Decision at 11. Moreover, the Commissioner does not agree with the petitioner's argument that because T.W. was not admitted into MCVSD's program, the program was not "offered" in accordance with

[4] The Commissioner is also in accord with the ALJ's determination that the petition was timely filed.

N.J.A.C. 6A:19-2.3(a)(2). Finally, the Board's placement of certain special education students does not have any impact on this matter nor does it create the existence of material facts in dispute that requires a hearing in this case.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/19
Date of Mailing: 3/27/19

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
SUMMARY DECISION
OAL DKT. NO. EDU 11522-18
AGENCY DKT. NO. 192-8/18

T.W. on behalf of M.W.,
Petitioner,
v.
BOARD OF EDUCATION
OF THE FREEHOLD REGIONAL
HIGH SCHOOL DISTRICT,
Respondent.

Patrick F. Carrigg, Esquire, for petitioner (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Mark G. Toscano, Esquire, for respondent Freehold Regional High School District Board of Education (Comegno Law Group, P.C., attorneys)

Record Closed: February 5, 2019 Decided: February 14, 2019

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

T.W. (petitioner) on behalf of her minor son, M.W., a Monmouth County resident, was denied admission to Monmouth County Vocational School District's (MCVSD)

Electricity Program but was admitted to Mercer County Technical Schools' (MCTS) Electrical Construction Program, seeks an order requiring respondent Freehold Regional High School District Board of Education (Freehold), which is M.W.'s resident district board of education, to pay for M.W. to attend MCTS pursuant to N.J.A.C. 6A:19-2.3(a)(2), which states:

> The resident district board of education shall be responsible for the tuition, transportation costs, and nonresident fee (where applicable) of any resident student admitted to a county vocational school outside the county in which the resident school district is located, unless the district board of education maintains a vocational school pursuant to N.J.S.A. 18A:54-5 et seq., or the county in which the resident school district is located maintains a county vocational school, and either of these schools offers the same program as the non-resident county vocational school where the student has been admitted. A program shall be deemed the same, for purposes of this section, if it is approved by the Department in accordance with N.J.A.C. 6A:19-3.1 and 3.2, is assigned the same Classification of Instructional Programs (CIP) code and meets or exceeds all applicable program performance standards.

T.W. argues that this provision compels Freehold to pay for her son to attend MCTS because, even though MCVSD has the same electrician program as MCTS, M.W. was denied admission to MCVSD's program and, thus, MCVSD did not offer its program specifically to M.W. In opposition, Freehold maintains that N.J.A.C. 6A:19-2.3(a) must be strictly construed, such that Freehold is under no obligation to pay for M.W. to attend MCTS because MCVSD, the resident county vocational school, "offers the same program as the non-resident county vocational school where the student has been admitted."

PROCEDURAL HISTORY

On August 9, 2018, petitioner filed a petition for due process with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergent relief. On August 10, 2018, the emergent matter was filed with the Office of Administrative Law (OAL). The emergent-relief request was scheduled for oral argument, which was held on August 21, 2018. The emergent application was denied, and respondent

thereafter filed the within motion for summary decision. Oral argument was requested and heard on December 10, 2018. Petitioner was permitted to supplement the record until February 1, 2019. Respondent replied to petitioner's supplemental submission on February 5, 2019, and the record closed on that date.

FACTUAL DISCUSSION

The following facts are not in dispute and as such **I FIND AS FACT** that M.W. lives with his mother, T.W., in Howell, which is in Monmouth County. Petition, ¶ 1. He attends Howell High School (HHS), which is within the Freehold's jurisdiction. Id. at ¶ 2.

M.W. applied for admission to the career and technical education (CTE) programs for aspiring electricians at MCVSD and MCTS for the 2018-2019 school year.[1] Id. at ¶¶ 5-9. On April 24, 2018, MCTS informed M.W. that he had been accepted into its Electrical Construction Program. Id. at Ex. B. However, on May 9, 2018, MCVSD informed M.W. that he had been denied admission to its Electricity Program. Id. at Ex. A. The two programs have the same CIP code of 460302.[2] Certification of Michael Dillon, Ex. B; New Jersey Department of Education, Postsecondary Career and Technical Programs, https://homeroom5.doe.state.nj.us/pctep/search.php.

On May 10, 2018, T.W. wrote a letter to Dr. Lester Richens, the Interim Executive County Superintendent for Monmouth County, to inform him that M.W.'s guidance counselors had told her that, despite his admission, M.W. could not attend the MCTS program, and asked Dr. Richens to "resolve this issue." Petition, Ex. C. In her letter, T.W. asserted that N.J.A.C. 6A:19-2.3(a)(2) obligated Freehold Regional to pay for M.W.'s attendance at MCTS since he was denied admission to MCVSD's program. Ibid.

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[1] Freehold Regional does not operate its own vocational school or offer a CTE program for aspiring electricians. Id. at 3-4.
Several years ago, the State Board of Education generally changed the regulatory terminology from "vocational" to "career and technical" education "to ensure that programs once considered 'vocational' are now given the legitimacy and respect they deserve." 38 N.J.R. 3205(a); 39 N.J.R. 29(a). The term "vocational" is still used if there is a statutory basis. 38 N.J.R. 3205(a).

[2] These programs are known as "shared-time" programs because they allow a student to attend a vocational school for half of each day and the home high school for the other half of the day. MCVSD, "Shared Time Overview," available at https://www.mcvsd.org/sharedTime/shared-time-overview.html.

In a response letter dated May 17, 2018, Dr. Richens notified T.W. that, under N.J.A.C. 6A:19-2.3(a)(2), Freehold Regional "would not be required to pay tuition or provide transportation, despite the fact that [M.W.] was denied admission to [MCVSD's] program" because "[w]e have deemed Monmouth and Mercer to have equivalent electrical programs." Id. at Ex. D.

In an August 7, 2018, letter to T.W., Michael Dillon, Freehold's Director of Guidance and Operations, stated that "[t]his letter serves as formal notice that the Freehold Regional High School District will not pay tuition or transportation to any program at [MCTS] as [M.W.] has access to the Monmouth County Vocational Programs." Dillon Cert., Ex. A. Dillon quoted from N.J.A.C. 6A:19-2.3(a)(2) and concluded that, "[a]s such, you would be solely responsible for the full tuition and transportation costs to [MCTS] should [M.W.] choose to attend their program." Ibid.

On August 9, 2018, T.W. filed a petition of appeal with the Commissioner of Education, seeking an order requiring Freehold to "pay all costs, including transportation, associated with M.W.'s attendance at [MCTS'] Electrician program." T.W. included a separate motion for emergent relief in the form of an order requiring Freehold to pay for M.W.'s attendance at MCTS for the 2018-2019 school year, pending the Commissioner's final decision on the underlying petition of appeal.

On August 9, 2018, the Commissioner transmitted the petition of appeal and motion for emergent relief to the Office of Administrative Law (OAL). On August 22, 2018, I denied T.W.'s motion for emergent relief by order. On September 10, 2018, the Commissioner adopted the emergent relief order and ordered that "[t]his matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure." Commissioner's Decision on Application for Emergent Relief.

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there

is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

On October 1, 2018, Freehold filed with the OAL a "Motion for Summary Decision in Lieu of an Answer."[3] In a supporting brief and certification, Freehold submits that summary decision on T.W.'s petition of appeal is appropriate because there are no genuine issues of material fact and Freehold is entitled to prevail as a matter of law. Specifically, Freehold argues that, under the strict terms of N.J.A.C. 6A:19-2.3(a)(2), Freehold is not obligated to pay for M.W.'s attendance at MCTS, a non-resident county vocational school, because MCVSD, the resident county vocational school, "offers the exact same program" as the electrician program at MCTS. In this regard, Freehold notes that the two programs have the same CIP code, as required by N.J.A.C. 6A:19-2.3(a)(2). Brief, p. 2.

Freehold also argues that summary decision is appropriate because T.W. failed to appeal Dr. Richens' denial of her request for Freehold to pay for M.W.'s attendance at MCTS. According to Freehold, "[t]he 90-day deadline to appeal the Interim Executive Superintendent's determination passed on August 15, 2018, meaning it has now become a final decision, and Petitioners' Petition is now also barred as untimely." Id. at pp. 2-3.

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[3] This type of motion does not exist under either the procedural rules governing controversies and disputes before the Commissioner, N.J.A.C. 6A:3-1.1 to -1.17, or the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to 21.6. N.J.A.C. 6A:3-1.5(a) generally requires a respondent to file an answer within twenty days after receiving a petition. But see N.J.A.C. 6A:3-1.5(g) (stating that "[n]othing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer"). Here, the Commissioner immediately sent T.W.'s emergent motion, along with the underlying petition, to the OAL without an answer. See N.J.A.C. 6A:3-1.6. T.W. has not objected to Freehold's motion on the grounds that it is premature without an answer, and the papers submitted by the parties shows that there are no genuine issues of material fact. Thus, Freehold should be allowed to proceed with its motion for summary decision even though it has not filed an answer to T.W.'s petition. See N.J.A.C. 1:1-1.3(b) (providing that procedural rules may be relaxed or disregarded if the judge determines that adherence would result in unfairness or injustice").

On October 18, 2018, T.W. filed a brief in opposition to Freehold's motion. T.W. argues that Freehold's interpretation of N.J.A.C. 6A:19-2.3(a)(2) is too narrow. Instead, T.W. contends that, under that provision, Freehold is responsible to pay for M.W.'s attendance at MCTS because MCVSD failed to "offer" M.W. the same program as MCTS by denying him admission. According to T.W., public policy in favor of access to a vocational education supports a broader reading of N.J.A.C. 6A:19-2.3(a)(2) to include M.W.'s situation.

T.W. also disagrees with Freehold's contention that Dr. Richens' May 17, 2018, letter triggered the ninety-day rule under N.J.A.C. 6A:3-1.3(i), which provides that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." According to T.W., "[t]he Executive County Superintendent's letter of May 17, 2018 is advisory as [he] has no authority to render an appealable decision." Opposition Brief, p. 10.

On October 31, 2018, Freehold submitted a reply brief in which the board argues that T.W. "continues to intentionally confuse the reference to the program being 'offered' generally, as used in [N.J.A.C. 6A:19-2.3(a)(2)], with an offer of admission specific to M.W., which is not how the regulation reads." Reply Brief, p. 3. Freehold also reiterates its contention that this matter should be dismissed because T.W. failed to timely appeal Dr. Richens' decision regarding Freehold's obligation to pay for M.W.'s attendance at MCTS.

Again, as in the emergent application, it was clear that the parents only have the best interest of their child in pursuing this application and educational pursuit. In fact, the entire presentation by petitioner was appreciated by the court.

Likewise, with the emergent application, the undersigned questioned the logic of the respondent in following the "letter of the law" and not the "spirit of the law." Clearly, the spirit of the law was to prevent forum shopping by residents of a county where a program was offered but they just simply refused to attend. That is not the case here.

Failing to pay for a program in another county simply because it is offered in the home county where the student was rejected not due to academics or disciplinary problems is not the intent of the law. The intent is to encourage education. At the time, there was no indication that he was rejected for anything other than seating availability. However, following oral argument on Freehold's motion on December 10, 2018, the court asked T.W. to supplement the record on January 22, 2019, with information about the reason MCVSD denied M.W. admission to its Electricity Program. According to T.W., MCVSD informed her that "there were 70 applicants to the program and they accepted 20 students" and that "[t]he criteria used for determining which applicants would be accepted was grades and attendance." T.W.'s January 22, 2018, Supplemental Submission. However, "M.W. was not one of the top 20 students based on his grades and attendance" because "he had a cumulative GPA of 1.59 and 11 absences in his 9th grade year and 13 absences in through [sic] his 10th grade year." Ibid. As part of her supplemental submission, T.W. provided MCVSD's admission policy.[4] Ibid.

According to the policy, "[a]ll pupils will be given equal opportunity for enrollment," but "[q]ualified pupils will be accepted into regular vocational programs . . . on a geographic basis based upon the number of applications submitted by the home high schools." Ibid. Under the criteria for "qualified pupils," "[p]upils must have an excellent attendance record (less than fifteen days absent per year)" and "must have a 'C' grade point average." Ibid. The admission policy also states that "[i]f less applications than spaces are received, all qualified pupils will be accepted" and that, "[i]f more applications than spaces are received, pupil selection will be based upon need as established by the number of qualified applications from each school district with all schools being given equal access to all programs." Ibid.

LEGAL DISCUSSION

First, as a threshold matter, Freehold incorrectly argues that T.W.'s petition should be dismissed as untimely. Under N.J.A.C. 6A:3-1.3(i), otherwise known as the ninety-day rule, "[t]he petitioner shall file a petition no later than the 90th day from the date of

[4] The policy is publicly available at https://www.mcvsd.org/shared-time-policy.html.

receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." If a petitioner fails to file his or her petition within this ninety-day period, the petition may be dismissed as untimely.

Here, T.W. timely filed her petition in accordance with N.J.A.C. 6A:3-1.3(i). On August 7, 2018, Freehold's Director of Guidance and Operations notified T.W. by letter that "[t]his letter serves as formal notice that the Freehold Regional High School District will not pay tuition or transportation to any program at [MCTS] as [M.W.] has access to the Monmouth County Vocational Programs." Two days later, on August 9, 2018, T.W. filed her petition challenging this final ruling by the district Board of Education that is the subject of this contested case. Therefore, T.W. filed a timely appeal. The county superintendent's May 17, 2018, opinion letter is not the triggering event under N.J.A.C. 6A:3-1.3(i), and even if it were, T.W. still filed her petition questioning Freehold's financial obligation within ninety days. As such, T.W.'s petition will not be dismissed as untimely.

However, for the following reasons, Freehold is not obligated to pay for M.W.'s attendance at MCTS.

In New Jersey, a primary purpose of vocational education is "to fit for profitable employment." N.J.S.A. 18A:54-1. To reach this goal, the Legislature has, through N.J.S.A. 18A:54-1 to -41, authorized the creation of local, county, and regional vocational schools, and set forth funding and enrollment requirements for the delivery of a vocational education to interested students.

If a local board of education does not operate its own vocational school, N.J.S.A. 18A:54-20.1 provides that such board "in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district . . . and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district" and "shall pay tuition for each of these pupils to the county vocational school district." N.J.S.A. 18A:54-20.1(a).

N.J.S.A. 18A:54-20.1 further provides that "[t]he board of education of a county vocational school district shall receive pupils from districts without the county so far as their facilities may permit" and authorizes the non-resident school to collect tuition and a non-resident fee from the sending district. N.J.S.A. 18A:54-20.1(b) and (c). However, N.J.S.A. 18A:54-20.1 does not specifically address the funding requirements for situations in which a resident county has a vocational school, but the resident student wishes to attend a non-resident county vocational school at the expense of his local school district. To fill this statutory void, the State Board of Education and Department of Education promulgated the regulation at issue in this matter, N.J.A.C. 6A:19-2.3(a)(2), which governs non-resident access to county vocational schools. Again, that regulation provides in relevant part:

> The resident district board of education shall be responsible for the tuition, transportation costs, and nonresident fee (where applicable) of any resident student admitted to a county vocational school outside the county in which the resident school district is located, unless . . . the county in which the resident school district is located maintains a county vocational school, and . . . offers the same program as the non-resident county vocational school where the student has been admitted. A program shall be deemed the same, for purposes of this section, if it is approved by the Department in accordance with N.J.A.C. 6A:19-3.1 and 3.2, is assigned the same Classification of Instructional Programs (CIP) code, and meets or exceeds all applicable program performance standards.
>
> [N.J.A.C. 6A:19-2.3(a)(2).]

Also, N.J.A.C. 6A:19-2.3(b) states that "[a] county vocational school district shall admit resident students based on board-approved policies and procedures that ensure equity and access for enrollment that shall be posted on the school district's website" and that "[a] county vocational school district shall similarly admit non-resident students to the extent that space is available, pursuant to N.J.S.A. 18A:54-20.1.b."

Upon a thorough review of prior administrative decisions, it appears that the issue in this matter is one of first impression. Here, the parties dispute the meaning of the word "offers" under N.J.A.C. 6A:19-2.3(a)(2). Freehold strictly reads "offers" to mean that, so

long as the resident county school has the same program as the non-resident school, a local school district is under no obligation to fund a resident student's attendance at the non-resident school, regardless of whether the student is denied admission to the resident school. In contrast, T.W. broadly reads "offers" to include the implicit assumption that the resident school admits the resident student; only then has the resident school "offered" the student the same program as the non-resident school. Due to these conflicting views, it is necessary to determine which party's interpretation should prevail.

In interpreting a regulation, the rules of statutory construction apply. US Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012) (citation omitted). As such, "[d]etermining the intent of the drafter is [the] paramount goal," and "[g]enerally, the drafter's intent is found in the actual language of the enactment." Ibid (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005); Bedford v. Riello, 195 N.J. 210, 221 (2008)). Moreover, a "well established rule of statutory construction [is] that a legislative provision should not be read in isolation or in a way which sacrifices what appears to be the scheme of the statute as a whole," but "which harmonizes all of its parts so as to do justice to its overall meaning." Zimmerman v. Mun. Clerk of Berkeley, 201 N.J. Super. 363, 368 (App. Div. 1985) (citing Alexander v. New Jersey Power & Light Co., 21 N.J. 373 (1956)). With these principles in mind, Freehold's interpretation of N.J.A.C. 6A:19-2.3(a)(2) must prevail.

While N.J.S.A. 18A:54-20.1 and N.J.A.C. 6A:19-2.3 are designed to foster access to county vocational schools, these provisions do not guarantee enrollment or tuition-free attendance. First, these provisions recognize that a student's right to attend a county vocational school is subject to admissions standards and available space. Under N.J.S.A. 18A:54-20.1(a), an obvious prerequisite to a local school board's funding obligation is that a resident student "has applied for admission to and has been accepted for attendance . . ." See also N.J.A.C. 6A:19-2.3(a) (stating that "[e]ach resident district board of education shall ensure that resident students may apply to and, if accepted, attend a county vocational school pursuant to N.J.S.A. 18A:54-20.1").

And N.J.A.C. 6A:19-2.3(b) provides that "[a] county vocational school district shall admit resident students based on board-approved policies and procedures that ensure equity and access for enrollment" and that "[a] county vocational school district shall

similarly admit non-resident students to the extent that space is available, pursuant to N.J.S.A. 18A:54-20.1(b) ['The board of education of a county vocational school district shall receive pupils from districts without the county so far as their facilities may permit']." Thus, these provisions only guarantee equal opportunity for enrollment, not enrollment for all.

Second, even if a student is admitted to a county vocational school, his right to tuition-free attendance is not absolute. Under the provision at issue, N.J.A.C. 6A:19-2.3(a)(2), "[t]he existence of the same career and technical education program at the resident district board of education shall not negate a student's right to apply to and, if accepted, attend a county vocational school," but the local school board is not responsible for tuition if the resident district or resident county vocational school "offers the same program as the non-resident county vocational school where the student has been admitted." (Emphasis added).

When this provision is read in conjunction with the language regarding admissions standards and available space under N.J.S.A. 18A:54-20.1 and N.J.A.C. 6A:19-2.3(b), it becomes clear that Freehold's interpretation is correct. Admission is not certain for every student who would like to attend a county vocational school. A county vocational school is permitted to establish admission requirements based on academic qualifications and space considerations. Thus, N.J.A.C. 6A:19-2.3(a)(2) is appropriately read to absolve a local school board of an obligation to fund a resident student's attendance at a non-resident county vocational school if a resident county vocational school has the same program, whether or not the student has also been admitted to the resident county school. Again, under N.J.A.C. 6A:19-2.3(b) every child is assured an equal opportunity to pursue an education at his or her county vocational school, but not every child is assured admission.

The conclusion that "offers" means "has," and cannot be read to imply that a resident county school only "offers" a program to admitted students, is further supported by the presence of both the word "existence" and "offers" in reference to the "same program" under N.J.A.C. 6A:19-2.3(a). Clearly, "existence" and "offers" are synonymous under that provision, and in this context, both words simply mean "has."

As a result of this interpretation, Freehold is not responsible for the cost of M.W.'s attendance at MCTS under N.J.A.C. 6A:19-2.3(a)(2). MCVSD, the resident school, "offers the same program" as MCTS, the non-resident school, because the electrician programs at both schools have a CIP code of 460302. N.J.A.C. 6A:19-2.3(a)(2) does not require Freehold to pay for M.W.'s attendance at MCTS because he was denied admission at MCVSD. The record shows that he had the opportunity to apply for admission to MCVSD, but unfortunately did not meet that school's academic requirements. Fortunately, he was admitted to, and attends, MCTS. However, as a matter of law, Freehold does not have to pay for his attendance.

Also, despite the fact that petitioner did not file a cross-motion for summary decision, it is clear from the papers that there are no genuine issues of material fact requiring a hearing and that T.W. should prevail as a matter of law. As such, and because the UAPR provide that "[t]he judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency or the agency conducting the hearing" and "[t]he judge may take such other actions as are necessary for the proper, expeditious and fair conduct of the hearing or other proceeding, development of the record and rendering of a decision," N.J.A.C. 1:1-14.6(h) and (p). and **I FIND AS FACT** that there are no genuine issues of material fact requiring a hearing.

For the foregoing reasons, **I CONLUDE** Freehold's motion for summary decision is **GRANTED** even though he did not file a cross-motion for summary decision.

Having **CONCLUDED** that Freehold's motion for summary decision is **GRANTED**, it is hereby **ORDERED** that the petitioner's appeal be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

February 14, 2019
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 2-14-19

Date Mailed to Parties: 2-14-19

mph

New Jersey Commissioner of Education

Final Decision

Morris Lucky,

Petitioner,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent.

Synopsis

The petitioner – a tenured Student Assistance Coordinator (SAC) formerly employed in the respondent Board's school district prior to a Reduction in Force (RIF) – alleged that the Board terminated his employment pursuant to the RIF without regard to his tenure and seniority rights. Petitioner sought reinstatement and back pay. The Board contended that its actions were consistent with applicable law and regulation. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner holds standard certificates as both a SAC and as a School Social Worker; he has been employed by the Board since 2010 and has worked exclusively as a SAC, and never as a Social Worker; petitioner's RIF at the end of the 2016-2017 school year came in the aftermath of a decision to eliminate the full-time SAC position in favor of a position that combined the SAC with a School Counselor; because petitioner does not hold certification as a School Counselor, the new position was given to an outside candidate with the required dual certification; petitioner contended that the SAC aspects of the new position should have been assigned to him; pursuant to *N.J.S.A.* 18A:28-9, the Board has the right to reduce the work force for reasons of economy, reorganization, or for other good cause; petitioner has the burden to prove that the Board's action was arbitrary, capricious or in bad faith; and the Board demonstrated that there were valid educational reasons for combining the two positions. The ALJ concluded that the Board did not violate petitioner's tenure or seniority rights; accordingly, the petition was dismissed.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter; summary judgment was granted in favor of the Board, and the petition of appeal was dismissed.

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

March 27, 2019

OAL Dkt. No. EDU 13727-17
Agency Dkt. No. 173-8/17

New Jersey Commissioner of Education

Final Decision

Morris Lucky,

Petitioner,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), as well as the exceptions filed by petitioner – and respondent's reply thereto – have been reviewed and considered.[1] Upon review, the Commissioner is in accord with the Administrative Law Judge's (ALJ) findings and determination of the matter.

In this matter, petitioner's contention is that his tenure and seniority rights were violated when the Board eliminated the Student Assistance Coordinator (SAC) position by way of a reduction in force (RIF), and subsequently combined the SAC position with a School Counselor (SC) position. As petitioner does not hold a SC certificate, the new SAC/SC position was offered to a dually certified, non-tenured candidate. Although the petitioner also possesses a School Social Worker (SSW) endorsement, the record establishes that there are currently no non-tenured – or tenured but less senior – SSWs employed by the Board. The ALJ found that the Board presented valid educational reasons for combining the two positions because the Board can offer better integrated counseling services and improve efficiency in the delivery of counseling services to

[1] The Commissioner received, but did not consider, petitioner's filing dated March 8, 2019 and respondent's filing dated March 11, 2019, as said submissions were beyond the scope of *N.J.A.C.* 1:1-18.4.

students. The ALJ further found that petitioner's tenure and seniority rights were not violated as he does not possess a SC certificate and there are currently no other positions in the District upon which he can assert such rights.

Petitioner has filed exceptions to the ALJ's determination, stating that the District's decision to combine the SAC and SC positions to defeat petitioner's tenure and seniority rights is arbitrary, capricious, and unreasonable. Petitioner argues that the Board should not be allowed to combine two separate jobs with distinguishable functions into one position as a matter of convenience, resulting in the violation of the rights of tenured teachers. Petitioner further argues that he should have been offered the "part-time" SAC position following the RIF based on his tenure rights and seniority in the SAC position. Lastly, petitioner argues that summary decision is improper because the record is inconclusive as to whether petitioner should have been recalled from the eligibility list to fill positions for which petitioner was qualified by way of his tenure and/or seniority rights.

In its reply, the Board contends that the combined SAC/SC position was not created to defeat petitioner's tenure rights; rather, it was for the benefit of the students as substantiated in the record. Respondent clarifies that there is no "part-time" SAC position because the SAC and SC roles are integrated into a single SAC/SC position, and the individual serving in that position simultaneously provides SAC and SC services to the school community. Respondent reiterates that petitioner's tenure and seniority rights were not violated as a result of the RIF and the subsequent combination of the SAC and the SC positions. Respondent further submits that there are no unresolved issues of fact in this matter with respect to petitioner's entitlement to any other position in the District.

As a preliminary matter, the Commissioner finds that there are no material facts in dispute because it has been established that petitioner possesses an educational services certificate

with the SAC and SSW endorsements, he has only served as a SAC in the District, there are currently no non-tenured – or tenured but less senior – SSWs employed by the Board, and there are no other positions in the District upon which petitioner might assert his tenure/seniority rights. Therefore, the ALJ's disposition of this case via summary decision was proper.

With regard to petitioner's remaining contentions, the Commissioner finds his arguments unpersuasive. The Commissioner disagrees that the two positions were combined to "defeat" petitioner's tenure and seniority rights. The Board has clearly established – as detailed in the Initial Decision and supported by the record – that valid educational bases exist for the District's consolidation of the two positions into a single position. The Board's decision, therefore, was not arbitrary, capricious or unreasonable. Moreover, petitioner admittedly does not possess the requisite SC endorsement to serve in the newly created position; therefore, petitioner does not have entitlement over the SAC/SC position and it was properly filled by an individual who holds the required certification and endorsements.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter; summary judgment is granted in favor of respondent, and the petition of appeal is dismissed with prejudice.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/19
Date of Mailing: 3/27/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13727-17
AGENCY DKT. NO. 173-8/17

MORRIS LUCKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Alfred Maurice, Esq., for petitioner (Springstead and Maurice, attorneys)

Sandra Varano, Esq., for respondent (Nirenberg and Varano, attorneys)

Record Closed: January 31, 2019 Decided: February 14, 2019

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

STATEMENT OF THE CASE

Morris Lucky, a tenured Student Assistance Coordinator (SAC) formerly employed by the Englewood Board of Education (the Board), alleges that the Board terminated his employment pursuant to a Reduction-in-Force (RIF) without regard to his tenure and seniority rights. He seeks reinstatement and back pay. The Board replies that its actions were consistent with applicable law and regulation.

PROCEDURAL HISTORY

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on August 3, 2017. The Board filed an answer on September 12, 2017. The contested case was transmitted to the Office of Administrative Law (OAL) on September 14, 2017.

After completing discovery, the parties determined that the outcome of this matter could impact the employment status of Jalesah Brooks, a school district employee. Accordingly, via letter dated February 27, 2018, she was advised of her right to intervene pursuant to N.J.A.C. 1:1-16.4. Brooks did not reply.

Via letter dated August 23, 2018, the parties jointly asked that this matter be resolved via Cross-Motions for Summary Decision. Motions were filed on or about October 26, 2018. In his brief, Lucky for the first time asserted an entitlement to the position held by School Social Worker Jerome Land. I conferred with counsel to determine if Land now needed to be invited to intervene. Further information was exchanged by the parties, and petitioner's counsel advised via letter dated November 29, 2018, that his client no longer claimed Land's position. It was agreed that Land did not need to be invited to intervene. It was further agreed that now that the issue presented was clearer to the parties, they would file supplemental briefs.

Lucky filed a supplemental brief on December 16, 2018, and the Board filed its supplemental brief on January 31, 2019, at which time the record closed.

ISSUE PRESENTED

The parties agree that the only issue presented is whether the Board's action in abolishing the full-time SAC position; creating a dual SAC/School Counselor position; and appointing a nontenured staff member to fill that position, violated Lucky's tenure and seniority rights.

FINDINGS OF FACT

The salient facts are not in dispute, and I **FIND**:

Lucky holds a standard New Jersey Educational Services Certificate endorsed as both a Student Assistance Coordinator and as a School Social Worker. He holds no other endorsements on his certificate. Lucky commenced his employment with the Board in September 2010; throughout, he has worked exclusively as a SAC, and never as a Social Worker. In May 2017, Lucky was advised that his employment would be terminated at the end of the 2016-2017 school year due to a staff reorganization. At the time of his RIF, Lucky was the only SAC employed by the school district. Since his RIF, the district has not employed a full-time SAC. There are currently no nontenured Social Workers employed by the school district.

Lucky's RIF came in the aftermath of a decision to eliminate the full-time SAC position in favor of a position that combined a SAC with a School Counselor. Since Lucky does not hold a certification as a School Counselor, the position was given to an outside candidate, Jalesah Brooks. Brooks holds these dual certifications. The rationale for combining the two positions was explained by the Director of Pupil Personnel Services, Jamie Ciofalo, via certification:

> Under the prior system, students in need of SAC counseling would meet with a SAC and then have to meet with a different individual for academic school counseling services. By combining these positions, these students are now able to interact and develop a relationship with one counselor who provides drug, alcohol, social and/or emotional support as well as the services of academic school counseling. The decisions made with respect to school counseling, such as formulating educational and career plans, are informed by the information obtained as a result of the counseling provided as a SAC and vice versa. The further advantage of combining the positions is that the student does not have to schedule two appointments...and miss more class time.

Brooks is assigned a case load that includes students who require SAC services. Ciofalo explained that "Brooks simultaneously provides SAC and [student counseling]

services to the students and therefore she integrates the two positions. As such, her duties are not neatly split between these two roles." The school district has developed a job description that is consistent with Ciofalo's description of the goals of this dual position.

Lucky contends that the action of the Board in creating this dual position was inconsistent with his tenure and seniority rights, which are superior to those of Brooks, a newcomer to the school district. He thus contends that the SAC aspects of Brooks' position should have been assigned to him.

CONCLUSIONS OF LAW

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

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, '[f]anciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251–52.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law. Tenure is a legislative status; it is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962); N.J.S.A. 18A:28-5. Lucky was employed under tenure; accordingly, the RIF that resulted in his termination needed to be made 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; Howley v. Ewing Twp. Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd, 1983 S.L.D. 1554.

Lucky asserts that the Board's action in creating a position that included his prior duties, but incorporated qualifications that he could not meet, was inconsistent with his tenure and seniority rights and thus violative of the school laws.[1] The prerogative of the Board to reduce force is well-established. N.J.S.A. 18A:28-9 provides that

> [n]othing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district

[1] Because he holds a School Social Worker endorsement, Lucky might have been entitled to social work positions held by nontenured staff. He does not raise this as an issue because discovery revealed neither nontenured Social Workers, nor less senior Social Workers, are currently employed in Englewood. It is for this reason that the parties concluded that Lucky could lay no claim to the position held by Jerome Land, who is a tenured Social Worker with greater years of service in the school district.

> whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Pursuant to the statute, the Board may reduce its ranks and/or reorganize the delivery of services to its students. Consolidating positions, as the Board did here, is among the actions within a local board's authority. Francin v Maywood Bd. of Educ., EDU 09131-08, Initial Decision (July 6, 2009), aff'd Commissioner (August 20, 2009), <http://njlaw.rutgers.edu/collections/oal/>, citing Dunellen Bd. of Educ. v Dunellen Ed. Ass'n. 64 N.J. 17, 30 (1973). The burden is on Lucky to demonstrate that the action of the Board in doing so here was arbitrary, unreasonable or implemented in bad faith. Francin, Commissioner's Decision, at page 4.

Lucky cannot meet this burden. The Board has presented valid educational reasons for combining the work of a SAC with that of a student counselor; its actions in doing so promote efficiency and the delivery of better integrated counseling services. Lucky has proffered no facts to contest the Board's assertion that the consolidation of the two positions sprung from a legitimate desire to better deliver services to its students. Lucky lacks the certifications needed to fill this position, and as a result cannot lay claim to it based on his tenure and seniority rights.

Francin presents analogous facts. There, the board determined that it wished to deliver instructional services by staff certificated in both Physical Education and Health. The petitioning teacher was tenured but held an endorsement only as a Teacher of Physical Education. She unsuccessfully challenged the action of the local board in terminating her employment, while retaining nontenured staff in the dual Physical Education and Health role. In upholding the action of the board there, the Commissioner noted that in Dennery v Bd. of Educ., 131 N.J. 626, 638-39 (1993), the Court had determined that it was "unable to conclude...that the requirement of two certificates to qualify for a single education position is anomalous, arbitrary or irrational. Nor is it unlawful or invalid." See also: Martin v. South Amboy Bd. of Educ., EDU

13631-12, Initial Decision (March 28, 2014), aff'd, Commissioner (May 13, 2013), <http://njlaw.rutgers.edu/collections/oal/>.[2]

I **CONCLUDE** that the Board did not violate Lucky's tenure or seniority rights when it abolished his full-time SAC position; created a dual SAC/school counselor position; and assigned the newly created position to a dually certificated non-tenured staff member. [3]

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**.

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

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

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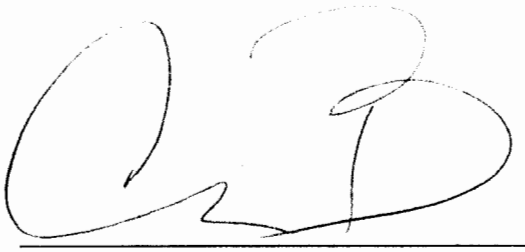
[2] Lucky's reliance on cases such as Bednar v Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987) is misplaced. The Board rightly points out that Bednar concerned the right of a tenured teacher to a position held by a nontenured colleague, where the petitioning teacher was certificated for the position but had no seniority rights. Lucky lacks the credentials to perform the duties of the combined SAC/School Counselor position.

[3] Lucky's contention that the dual position of SAC/School Counselor was an unrecognized title requiring approval by the County Superintendent of Schools is a nonstarter. While N.J.A.C. 6A:9B-5.5 does require that unrecognized titles receive such approval, both SAC (N.J.A.C. 6A:9B-14.2) and School Counselor (N.J.A.C. 6A:9B-14.8) are recognized titles. The Board and Lucky both shared input from County Superintendent Joseph Zarra regarding the requirement to secure this approval, both generally and in this specific instance. These submissions were uncorroborated hearsay and entitled to no weight. See: N.J.A.C. 1:1-15.5(b).

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



February 14, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 2/14/19

Date Mailed to Parties: 2/15/19

sej

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE between **SOMERSET COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT BOE**, Petitioner, -and- **JOHN VINGARA**, Respondent	DOE DOCKET NO. 121-4/16 **CONSENT AWARD**

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF HEARING: February 19, 2019 (Telephonic)

DATE OF CONSENT AWARD: March 20, 2019

APPEARANCES:

For the Petitioner:

Lisa M. Fittipaldi, Esq., DIFRANCESCO BATEMAN KUNZMAN DAVIS *et al.*

For the Respondent:

Edward A. Cridge, Esq., MELK O'NEIL
John Vingara

WHEREAS, following the preferring of tenure charges by Petitioner to the Commissioner of Education with the original arbitration award vacated, and the subsequent assignment of the case to the undersigned by the DOE, a pre-hearing motion for the restoration of Respondent's salary pursuant to N.J.S.A.18A:6-14 was filed and granted, with hearing dates established; and

WHEREAS, the parties entered into negotiations, with the STIPULATION OF SETTLEMENT resulting *inter alia* in Respondent's remaining on paid Administrative Leave through June 30, 2019 and irrevocable retirement and Petitioner's withdrawal of the instant tenure charges with Mr. Vingara executing

the same; and

WHEREAS, the STIPULATION OF SETTLEMENT was duly adopted by the Somerset County Vocational Technical School District Board of Education and executed by the Board President on February 25, 2019, the terms of which are incorporated by reference herein; therefore

BE IT RESOLVED, that the attached STIPULATION OF SETTLEMENT is accepted in full and final resolution of the instant tenure charges, with a recommendation made to the DOE that the same be adopted, as it complies with the *Cardonick* criteria set forth at N.J.A.C. 6A:3-5.6, as applicable.

Dated: March 20, 2019
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQUIRE
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 20TH DAY OF MARCH, 2019, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019

Edward A. Cridge, Esq. (NJ Bar ID No. 02646-2006)
MELLK O'NEILL
51 E. Broad Street
Hopewell, NJ 08525
P: (609)-924-0700 / F: (609)-924-4622 / E: ed@mellk-oneill.com
Attorneys for Respondent John Vingara

IN THE MATTER OF THE TENURE CHARGES AGAINST JOHN VINGARA,	: STATE OF NEW JERSEY :DEPARTMENT OF EDUCATION :BEFORE THE COMM. OF ED.
SOMERSET COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT BOARD OF EDUCATION	Agency Dkt. No. 121-4/16 Administrative Action Before Michael J. Pecklers, Esq. Duly Appointed Arbitrator **STIPULATION OF SETTLEMENT**

The Somerset County Vocational and Technical School District Board of Education (the "Board") whose principal office is located at 14 Vogt Drive, Bridgewater, NJ 08807, its successors, assigns, officers, employees, agents and representatives (collectively, the "Board"), and John Vingara, having an address 824 Rhine Boulevard, Raritan, NJ 08869 ("Respondent") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement (hereinafter "Agreement") which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS, Respondent is a tenured teaching staff member employed by the Board as a teacher; and

WHEREAS the Board certified the above-captioned tenure charges to the Commissioner of Education of the State of New Jersey, and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Robert J. Simmelkjaer, Esq.; and,

WHEREAS, subsequent to Appellate review and remand of the instant matter for further proceedings, the Commissioner of Education referred the within tenure charges to Arbitrator Michael J. Pecklers, Esq. (the "Arbitrator") who currently presides over same; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board having stringent budget limitations, and due to the expenditure of resources resulting from multiple days of hearings with numerous witnesses, and the concern that school personnel will be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Agreement in the best interest of the Parties and the public because Respondent voluntarily separates from his employment without litigation and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1: Upon the approval of this Agreement by the Arbitrator, Respondent shall submit an irrevocable letter of retirement to the Board, which shall provide for his retirement from his position with the Board, effective July 1, 2019.

2: Upon final approval of the signed Agreement by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Agreement

remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Agreement is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the Board, and Respondent reserves the right to defend same.

3: From the date of this Agreement through close of business on June 30, 2019, Respondent will remain on paid administrative leave from his position with the Board, during which time he shall have no duties and/or responsibilities vis-à-vis his position, and during which time he shall receive his full salary, together with all other benefits and emoluments of employment, including but not limited to health benefits. During this time, Respondent shall continue to receive his normal payroll checks on the Board's normal salary payment schedule, and shall be recorded as an employee on administrative leave with pay.

4: By June 1, 2019, the Board shall pay to Respondent the lump sum of $17,348.63 representing payment to Respondent for 35 sick days at his current per diem rate of $495.68, by way of contribution into a 403(b) plan. The Board acknowledges and agrees that payment pursuant to this paragraph is made in consideration of Respondent's entering into this Agreement, that it is a condition precedent to this Agreement; and that it is not contingent upon any other matter or proceeding.

5: This Agreement is based upon the understanding that Respondent's separation from employment with the Board, effective close of business on June 30, 2019, is and shall be deemed a voluntary separation. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary retirement.

6: The Board expressly reserves the right to oppose any application by Respondent for unemployment benefits. Notwithstanding any other term or condition of this Agreement, Respondent does not waive or release his right to seek

unemployment compensation, his entitlement to which shall be determined by the State of New Jersey, Department of Labor and Workforce Development.

7: In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners.

8: Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

9: In exchange for the consideration set forth above, the sufficiency of which is hereby acknowledged, Respondent, through the date of his execution of this Agreement, hereby waives, releases and discharges any and all claims or rights that he has or may have against the Board, the Superintendent, its Board of Education and its members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed

Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent agrees to withdraw any and all other pending complaints or actions that have been filed against the Board or any of its employees or representatives. This paragraph shall not apply to claims for unemployment compensation, or to claims for Workers' Compensation, or to any rights which Respondent may have to continue his health benefits coverage via COBRA.

10: To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Respondent understands that he may rescind this Agreement within seven (7) calendar days of

signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

11: This agreement shall not constitute a precedent in any matters involving other Board employees.

12: The Parties each acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

13: Each signatory to this Agreement understands, acknowledges and agrees that this Agreement constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

14: The execution of this Agreement does not constitute any admission or acknowledgement by any party as to the nature, quality, veracity, or demonstrability of any claim existing by and between the parties, nor of any wrongful, actionable, or otherwise improper conduct, nor as to the liability of any party.

15: This Agreement shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Agreement.

16: This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

17: Respondent and the Board agree that they will not defame or disparage each other either verbally, in any written communications, or on any social media platform. Vingara and the Board understand and agree that violation of this

Paragraph would irreparably harm the disparaged / defamed Party, which Party would be entitled to an injunction against the disparaging / defaming Party, including monetary damages, as well as payment of counsel fees for the cost of obtaining any injunction and to litigate a lawsuit to enforce this Agreement. For purposes of the Board, this paragraph shall apply to the Board's members, Superintendent, and administrative personnel. Neither party shall make any public statement regarding this Agreement, or the disposition of these tenure charges, other than to state that the matter "has been settled."

18: This Agreement, or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Agreement jointly prepared this Agreement.

19: Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Agreement.

20: Additionally, this Agreement is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

IT IS SO AGREED

RESPONDENT JOHN VINGARA

Dated: 2/25/19

SOMERSET COUNTY
VOCATIONAL AND TECHNICAL
SCHOOL DISTRICT
BOARD OF EDUCATION

Dated: 2/25/19

By:

Title: President

CERTIFICATION

I, John Vingara, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 2/25/19

John Vingara

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 2/25/19

Lisa Fittipaldi, Esq.
DEFRANCESCO BATEMAN
15 Mountain Blvd.
Warren, NJ 07059
Attorneys for Petitioner Somerset County Vocational Technical School District Board of Education

APPROVED:

Dated: 3/19/19

Michael J. Pecklers, Esq.
Arbitrator

OAL Dkt. No. EDU 05972-18
Agency Dkt. No. 71-3/18

New Jersey Commissioner of Education

Final Decision

R.V., on behalf of minor child, S.V.,

Petitioner,

v.

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

Respondent.

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

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

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/19
Date of Mailing: 3/27/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05972-18

AGENCY DKT. NO. 71-3/18

R.V. ON BEHALF OF MINOR CHILD, S.V.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROBBINSVILLE, MERCER COUNTY,

Respondent.

R.V., on behalf of S.V., petitioner, pro se

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC attorneys)

Record Closed: February 22, 2019 Decided: March 4, 2019

BEFORE **DAVID M. FRITCH,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 26, 2018, 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 August 24, 2018, prior to the scheduled hearing dates of August 30, 2018, and September 4, 2018, the parties filed a fully executed Settlement Agreement in this matter. The Board resolution approving the settlement was received on February 22, 2019. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

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

March 4, 2019
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 3.5.19

Date Mailed to Parties: 3519

/dw

RECEIVED

2018 SEP -4 A 11: 26

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CLEARY GIACOBBE ALFIERI JACOBS, LLC
955 State Route 34, Suite 200
Matawan, New Jersey 07747
Tel 732.583.7474
Fax 732.566.7687
Attorneys for Respondent
Township of Robbinsville Board of Education

R.V. o/b/o S.V., Petitioner, v. TOWNSHIP OF ROBBINSVILLE BOARD OF EDUCATION, MERCER COUNTY, Respondent.	COMMISSIONER OF EDUCATION STATE OF NEW JERSEY Agency Ref. No..: 71-3/18 OAL Dkt. No.: EDU 05972-2018 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is made and entered into by and between the Township of Robbinsville Board of Education ("Board"), having administrative offices at 155 Robbinsville Edinburg Road, Robbinsville, New Jersey 08691, and R.V., on behalf of his minor child, S.V. ("Petitioners"), residing at 6 Banbury Court, Robbinsville, New Jersey, 08691, collectively referred herein as "Parties."

WHEREAS, minor child S.V. is a twelfth (12th) grade student whom previously attended the eleventh (11th) grade at Robbinsville High School; and

WHEREAS, commencing in or around January 2018, the Board conducted an investigation as to whether Petitioners reside within the Township of Robbinsville; and

WHEREAS, on February 14, 2018, the Board notified R.V. of its determination that Petitioners did not reside within the Township of Robbinsville; and

WHEREAS, on February 27, 2018, a residency hearing was held before the Board of Education, which was attended by R.V. and S.V.'s mother, C.V.; and

WHEREAS, on March 5, 2018, the Board issued a Resolution finding S.V. ineligible for tuition-free attendance in the Robbinsville School District and disenrolling S.V. from Robbinsville High School, in accordance with N.J.S.A. 18A:38-1, et seq. and N.J.A.C. 6A:22-1.1, et seq.; and

WHEREAS, on or about March 20, 2018, Petitioners filed the within Pro Se Residency Appeal ("Residency Appeal") with the Commissioner of Education; and

WHEREAS, on or about April 24, 2018, Respondent filed an Answer and Counterclaim to Petitioners' Residency Appeal; and

WHEREAS, the Parties have negotiated in good faith and have determined to amicably resolve this matter; and

WHEREAS, the Parties now wish to memorialize the terms of the settlement by way of this written Agreement.

NOW THEREFORE, in consideration of the following valuable consideration, it is hereby agreed by and between the Parties as follows:

1. The Board acknowledges that, as of the date of this Agreement, Petitioners are domiciled in the Township of Robbinsville and that S.V. is entitled to tuition-free attendance at Robbinsville High School.

2. Petitioner S.V. acknowledges that his other minor child resides in Bordentown with the child's mother, C.V., and is not entitled to tuition-free attendance in the Robbinsville School District.

3. In the event that, subsequent to this Agreement, Petitioners no longer reside in the Township of Robbinsville, the Board reserves its right to conduct an investigation to determine whether S.V. remains eligible for tuition-free attendance at Robbinsville High School.

4. In consideration of the above, the Parties hereby fully and completely release each other from any and all claims they have or may have accrued against each other as of the date of this Agreement in any forum arising out of or connected with S.V.'s education from the beginning of time through the date this Agreement is executed. Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

5. It is agreed that neither party is a prevailing party for any purpose and that each party hereto will be responsible for bearing the costs of their own fees and costs associated with this matter.

6. This Agreement is to be kept confidential by both parties to the maximum extent permitted by Law and the Parties agree not to share the contents of this Agreement with any entity not party to this Agreement. The fact that S.V. attends Robbinsville High School, however, is not confidential.

7. This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed agreement.

8. This Agreement is governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this agreement shall be brought.

9. In the event that any provision of this contract is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.

10. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

PETITIONER, FOR HIMSELF AND FOR S.V.:

R.V.

Witness for Petitioner:

Notary or Attorney at Law, State of NJ

SONAL VYAS
Notary Public
State of New Jersey
My Commission Expires Sept. 8, 2019

Dated: 08/30, 2018

FOR THE TOWNSHIP OF ROBBINSVILLE BOARD OF EDUCATION:

Dated: 8-30, 2018

Robbinsville Board of Education
155 Robbinsville Edinburg Road
Robbinsville, NJ 08691
Phone: 609-632-0910 (2201) / Fax: 609-371-7964

CERTIFICATION OF MINUTES
Robbinsville Board of Education Meeting
January 29, 2019

Motion: Mrs. DeVito
Second: Mrs. Temple
Vote: 6-0-1

APPROVE SETTLEMENT AGREEMENT

Motion upon recommendation of the Superintendent to approve a settlement agreement regarding a residency matter between the Robbinsville Board of Education and the parents of student #190852.

Yes:	Mrs. Shaina Ciaccio, Mrs. Sharon DeVito, Mr. Vito Galluccio, Mrs. Jane Luciano, Mrs. Lisa Temple, Mr. Scott Veisz, Mr. Richard Young
Nays:	None
Abstentions:	Mr. Richard Young
Absent:	Mr. Thomas Halm, Mr. Craig Heilman

CERTIFICATION

I hereby certify that the within excerpt from the Minutes of the Public Meeting Session of the Robbinsville Board of Education held on the 29th of January, 2019 is a true and exact excerpt of the minutes as recorded.

Beth Brooks
Beth Brooks, School Business Administrator

1/31/19
Date

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

86-19

OAL Dkt. No. EDU 07970-18
Agency Dkt. No. 111-5/18

New Jersey Commissioner of Education

Final Decision

Michael Kozak,

Petitioner,

v.

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

Respondent.

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

Paragraph two (2) of the Agreement stipulates that the settlement payment must be made "within 30 days of approving this Agreement"; further, according to paragraph seventeen (17), the settlement is not "final and binding" until seven calendar days after the petitioner signs the Agreement. Both of these dates have preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/19
Date of Mailing: 3/27/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07970-18

AGENCY DKT. NO. 111-5/18

MICHAEL KOZAK,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,

Respondent.

Andrew Babiak, Esq., for petitioner

Patrick F. Carrigg, Esq., for respondent (Lenox Socey Formidoni Giordano Cooley Lang and Casey, attorneys)

Record Closed: March 4, 2019 Decided: March 11, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on June 5, 2018, 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 and General Release indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

March 11, 2019
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: 3-11-19

Date Mailed to Parties: 3-11-19

/vj

MONROE TOWNSHIP BOARD OF EDUCATION
423 Buckelew Avenue
Monroe Township, New Jersey 08831
(732) 521-1500

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MICHAEL C. GORSKI, CPA
Business Administrator/Board Secretary

I hereby certify that the following is a true and exact excerpt from the minutes of the Public Board of Education Meeting held on February 13, 2019, at which time a quorum was present.

A motion was made by Ms. DeMaio and seconded by Ms. Lang to approve the following resolution by consent roll call:

It is recommended that the Board of Education approve the previously submitted Settlement Agreement and General Release in the matter entitled Michael G. Kozak, Ed.D. v. Monroe Township Board of Education, before the Commissioner of Education, OAL Docket. No.: EDU 07970-2018 S. the Board President and the Business Administrator/Board Secretary are hereby authorized and directed to take all necessary steps to implement the aforesaid Settlement Agreement. Roll call 10-0-0-0-0. Motion carried.

Respectfully submitted,

Michael C. Gorski, CPA
Business Administrator/Board Secretary

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "**Agreement**", "**Settlement**" and/or "**Release**") is being entered into among and between MICHAEL G. KOZAK, ED.D. (hereinafter "**Dr. Kozak**" or "**Releasor**") and MONROE TOWNSHIP BOARD OF EDUCATION. MONROE TOWNSHIP BOARD OF EDUCATION shall hereinafter be referred to as the "**Releasees**". Dr. Kozak and Releasees shall hereinafter collectively be referred to as the "**Parties**".

WHEREAS, by way of employment contract Dr. Kozak was employed by MONROE TOWNSHIP BOARD OF EDUCATION, as Superintendent of Schools from July 1, 2015 to June 30, 2018 (hereinafter "**Employment Contract**"); and

WHEREAS, MONROE TOWNSHIP BOARD OF EDUCATION, did not renew Dr. Kozak's Employment Contract; and

WHEREAS, Dr. Kozak initiated litigation against MONROE TOWNSHIP BOARD OF EDUCATION, alleging, among other things, failure to reappoint in violation of Title 18A, in a lawsuit captioned Michael G. Kozak, Ed.D. v. Monroe Township Board of Education, before the Commissioner of Education, OAL Docket. No.: EDU 07970-2018 S; and

WHEREAS, the Parties wish to resolve the litigation initiated by Dr. Kozak in the interest of the public without the need for further litigation, and all of Dr. Kozak's claims and potential claims against Releasees, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Dr. Kozak, who understands that this Agreement settles, bars, and waives any and all claims that he could possibly have against Releasees as of the date of this Agreement;

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

1. Settlement and General Release of Dr. Kozak's Claims. In consideration for Releasees promises and representations made herein, Dr. Kozak, individually and on behalf of his heirs, representatives, immediate family members (including, but not limited to, his spouse and children), agents, successors and assigns, hereby releases Releasees, former and present board members of the MONROE TOWNSHIP BOARD OF EDUCATION, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (hereinafter collectively referred to as "**Released Parties**"), from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Dr. Kozak now has, claims to have, owns, holds or which Dr. Kozak at any time heretofore had, held, or claimed to have based on events arising out of or relating to his employment with the Monroe Township Board of Education occurring through the date of execution of this Agreement, to the fullest extent

allowed by law. This Release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from this release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, this Release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of privacy, conspiracy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law relating in any manner whatsoever to his employment with MONROE TOWNSHIP BOARD OF EDUCATION or the termination of that employment relationship. Dr. Kozak represents and warrants that he has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against Released Parties that relate to the matters stated above.

2. Payment. Releasees, or their agent, shall remit a check to Dr. Kozak, or his attorney, in the sum of **$26,000.00 (Twenty-six thousand dollars)**, in full payment for this Release, inclusive of attorney's fees. Within 30 days of approving this Agreement, the MONROE TOWNSHIP BOARD OF EDUCATION shall issue the check to Dr. Kozak. At Releasor's request, Releasees will issue IRS form 1099, with income listed in Box 3. It is expressly understood and agreed by the Releasor and Releasees that the Releasees do not represent or guarantee that payroll, wage or other income taxes should not be paid on the proceeds of the settlement. The Releasor agrees to indemnify and hold the Releasees harmless for any withholding taxes resulting from the receipt of the settlement payment, as well as for any interest and penalties assessed against and/or paid by the Releasees to any governmental tax entity by virtue of an adjudication by that entity reclassifying all or any portion of this settlement amount as a wage rather than a non-wage payment.

3. Social Media. Dr. Kozak shall remove from all social media and any other Internet site any and all references that state, indicate, or suggest that Dr. Kozak is currently employed by Releasees. Dr. Kozak may indicate dates of employment as Superintendent of Monroe Township Board of Education.

4. Benefits. Dr. Kozak shall be entitled to no further payments, benefits or emoluments of employment from Monroe Township Board of Education.

5. No Admissions. The Parties agree that this Settlement, including the Releasees approval of same, does not constitute an admission of liability or wrongdoing by either party.

6. Liens. It is further understood that as a condition of this Settlement, all claims and/or liens, past, current and/or future arising out of this Settlement or asserted against the

proceeds of this Settlement are to be satisfied by Releasor and/or his attorneys, including but not limited to any Child Support Judgment liens, Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including, but not limited to, claims based on subrogation or any other legal or equitable theory. Releasor therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and/or attorney's fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor and his attorney(s) agree to pay all costs, interest and attorney's fees relative to any such lien.

7. Post-Employment Inquiry. MONROE TOWNSHIP BOARD OF EDUCATION agrees, through its administration, to respond to post-employment inquiries regarding Dr. Kozak by providing the information required by N.J.S.A. 47:1A-10. MONROE TOWNSHIP BOARD OF EDUCATION shall also provide fully and truthfully all such information as it may be legally required to provide to any governmental agencies or pursuant to court order.

8. No Rehire. Dr. Kozak understands and agrees that his employment relationship with MONROE TOWNSHIP BOARD OF EDUCATION ended on June 30, 2018. Dr. Kozak understands and agrees that he is no longer entitled to any wages, salary, bonuses, health benefits, emoluments, or any other payments other than those specifically and explicitly set forth in this Agreement. Releasees shall be under no obligation to reinstate, hire, rehire or consider Dr. Kozak for future employment with MONROE TOWNSHIP BOARD OF EDUCATION. Dr. Kozak acknowledges that he will not be eligible for rehire with the Released Parties, including, but not limited to, full-time, part-time, temporary employment, as a non-payroll worker, or any other form of contract work at any time in the future. Accordingly, Dr. Kozak agrees that he will not seek or apply for employment with the Releasees or any successor or assign of the Releasees. Dr. Kozak acknowledges that if he applies for such employment notwithstanding his representations in this paragraph and is rejected, the decision will be based solely on this paragraph and not for some other reason, unlawful or otherwise.

9. Public Interest Served. The within Settlement will serve the public interest, eliminating additional litigation costs.

10. No Other Legal Action by Dr. Kozak. Dr. Kozak confirms that he does not have any charge, complaint or action pending in any forum or form against any of the Released Parties as of the date hereof. Further, Dr. Kozak covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement. This covenant extends to, but is not limited to, proceedings to negate, modify or reform this Agreement, though nothing in this paragraph is intended to limit Dr. Kozak from instituting legal action for the sole purpose of enforcing Releasees' obligations to him under this Agreement. Further, nothing in this paragraph is designed to interfere with or limit Dr. Kozak's protected rights to file a charge with or participate in an investigation by or proceeding before the

Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nonetheless, Dr. Kozak understands that, by signing this Agreement, he waives any rights he may have to recover money or other relief in any lawsuit or proceeding he brings, or that is brought on his behalf, by any agency or third party against any of the Released Parties based on events arising out of or relating to his employment with MONROE TOWNSHIP BOARD OF EDUCATION through the date of this Agreement. Except where otherwise permitted under this paragraph, Dr. Kozak agrees that any action he may file against any of the Released Parties based on events that transpired on or before the effective date hereof for any matter arising out of or relating to his employment with Monroe Township Board of Education shall be dismissed with prejudice upon presentation of this Agreement. Dr. Kozak further agrees that, to the extent allowed by law, he will not participate in any litigation, complaints, or claims brought by other individuals against Released Parties.

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

12. Non-Disparagement. Dr. Kozak and the Releasees agrees not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of each other or any of the Releasees. Dr. Kozak and the Releasees agree not to defame or disparage the other with respect to any matter arising out of the employment relationship or lawsuit in the past and in the future.

13. Entire Agreement. This Agreement sets forth the entire agreement between Dr. Kozak and Releasees. All other prior agreements between the Parties are hereby terminated and shall have no other force or effect. Dr. Kozak acknowledges and agrees that Releasees have not made any promises to him other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement between the Parties. Because counsel for Dr. Kozak had a full opportunity to review this Agreement with him before he signed it, the language of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

14. Disputes. The validity, performance, construction, and effect of this Agreement shall be governed by the substantive laws of the United States and the State of New Jersey. The Superior Court of New Jersey shall retain jurisdiction to implement and enforce this Agreement and its terms.

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

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

17. Dr. Kozak acknowledges that he has been advised that he has twenty-one (21) calendar days within which to consider this Agreement before signing it and that he may use as much of that twenty-one day period as he considers necessary. After signing the Agreement, Dr. Kozak understands that he may revoke his signature within seven (7) calendar days by providing written notification of his decision to revoke his signature to Patrick F. Carrigg, Esq., Lenox Law Firm, 136 Franklin Corner Road, Lawrenceville, NJ 08648. If Dr. Kozak does not deliver written revocation to Attorney Carrigg within that seven (7) calendar day period, the Agreement becomes final and binding.

DR. KOZAK ACKNOWLEDGES THAT HE HAS READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

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

DR. KOZAK FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THIS AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT HE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THIS AGREEMENT.

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

MICHAEL G. KOZAK

Michael G. Kozak

Dated: 2/13/19

WITNESS

Andrew Babiak

Andrew Babiak, Council for Dr. Kozak

Dated: Feb. 13, 2019

MONROE TOWNSHIP BOARD OF EDUCATION

Kathy Kolupanowich

NAME: Kathy Kolupanowich
TITLE: President, M.T. BOE

Dated: 02/14/19

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Edward J. Furhmeister	:	
and	:	**Docket No. 305-12/18**
Board of Education of the City of Pleasantville, Atlantic County	:	

Decision and Award

Appearances:

On behalf of Board of Education of the City of Pleasantville:
Daniel J. Gallagher, Esquire
The Carroll Law Firm, PLC
1 N. New York Rd., Suite 39
Galloway, NJ 08205

On behalf of Edward J. Furhmeister:
Keith Waldman, Esquire
Kathleen L. Kirvan, Esquire
Selikoff & Cohen, PA
700 East Gate Drive
Suite 502
Mount Laurel, NJ 08054-3923

Introduction

This matter arises from tenure charges of; (1) Chronic and Excessive Absenteeism Including Failure to Adhere to Call Out Procedures and Failure to Report to Work in a Timely Manner, (2) Incapacity and (3) Conduct Unbecoming, Unprofessional Activity and Neglect of Duty, against Edward J. Fuhrmeister, (Respondent) by the Pleasantville Board of Education, Atlantic County (the District) and a January 4, 2019 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Office of Controversies and Disputes pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26 and P.L. 2015, c.109.*

The hearing in this matter was conducted on February 12 and 14, 2019 in Pleasantville, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Edward J. Fuhrmeister was present for the entire hearing and testified on his own behalf. At the close of the hearing on February 14, 2019 the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on March 8, 2019 the matter was deemed submitted.

This Award is made following my careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if so, what is the appropriate penalty, if any?

The Tenure Charges

The tenure charges in this matter were certified by Dr. Clarence Alston, Superintendent of Schools, of the Pleasantville School District on October 26, 2018 and provide:

CHARGE ONE

CHRONIC AND EXCESSIVE ABSENTEEISM INCLUDING FAILURE TO ADHERE TO CALL OUT PROCEDURES And FAILURE TO REPORT TO WORK IN A TIMELY MANNER

Respondent, a teacher employed by the Pleasantville High School, failed to perform his duties in a competent manner by being chronically and excessively absent as follows:

- Present School Year (2018-19) missed 4.5 days of work (as of October 23, 2018) and has been late to work thirteen (13) times.
- School Year 2017-18 missed 27.5 days of work (plus, Respondent missed 12 weeks of school while he was out on Family Medical Leave from October through December 2017) for a total days missed equaling: **82 days**

(See attached **Exhibit A**[1], a copy of Respondent's attendance sheets/print out for school years 2017-18 and **Exhibit K**, a copy of a memo from Principal Rayna Hendricks to Respondent dated October 22, 2018).

SPECIFICATION: The regular and prompt attendance of employees is an essential element in the efficient operation of the school district.

See PBOE policy #3212- ATTENDANCE which states (a copy of which is attached as **Exhibit B**):

[1] Exhibits are not quoted herein.

> The regular and prompt attendance of teaching staff members is an essential element of the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program and the Board of Education considers attendance an important component of a staff member's job performance.
>
> A teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with board Policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.
>
> In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to injury or illness or because the staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such a disease in the staff member's immediate household. No teaching staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective-bargaining agreement negotiated with the members' majority representative, in an individual employment contract, or provided in the policies of the Board. In accordance with N.J.S.A.18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.
>
> The Superintendent, in consultation with administrative staff members, will review the rate of absence among the staff members. The review will include the collection and analysis of attendance data, the training of teaching staff members in their attendance responsibilities, and the counseling of teaching staff members for whom regular and prompt attendance is a problem.

See also N.J.S.A. 18A:27-4; 18A:28-5; 18A:30-1 et seq.

The collective bargaining agreement ("CBA") between the PBOE and the Pleasantville Education Association in effect at all relevant times herein, granted teachers ten (10) sick days per year, three (3) personal days and ten (10) vacation days to be earned pro rata. (See attached **Exhibit C**, a copy of the relevant portions of the CBA.)

Respondent was hired by the District as a teacher on or about November 26, 2001. (See attached **Exhibit D** – a copy of letter). Throughout his employment, Respondent was repeatedly warned and reprimanded for: excessive absences; a failure to follow call-out procedures; and a failure to report to work on time. Said documentation further indicates that attempts were made to encourage, assist or instruct Respondent in the importance of maintaining regular attendance and following school procedures.

Please see the attached documentation as follows:

- March 12, 2014 – letter reminding Respondent that he must report to work on time and implementing a 30 day attendance plan.
- April 4, 2014 – letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- May 23, 2014 – second letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- October 14, 2015 – letter reprimanding for failing to adhere to procedures for attendance and punctuality.
- December 7, 2015 – letter indicating a meeting was held to develop a plan to improve Respondent's reporting to work in a timely manner.
- November 3, 2016 – letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- March 14, 2016 – another letter reprimanding Respondent for his failure to follow the proper call out procedures when he was going to be absent.
- November 28, 2017 – letter informing Respondent that to date he had been absent 39.5 days and that the PBOE was considering disciplinary action.
- May 1, 2018 – letter indicating that Respondent met with the Superintendent to develop a plan to improve Respondent's attendance.

(See attached **Exhibit E**, a copy of the above letters.)

Additionally, more recently, Respondent's attendance record indicates that he was absent from school as follows:

- Present school year (2018-19):

A Corrective Action plan was signed by Respondent in September 2018 (See attached **Exhibit M**, a copy of the Corrective Action Plan). Since Respondent signed the Corrective Action Plan, Respondent missed (as of October 23, 2018) 4.5 days of work (9/28/18, 10/3/18, 10/9/18 and 10/19/18). Respondent did not notify or request said absences from any of his supervisors. Additionally, two of the days Respondent was absent were personal days and he did not submit any paperwork requesting approval for the same. Finally, the Corrective Action Plan states that unless Respondent received prior approval, he must report to work on time every day. Respondent has been late to work (as of October 23, 2018) 13 days since the start of the school year. (See Exhibit K, a copy of a memo from principal Rayna K. Hendricks to Respondent dated October 22, 2018).

- School year 2017-18

  Respondent missed 27.5 days of work (plus, Respondent missed 12 weeks of school while he was out on Family Medical Leave from October through December 2017) for a total days missed equaling: **82** days. (See attached **Exhibit A**, a copy of Respondent's attendance sheets/print outs).

All of the above documentation and correspondence indicated that Respondent has engaged in chronic and excessive absenteeism, including a failure to follow call out procedures and repeated tardiness, during his tenure as an employee in the District in violation of PBOE policy, New Jersey statues, and the CBA.

In resolving whether dismissal is warranted based upon allegation of chronic absenteeism, the Court has looked at three factors: 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; and 3.) whether some warning had been given to the employee that his or her supervisors were dissatisfied with the pattern of absences. See, In the Tenure hearing of Lena White, State Operated school District of Jersey City, Hudson County, 92 N.J.A.R. 2d (EDU) 157; and Kelsey v. board of Education of the City of Trenton, Mercer County, Commissioner Decision No. 127-89, May 11, 1989.

Looking at three factors identified by the Court as applicable to this matter, the District respectfully asserts that Respondent's absences have impacted the District's ability to properly plan the staffing of its schools and its continuity of instruction, and Respondent has been repeatedly clearly warned that his supervisors were dissatisfied with the pattern of absences; his failure to adhere to call out procedures, and his failure to be punctual.

WHEREFORE, Respondent's actions constitute abandonment of her (sic) employment position and Respondent should be terminated for the same.

CHARGE TWO
INCAPACITY

Respondent, a teacher employed by the Pleasantville High School, was incapacitated and failed to perform his job in a professional and acceptable manner by being chronically and excessively absent, by failing to follow call out procedures and by being repeatedly late for work during his tenure of employment for the District.

SPECIFICATION: As more particularly outlined above in Count One above and incorporated herein, as a teacher, all of the above documentation and correspondence indicates that Respondent's chronic and excessive absenteeism and failure to follow procedures and failure to be punctual have rendered him incapable of doing his job pursuant to PBOE policy, New Jersey statutes, and the CBA. Therefore, Respondent was incapacitated and failed to perform his duties in a professional acceptable manner.

WHEREFOR, Respondent should be terminated for being incapacitated and failing to perform his duties in a professional and acceptable manner.

CHARGE THREE
CONDUCT UNBECOMING
UNPROFESSIONAL ACTIVITY
AND NEGLECT OF DUTY

Respondent, a teacher in the Pleasantville School District engaged in conduct unbecoming and in unprofessional activity during his tenure as an employee for the Pleasantville Board of Education which resulted in the neglect of his duties and violations of the policies of the District.

Board Policy #3280 Liability for Pupil Welfare states in relevant part: Teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct.

Board Policy #3281 Inappropriate Staff Conduct states in relevant part: The Board of Education recognizes its responsibility to protect health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district. In support of the Board's strong

commitment to the public's trust and confidence in school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

(See attached **Exhibit F**, a copy of PBOE #3280 and #3281).

Respondent engaged in unprofessional conduct and conduct unbecoming a teaching staff member by failing to properly discharge his responsibility for the supervision of pupils with the highest level of care and prudent conduct which resulted in a neglect of his duties and a violation of board Policies and Regulations as well as the standards of professional conduct.

SPECIFICATION: Respondent has been employed as a teacher in the District for over seventeen (17) years. Petitioner alleges that Respondent's long term work history and more recent actions occurring in the present school year, have not achieved the high level of professional responsibility that the District demands for all school staff to protect a pupil's health, safety and welfare. Respondent's actions have violated the public's trust and confidence and has negatively impacted his ability to protect the well-being of all pupils attending the school district. Respondent's personnel file consists of the following documentation in support of the above:

1. Respondent was hired as a teacher in the district in 2001 (See attached **Exhibit D**).
2. Beginning as early as school year 2002-2003, a Professional Improvement Plan (PIP) was instituted for Respondent following observation/evaluation. A PIP was instituted every year thereafter until and including 20008/2009. (See attached **Exhibit G**, a copy of the PIP plans instituted). A recurring theme of the PIPs was the need for Respondent to incorporate inventive and varied teaching strategies for lesson plans; to submit timely lesson plans; and to actively participate in workshops/in-service trainings.
3. During the course of his tenure as a teacher in the District, Respondent accumulated the following letters of reprimand and/or warnings and/or suspensions:

   - On or about March 18, 2014, Respondent was suspended and placed on administrative leave as a result of alleged improper conduct concerning the management of OnCourse.
   - On or about April 7, 2014, Respondent failed to adhere to his work schedule.
   - On or about May 23,2014, Respondent was accused of leaving school premises for lunch and not returning in a timely manner.

- On or about June 30, 2016, Respondent was placed on paid suspension pending an investigation into an arrest.
- On or about May 4, 2018, Respondent's increment was withheld for school year 2018-19 by the PBOE for excessive absenteeism during the 2017-18 school year.

(See Exhibit H, a copy of the above referenced letters).

4. More recently, during the present school year (2018-19), Respondent has engaged in behaviors that clearly indicate a continued intent by him to neglect his teaching duties in violation of PBOE policies and detrimentally affect students' ability to learn in a positive and supported environment. See as follows:

   - By email dated September 28, 2018, Principal Rayna Hendricks notified Respondent that his lesson plans for the week had not been properly uploaded to the Oncourse. (See attached **Exhibit N**, a copy of the 8/28/18 email).
   - By letter dated September 14, 2018, Superintendent Dr. Alston informed Respondent that when he and his BA Elisha Thompkins visited Respondent's classroom (A technology class) on September 13, 2018, they observed students seated at their desks with all of the computers turned off, and there was a moving (sic) playing that few students appeared to be engaged in. (See attached **Exhibit O**), a copy of the 9/14/18 letter).

     In that same letter, Dr. Alston advised Respondent that Mr. Thompkins reported on September 14, 2018 that he heard a loud noise coming from Respondent's classroom. Mr. Thompkins and Dr. Alston went to Respondent's classroom and observed most of the students standing at one end of the classroom conversing and appearing to socialize. Respondent was sitting at his desk and appeared to be viewing his cell phone. Again, the computers were off and there was another, or possibly the same, movie playing from the previous day. In response to Dr. Alston's questioning about the situation, Respondent stated that he did not have "mice" for the computers. Ar. Alston responded that upon speaking to Ms. Rayna Hendricks, the principal, it was asserted that Respondent had lost all the mice for the computers last year.

   - By memo dated October 2, 2018, Principal Rayna Hendricks advised Respondent of the following (See attached **Exhibit L**, a copy of the 10/2/18 memo):

     - On October 1st he was seen in the back of the building in the bus dismissal area on the way to his vehicle at

2:39p.m. Said departure time is in violation of Respondent's contractual duties.

- On October 2nd a video was brought to Ms. Hendricks' attention which showed two students slap boxing in Respondents classroom as he was sitting on the countertop in the classroom looking at his cell phone. On the video, Respondent can be heard telling the students to stop; however, at no point did Respondent ever attempt to intervene, call security or an administrator to have the students removed. (See attached Exhibit I, a copy of the video).
- Respondent's previous assertion that he did not have any mice for the computers was refuted; Ms. Hendricks' (sic) stated that Respondent had a full set that were replaced last year and now were lost. The memo further stated additional activities that Respondent should be doing until the class receives new "mice."
- Ms. Hendricks stated that there did not appear to be any improvement in Respondent's classroom since he received the letter dated September 14th from the Superintendent.
- Finally, Ms. Hendricks reminded Respondent that he was under a Corrective Action Plan for the 2018-19 school year which directed him to:
  - Arrive to work on time and remain at work until the contractual day ends.
  - Create a classroom management plan and submit a copy of same.
  - Adjust his lesson plans and instructional activities.

- By email and memo dated October 12, 2018, Ms. Hendricks informed Respondent that it was the fourth time that Respondent had failed to submit timely lesson plans and further that Respondent had failed to submit a behavior plan for his classroom by October 1st as he was required to do under his Corrective Action Plan. (See attached Exhibit J, a copy of the 10/12/18 email).

Facts

Respondent's Early Employment History

Respondent has been employed by the District for approximately 18 years. He became certified as a teacher through the then-existing alternative route and began teaching eighth grade math in 2001. He received tenure in or about 2004. He taught eighth grade math for approximately 11 years, was thereafter the District's Data-Base Coordinator, a District test coordinator, worked in an elementary school assisting the third-grade team in math and eventually became the District Technology Coordinator; a position he held for approximately two years. After his first year of teaching eighth grade math (2001-2002) Respondent had Performance Improvement Plans (PIPs) for the remaining years he taught the subject through the 2009-2010 school year. Respondent offered un contradicted testimony that he understood that such was the normal course for teachers certified through the alternative route. Respondent's post-tenure evaluations were positive and consistently rated his performance as Good.

The Illness and Death of Respondent's Wife

In July of 2014 Respondent's wife was diagnosed with cancer and died two years later, in July of 2016. At all times relevant, the controlling collective bargaining agreement has provided for ten days of sick leave per year and allows for the accumulation of unused sick leave from year to year. Prior to his wife's 2014 diagnosis, Respondent had accumulated between 80 and 90 days of sick leave. The illness, treatment and death of Respondent's wife caused significant disruption and emotional challenge to Respondent and his two pre-school age daughters. To assist his wife during

treatments. Respondent used intermittent FMLA leave; leave he was told by the District could not legally be the basis for negative employment consequences.

The District's Budget Challenge for the 2017-2018 School Year

Following the state-approval of the District's 2017-2018 budget in March 2017, the state notified the District that the approved budget would be reduced by $832,200.00. In response, the District's State Monitor directed that the District reduce its staff accordingly and advised that the District could not hire new staff. As a result, the District cut between 40 and 50 employees and reassigned various professionals in non-classroom teacher positions (such as academic coaches) to teach in the classroom. Respondent, in the position of District Technology Coordinator was such a professional and was notified that he would be assigned a seventh-grade math classroom teaching position for the 2017-2018 school year.

Upon learning of the reassignment, Respondent expressed his concern to the District's Superintendent Dr. Clarence Alston and his belief that he was of more service to the District in his District Technology Coordinator position, particularly since the District had just recently issued students chrome books. The Superintendent informed Respondent that Respondent was required to teach.

The 2017-2018 School Year

Respondent testified that his wife's diagnosis and death was devastating; an emotional roller coaster, and that after his wife passed, he focused on acclimating to being a single parent and providing support for his two daughters. Respondent testified

that for many months after his wife's death he went into "survival mode;" not acknowledging the loss as he tried to focus upon his children. He tried to normalize his daughter's routines, deal with emotional "meltdowns" of his children, learn how to provide the day-to-day care for his children that had previously been provided by their mother and began taking his children, and himself, to weekly Gilda's Club support groups, and he began seeing a psychiatrist (weekly Gilda's Club meetings and psychiatric care that have continued). Only after he was able to realize that he could give his daughters the support they needed, Respondent testified, did he really experience the loss of his wife, and at that time, it hit him "like a ton of bricks." He became devastated and depressed.

By the 2017-2018 school year, with his loss and challenges of his family, the challenge of going into the classroom and the realization that things were all new to him as he had been out of the classroom for so long, he became overwhelmed, he was falling behind at work and struggling to keep up with his girls. Respondent testified that he needed a break from work to regroup and went out on FMLA leave on October 4, 2017. Respondent was later cleared to return to work by his psychiatrist and returned to work on January 3, 2018.

During the school year prior to his going out on FMLA he had been absent 5 and one half days. Upon his return to the District after his FMLA leave, Respondent was assigned to teach technology for the remainder of the school year. From his return on January 3, 2018 through the end of the 2017-2018 school year, Respondent was absent another 23 and a half days.

Respondent's April 30, 2018 Meeting with Superintendent Alston

Both Respondent and Superintendent Alston testified to meeting one another on April 30, 2018. According to Alston, he spoke to Respondent about the teacher's absences and performance in the classroom, and asked Respondent if he would want his children to have such a teacher, and that Respondent answered "no." According to Alston, Respondent told the Superintendent he did not want to teach.

According to Respondent, when he met with Alston, the superintendent informed Respondent that his absenteeism was excessive. Respondent testified that Alston stated the employee had been absent some 82 times during the school year; that Alston repeated the number 82 a number of times during the conversation even though Respondent pointed out that much of his absence was covered by FMLA. Respondent denied that he told Alston, or any other administrator at the District, that he did not want to return for the 2018-2019 school year or that he did not want to teach. Instead, Respondent testified, he expressed to Alston, as well as to Business Administrator Elisha Thompkins and middle school Principal Rayna Hendricks at other times, that he had disaffection for going back into the classroom versus his technical position as he would be able to do so much more for the District in the latter. Respondent believed he could make a much bigger impact in the tech position.

At the end of the April 30 meeting, Superintendent Alston requested that Respondent inform him by the end of the week as to Respondent's intentions for the 2018-2019 school year. Alston followed up the conversation with a May 1, 2018 letter to Respondent providing in relevant part:

> ...This confirms our discussion about your absences during the 2017-2018 school year. We agreed that you would contact me by

> Friday, May 4, 2018 to let me know what your plans are for attendance and/or employment for the 2018-2019 school year…

By email of May 4, 2018 to Alston, Respondent wrote, in relevant part:

> …Per out meeting on Monday morning you asked me to reach out to you by today to let you know of future plans as it pertains to the Pleasantville School District.
>
> I am looking forward to being a productive and professional employee, and continuing my career at the district in whatever capacity is asked of me…

Later that day, Alston informed Respondent that the superintendent was recommending to the Board of Education to withhold Respondent's increment for the 2018-2019 school year.

Respondent received an overall evaluation of Ineffective for the 2017-2018 school year.

Increment Withholding

By letter to Respondent dated June 27, 2018 from the District's Human Resources Consultant, The District informed Respondent, in relevant part:

> …Based on numerous factors, the district is compelled to withhold your increment for the 2018-2019 school year. The factors taken into account as it relates to you were administration recommendation due to absentism. (sic) After careful review of all relevant factors, the Superintendent determined that your increment will be withheld for the 2018-2019 school year….

At the hearing in this matter, Superintendent Alston testified that the increment withholding was due to an accumulation of various things over seven years. Alston acknowledged that leave taken pursuant to FMLA could not be used as a basis for

discipline. He further testified that based upon Respondent's 82 absences, he could have issued a warning, suspension or recommended tenure charges, but did not and decided upon the withholding of increment in the interest of progressive discipline.

The 2018-2019 School Year

For the 2018-19 school year Respondent was again assigned to teach technology in middle school.

The 2018-2019 CAP

In September 2018 Principal Hendricks placed Respondent on a Corrective Action Plan (CAP) for the 2018-2019 school year with three identified areas for improvement; attendance, tardiness and guidance to students on classroom focus and standards of conduct. In the "Goals and Professional Responsibilities" section of the CAP, Respondent was informed of the following responsibilities:

1. Improve attendance
   -Unless prior approval is obtained from an administrator, ensure that you come to work each day.
2. Arrive at work on time daily
   -Unless you receive prior approval for a late arrival, ensure that you arrive at work on time every day.
3. Improve management of student behavior and peer interaction to ensure students are focused on learning
   - Attend classroom management workshop provided by the district professional development office.
   - Review relevant teacher practice instrument components and discuss strategies for implementation with a coach or administrator

Under the "Supervisor Responsibilities" and corresponding "Completion Date" section of the CAP relating to the third enumerated responsibilities section quoted above, Hendricks wrote:

- Ensure Mr. Fuhrmeister has opportunity to attend the classroom management workshop. 10/02/18
- Ensure Mr. Fuhrmeister has opportunity to observe classes with exceptional classroom management. 01/31/18
- Mr. Fuhrmeister will create a behavior plan for his classes. 10/05/18

The CAP was signed by Respondent and Hendricks on September 24, 2018.

Superintendent Alston testified that Respondent failed to adhere to his CAP. In this regard, Alston testified, Respondent did not complete a behavior plan by October 5, 2018, continued to be tardy and have absences and failed to manage his classroom.

2018/2019 Attendance and Tardiness

Between the date on which Respondent's CAP was signed (September 24, 2018) and the date of the District's tenure charges (October 26, 2018), Respondent took three and one half days of sick leave and one personal day. Although the record does not contain evidence of the manner or means by which the District determines tardiness, the District represented that during that same period Respondent was tardy 13 times.

By memorandum dated October 22, 2018 from Principal Hendricks, Respondent was informed:

> This written communication serves as documentation of concern over your attendance and tardiness.
>
> As you are aware, you are on a Corrective Action Plan. According to the plan you are to report to work each day. It explicitly states,

> "Unless prior approval is obtained from an administrator, ensure that you come to work each day." Since your Corrective Action Plan was signed you have been absent 4.5 days (9/28/18, 10/02/18, 10/16/18, and 10/19/18). You have not reached out to me any of these days to make me aware of your absence. District Policy states that you are to submit a written request for personal days. You have taken two personal days and did not submit any paperwork.
>
> Additionally, your Corrective Action plan states, "Unless you receive prior approval for a late arrival, ensure that you arrive at work on time every day." You have been late 13 days since this plan."
>
> I continue to be deeply concerned about your willingness to come to work each day and to report to work on time. Coming to work each day and on time are part of your professional responsibilities (Danielson Framework Domain 4).
>
> If there is any part of this letter that needs clarification or you have further questions regarding my concerns let me know immediately. **This is a formal reprimand and will be documented in your file.** (Emphasis added)

No additional 2018-2019 school year days of absence or tardiness were identified in the District's Tenure Charges prior to the date of the District's charges. Respondent testified that he did not contact his principal or other administrator about his absences following the date of his CAP. He testified that he now realizes that according to the CAP he was required to contact an administrator directly, but that he just continued to use the District's electronic reporting process. Respondent submitted evidence showing that when he used that electronic reporting process on the relevant days herein, the program informed that "NO APPROVAL REQUIRED." Respondent also offered uncontracted testimony that the District could have blocked him out of the electronic call-out system or modified the system to inform him that approval was required, but that no such changes were made.

Class Disruptions / Lack of Classroom Management

Screams and the Computer Mice

Both Superintendent Alston and School Business Administrator Elisha Thompkins testified that in or about September 2018 they heard loud noises (screaming) coming from Respondent's classroom on the floor below their offices and both went to investigate. They testified that when they went into the classroom they observed the students were not engaged in learning, were talking in groups and not paying attention to a movie playing and were not using their computers. When the administrators asked Respondent why the students were not engaged with their computers, Respondent answered that there were no "mice" available.

Respondent recalled the incident and testified that the two administrators came down to investigate what they described as screaming and that he told them there had not been any screaming in the classroom. He testified that at the time there were two maintenance workers working in the ceiling of the classroom on the air conditioning and he asked them if they had heard screams and they agreed that they had not. Respondent offered uncontracted evidence that at that time he and the administrators agreed that the noise must have come from the hallway.

Alston testified that he inquired about the computer mice situation with school principal Hendricks and that Hendricks reported that Respondent had been provided with new mice and that Respondent was responsible for their loss. Respondent testified that the school had experienced an issue with computer mice after students were issued their chrome books and that the school's other tech classroom as well as the library had experienced loss of computer mice. Assistant Principal Lapell Chapman testified that lost

computer mice had been an issue in the school in the beginning of the 2018-2019 school year including computers in the library.

"Slap Fight"

Superintendent Alston identified two videos of what he referred to as a "slap fight" between two students in Respondent's classroom. The evidence establishes that the incident recorded on the videos occurred prior to October 2, 2018. Alston testified that the video was troubling and that the conduct of the two students could have easily escalated into something more serious, but that Respondent did not intervene and stop the conduct. According to Alston, Respondent should have called security. Alston also testified that Respondent could be seen sitting on a counter looking at his cellphone and that the most disturbing element of the video is that the conduct of the students came about during a period of time during the class when instruction should have been happening. The video is evidence of Respondent's failure to manage his classroom; Alston testified, an issue that has been documented repeatedly in observations of Respondent's classroom by various observers over the course of the 2017-18 and 2018-19 school years. Additionally, in his view, Alston testified, this was further evidence that Respondent did not care about the education of his students, did not want to teach, was not going to comply with the requirements of his CAP and was unwilling to address his performance issues.

Respondent testified that the District provides a cellphone app to take student attendance and that at the time of the video he was taking attendance as students were just coming into the classroom after their lunch period and the two students involved were

students Respondent knew for years and were good friends of one another. He testified that the video shows that the two students were smiling at one another as they engaged in friendly horseplay and that he can be heard on the video telling the two boys that the problem with such conduct was that it could quickly and accidentally escalate into something serious, that they should stop and sit down. Respondent testified that the two students then stopped and sat down.

Principal Hendricks testified that when she reviewed the video she reported the matter to the state of New Jersey Institutional Abuse Investigations Unit (IAIU). She testified that neither student was disciplined for the conduct, she did not seek the suspension of Respondent and she did not submit an electronic report of the incident to the state.

The undersigned's review of the videos establishes that Respondent's version of what the videos show is accurate. The two students were engaged in friendly horseplay and Respondent did what Superintendent Alston testified he should have done; told the students such conduct could unintentionally escalate and someone could get hurt and that they students should stop and sit down, and that the students did as instructed without hesitation.

The record also establishes that the IAIU initially found that its investigation of the incident resulted in a finding of "not established" and that on March 18, 2019 (entered into the record by the undersigned upon motion by Respondent after the close of the hearing in this matter) the IAIU modified its finding to "unfounded."

Completion of Workshop

The record reflects that Respondent completed the "Classroom management" workshop required on his CAP on October 2, 2018; a date after the "slap boxing" video incident.

Leaving Early

In partial support of its Tenure Charge Three the District asserted that Respondent was observed outside, in the back of the school at 2:39 p.m. on October 1, 2018; a time prior to his contractual departure time.

Respondent admitted to being outside of the building as reported, and explained that his students had been dismissed for the day and that because he had an appointment to make he hoped to leave the parking lot prior to the busses blocking the lot.

By Memorandum dated Tuesday, October 2, 2018, from Principal Hendricks, Respondent received a formal reprimand relating to his leaving early on October 1, 2018, the slap boxing incident brought to the principal's attention in a video she received on October 2, 2018, his failure to assign students alternative activities in that absence of computer mice in his class room, and his failure to improve his classroom management. He was also reminded of the requirement of his CAP.

Observations

The District submitted two 2017-2018 school year classroom observations and an overall annual evaluation of Respondent in which Respondent was rated "Partially Effective," "Partially Effective," and "Ineffective" respectively. The major recurring

issue noted in the observations and evaluation was Respondent's lack of classroom management.

At the hearing, Respondent acknowledged that he was having difficulty with classroom management and that he did not question the soundness of the requirement in his 2018-19 CAP that he attend a classroom management seminar.

Memorandum of October 12, 2018

By memorandum dated October 12, 2018 regarding "Missing Deadlines" from principal Hendricks, Respondent was informed:

> This written communication serves as documentation of concern over your adherence to deadlines.
>
> 1. As you are aware, lesson plans are due each Tuesday. Staff members were notified on September 4th what day plans are to be submitted. This week marks the fourth occurrence this school year that you have failed to submit your lessons. On two of these occasions, you received written warnings via OnCourse (September 17th and October 1st) from Mr. Chapman and me.
>
> 2. You are also aware that per your Corrective Action Plan, you were to submit a behavior plan for your classroom by Friday, October 5, 2018. I have yet to receive this plan. You attended training at ETTC on October 2, 2018, for classroom management to assist you with this area.
>
> I continue to be deeply concerned about your willingness to meet required deadlines so that you have a plan for instruction and classroom management. Lesson planning and meeting required deadlines are both components of the Danielson Framework (Domain 1: Planning and Preparation and Domain 4: Professionalism). As a result of the aforementioned areas, you are being directed to:
>
> - Submit your lesson plans by midnight each Thursday.
> - Submit your detailed classroom behavior plan by Monday, October 15, 2018.
>
> Failure to adhere to deadlines will result in a formal written reprimand from my office and possible action by the Central

Administration. If there is any part of this letter that need clarification or you have further questions regarding my concerns, please let me know immediately.

Respondent admitted that he did not submit his behavior plan by the initial deadline established in his CAP. He testified that he initially was not sure how to do the plan, that he was unable to find tutorials or other guidance on the subject. He was able to submit the plan by the October 15 deadline established in Hendricks' memorandum of October 12.

Superintendent Alston's Reasons for Tenure Charges

Alston testified that it was clear to him that notwithstanding the many efforts made by the District to correct Respondent's performance and behavior, Respondent did not want to teach and had no intention of adhering to the District's policies. Respondent's observations reflected Respondent's poor classroom management, poor lesson planning, and lack of engagement with students; notwithstanding his reprimands, Respondent continued to fail to communicate with administration and failed to follow policy relating to tardiness and absence. Even after he signed his CAP, Respondent was absent four and a half days, Respondent left work before the end of his day, and failed to control his classroom as reflected in the slap boxing video.

Superintendent Alston testified on cross examination that the District's process of drafting Tenure Charges against Respondent began sometime in September 2018.

Respondent's Adjustments to his Home Life

At the hearing, Respondent admitted his absences were not good for the education of students and resulted in administrative challenges for the District. He admitted that he had problems with classroom management and that he agreed with the results of his observations. He also admitted that he did not meet lesson plan deadlines in September 2018 explaining that he did not have any curriculum for his classes until the end of September, and even then the curriculum he received was for his sixth grade class but not his seventh and eighth grade classes. He testified that in the early weeks of September 2018, he did not have a curriculum, did not have books, did not have computer log-in information for his students and did not have mice and he was not sure what he was to do about lesson plans; although he further admitted that it would have been better to submit some sort of generalized lesson plans. Respondent offered uncontracted testimony that once he had the curriculum for this classes he submitted lesson plans on time.

Respondent testified that during this period he submitted letters and/or emails to District administrators about his lack of curriculum, about the poor condition of his classroom, including that the air-conditioning did not work, that the classroom stunk of mold, and that the room was so humid as to make the floor slippery; a level of humidity that could harm the electronics in the room.

Respondent testified that contrary to the claims of the District's witnesses, he wants to teach. He has made changes in his personal circumstances to address the demands of his single-parent status and the obligations of his position with the District. In this regard, he has sold his home and moved his family in with his mother and brother

and is confident that his mother and brother will be able to meet the transpiration and care needs of Respondent's children when he is working.

Position of the School District

The District asserts that the evidence supports its tenure charges. The District has shown that Respondent's excessive absenteeism constituted incapacity, unbecoming conduct and just cause sufficient to warrant dismissal. As required by case law, the District has shown it considered the number of days Respondent was absent, the impact of the absences on the District and provided Respondent the appropriate warning. Respondent missed 29.5 days in the 2017-2018 school year plus FMLA leave resulting in his being absent for a total of 82 days. In the 2018-2019 school year he continued his failure to meet his obligations relating to attendance missing 14 days from September 10 through November 5, 2018. It is recognized that repeated absences of a teacher from his classroom, however, legitimate, has a negative impact upon instruction and compromises the District's ability to meet its most fundament obligation. Here, the District has additionally shown that there is a likelihood that Respondent will continue his conduct in the future as notwithstanding his having an increment withheld due to his absenteeism during the 2017-2018 school year, Respondent continued his conduct into the 2018-2019 school year.

Respondent's conduct amounted to unbecoming conduct. As a teacher, Respondent holds the public's trust and is subject to the highest standards of conduct. His inability to maintain classroom discipline and inability to be present on a consistent basis fails such standards. His unbecoming conduct resulted in his students believing it was

okay to slap box one another during class and have another student videotape the incident. Respondent was derelict in his duty and consistently breached the public's trust as reflected in his consistent partially effective evaluations. He failed to submit lesson plans four weeks in a row at the start of the 2018-2019 school year, failed to submit a classroom management plan as required by this CAP, failed to adhere to his schedule and failed to provide and obtain adequate materials, including computer mice, for his classroom. Respondent showed that he did not want to teach and his refusal to accept his teaching assignment should not be tolerated.

Respondent made it clear to the District's administrators that he did not want to teach. His testimony to the contrary is inconsistent with the testimony of administrators and his own conduct. Respondent's claim that we now wants to teach should be discredited; his conduct shows a pervasive pattern of a teacher that either cannot or will not conform his conduct to the legitimate and reasonable expectations of the District.

Respondent was adequately warned, his conduct was fully investigated and considering his attitude and the recurring nature of his failures, dismissal is a reasonable and proportionate response by the District. The tenure charges should be sustained.

Respondent

Respondent maintained that the District has failed to support its tenure charges. The basis of the charge relating to absenteeism – Respondent's use of FMLA – is impermissible. Notwithstanding the District's counsel and Superintendent Alston representing that the FMLA taken by Respondent is not a basis of the Charge, the Charge itself highlights Respondent's 82 days of absence during the 2017-2018 school

year, the large majority of which were FMLA, and Alston repeatedly referenced the 82 days in his April 30, 2018 conversation with Respondent as well as during his testimony at the hearing.

Additionally, in regard to absenteeism, the evidence establishes that Respondent's absenteeism in the 2017-2018 and 2018-2019 was an aberration caused by the illness and passing of his wife and the effects of such on Respondent and his children. In this regard, Respondent has worked for the District for 18 years and prior to his wife's diagnosis, Respondent had accumulated almost 90 days of sick leave. Respondent is not a serial abuser of sick-leave. The evidence also showed that the underlying cause of Respondent's absences has now abated. Respondent's family has undergone difficult adjustments to their lives to compensate for the absence of Respondent's wife and the children's mother and they are now in a circumstance that will assure that Respondent will be able to meet the obligations of his family as well as his position with the District. Moreover, as to Respondent's absences prior to the 2018-2019 school year, Respondent has already received the harsh discipline of an increment withholding relating to them and it is unfair to then punish him a second time for the very same conduct.

The District's claim that the content of a student's video of what the District characterizes as a "slap fight" in Respondent's class shows unprofessional conduct, conduct unbecoming and neglect of duty is shown to be an empty claim by the video itself. Contrary to the District's claims, the video show two students engage in a 30 second horseplay event that was effective stopped by Respondent as he was taking roll at the beginning of his class.

The District's claim that Respondent failed to comply with his 2018-2019 CAP is also not supported by the evidence. In this regard, Superintendent Alston admitted at the hearing that he was actively in the process of framing and drafting tenure charges against Respondent in September 2018. Considering the CAP was signed September 24 2018, it is likely that the District was drafting tenure charges against Respondent event before his CAP began. Although the CAP was to extend for the full school year, the District brought Tenure Charges against Respondent just over a month after his CAP was signed. Respondent was not given a meaningful opportunity to comply with his CAP. Moreover, the District did not give Respondent the tools and resources to comply with his CAP. Although he was to submit lesson plans, the evidence shows that Respondent was not given a curriculum for his classes until after four weeks into the school year. Once he received the curriculum, Respondent submitted his plans as requested. Similarly, Respondent was understandably confused about the CAP requirement that he gain administrative approval for his absences when the District's call off system informed his that his absences did not need approval.

The District also claimed that its Charges are supported by the alleged fact that Respondent told administrators that he did not want to teach. The evidence shows that Respondent expressed his strong preference to remain in his technology administrative position. But the evidence does not show that he did not want to teach.

Finally, as to the Charge of Incapacity, it too should be dismissed as the District failed to show that Respondent had a mental of physical condition that incapacitated Respondent from working. To the contrary, the evidence shows that upon the conclusion

of his FMLA leave in 2018, Respondent was cleared to return to work by his mental health provider and the District permitted him to return to work.

Discussion

The District bears the burden of supporting its Tenure Charges. Based upon careful consideration of the record as a whole, including all testimony and other admitted evidence and the arguments of the parties, I find that the District has failed to establish the truth of its Tenure Charges against Respondent.

Charge One - Attendance

At the end of the 2017-2018 school year Respondent was notified that he would be subject to the significant discipline of the withholding of his increment. His written notice from the District concerning the reasons for the discipline references attendance issues. Superintendent Alston testified that he could have issued a warning or a suspension, or recommended tenure charges. He explained that in his deliberations on what to do, he considered all of Respondent's conduct prior to and during the 2017-2018 school year and came to the decision to withhold the teacher's increment.

Notwithstanding that Respondent's pre-2018/2019 school year conduct was already subject to the significant discipline of increment withholding, in its Charge One the District cites Respondent's pre-2018 counseling letters and reprimands and particularly focuses upon the 82 days Respondent was absent during the 2017-2018 school year, the majority of which were covered by FMLA. The parties devoted significant energy and effort in arguing the bona fides of the District citing FMLA leave taken by Respondent during the 2017-2018 school year to support its tenure charges.

Although the record arguably (and even forcefully) supports a finding that the District's withholding of Respondent's increment was based upon inappropriate consideration of Grievant's use of FMLA, I find that consideration of the details of Grievant's 2017-2018 absence record is not appropriate here. In this regard, Respondent's increment was withheld and there is no evidence that Respondent appealed or otherwise challenged that action by the District. As a consequence of such, whether or not the withholding of Respondent's increment by the District was tainted by a reliance on FMLA leave taken or would have otherwise been supported by the employee's non-FMLA related absences during the 2017-2018 school year is not an issue presented here.

The Attendance Issue Here is Limited to the 2018-2019 School Year

Based upon such considerations, I find that the determinative issue presented by the District's Tenure Charge One is whether or not, and within the context of considerations of progressive discipline, Respondent's attendance-related conduct during the 2018-2019 school year establishes as alleged by Charge One that "Respondent's actions constitute abandonment" of his position and warrants his termination. Considering the limited conduct of Respondent during the 2018-2019 school year relied upon by the District as described in its Tenure Charge One, and the fact that the District already chose to issue lesser discipline for the conduct, I find that the answer to such a determinative inquiry is plainly "no."

As admitted by the District and cited in its October 26, 2018 Tenure Charge, Respondent missed 4.5 days during the period at issue and was tardy 13 times. Importantly, those very same 4.5 days of absence and 13 incidents of tardiness were the subject of an October 22, 2018 written "formal Reprimand" issued Respondent by

Principal Hendricks. There is no additional conduct evidenced in the record between Respondent's October 22 reprimand and the October 26 Tenure Charge. The District's Tenure Charge One relies upon the very same conduct that had already been the subject of a formal reprimand as a basis for its decision to discharge the employee.

If the District believed Respondent's 4.5 absences and tardiness, together with Respondent's prior attendance-related discipline warranted his dismissal, it should have notified him of tenure charges – particularly where, as here, it had already begun the process of formulating its tenure charges in September 2018. Instead, the District notified Respondent that he was receiving a "formal reprimand." I find that such conduct by the District amounts to an admission that the conduct cited warranted a reprimand not dismissal; an admission that is consistent with progressive discipline.

Respondent's Absences Have Not Been Chronic, They Have Been Situational

In addition, I find the evidence does not support a finding that Respondent's absence was chronic. Respondent has been an employee of the District for approximately 18 years. Respondent's absences have not been chronic as alleged by the District, they have been situational, and the underlying realities of such situation have now changed significantly. In this regard, the evidence established that Respondent earned ten days of sick leave a year and accumulated an amount of sick leave that would take approximately nine years without absence to bank. He only began his use of significant leave due to a tragic loss and adjustment to its aftermath. I am persuaded by the record that the adjustments made by Respondent to his home-life to provide for his children and the continuation of professional mental health support for himself and his children have established that the causes of his attendance challenges have abated. Within such

circumstances the District has failed to show that Respondent has abandoned his position or is unlikely to comply with the attendance requirements of his position in the future.

I find the District failed to meet its burden of proving the truth of its allegations in Tenure Charge One.

Charge Two - Incapacity

The District has failed to show that Respondent is incapacitated. The record establishes that he was cleared to return to work by his healthcare professional, and there is no evidence in the record to support a finding that Respondent is not physically or mentally fit. As for the District's reliance upon allegations relating to Respondent's attendance and performance as encompassed by Charges One and Three, I find for the reasons explained in my discussions about those Charges that such is not established by the evidence.

Charge Three – Unbecoming Conduct, Unprofessional Conduct and Neglect of Duty

Here the District alleges Respondent was not competent in his work, put students at risk as a result of his poor classroom management, did not want to teach and consequently neglected his duty, and failed and refused to comply with his CAP requirements.

PIPs

In its charge the District cited Respondent's work history and his receiving PIPs between 2003 and 2009. In this regard, the record establishes that Respondent received

PIPs in the ordinary course as an alternative route teacher and that he was rated as Good (the second highest rating in a four-level scale) in his annual evaluations during that period. Contrary to the assertions of the District, I find that Respondent's PIPs do not support the Tenure Charges. The Charge also cites discipline of Respondent in 2014 and 2016 that I find bears no relevance to Charge Three.

Not Wanting to Teach

A major element of the District's theory in support of its Third Charge – and all of its Charges against Respondent – is that Respondent told at least three administrators that he did not want to teach, and that his conduct thereafter was consistent with his declaration and establishes that he was refusing to teach. As a consequence, the District asserted Respondent has engaged in unbecoming and unprofessional conduct and has neglected his duty.

Not wanting to do something and refusing to do something are very different things. A teacher may not want to be in the classroom but may nevertheless be a good teacher, and so too a teacher may want to be in the classroom and yet be a poor teacher. I find that the record establishes that Respondent expressed to District administrators that he preferred to stay in his administration position over returning to the classroom. In that sense of preference, Respondent may not have "wanted" to return to the classroom. However, I do not find sufficient evidence upon which to base a finding that Respondent in any way refused to teach. In contrast to such, the record establishes that in late April / early May of 2018 when asked in writing by the Superintendent what his intentions were for the 2018-2019 school year, an inquiry that came after the conversation in which Superintendent Alston testified Respondent stated that he did not want to teach,

Respondent replied in writing that he wanted to continue with the District "...in whatever capacity is asked of me..."

As for the events during the 2018-2019 school year relied upon by the District to show Respondent's alleged refusal to teach, such as the lack of computer mice, the loud noises coming from his classroom, the slap fight video and Respondent's compliance with his CAP, I find the District's evidence is insufficient to support a finding that Respondent refused to teach or otherwise abandoned his position

The September 14 Loud Nose and Respondent's Lack of Mice

To support its charges of incompetence and inability to manage his classroom, the District offered evidence relating to allegations of screaming coming from his classroom and what administrators observed when they investigated the screams. I find that the evidence is insufficient to establish that the loud noise/scream heard from the administrative offices on September 14, 2018 came from Respondent's classroom. In this regard, neither Superintendent Alston nor administrator Thompkins were present in the classroom at the time of the alleged scream. In contrast, Respondent was in the classroom and testified that the noise did not come from the room. Respondent's testimony was consistent with his statement to the administrators at the time of the incident. Additionally, although the statements reported by Respondent made by maintenance personnel at the time – that the noise did not come from the classroom – is inadmissible hearsay, Respondent's testimony that Respondent had complained about the lack of air conditioning in the room, that maintenance personnel were working on the air conditioning in the classroom ceiling at the time the administrators came down to investigate the noise. and that he and the two administrators agreed that the noise must

have come from the hallway is admissible, and are collectively contrary to the allegation of the District or a finding that Respondent was responsible for the noise.

The evidence supports the reports by Superintendent Alston and administrator Thompkins that at the time they visited Respondent's classroom to investigate the noise, a movie was playing, the students did not appear to be engaged and when they asked Respondent why the student were not on computers, Respondent reported that there were no computer mice in the classroom. The District blamed the lack of computer mice and therefore the lack of engagement of the students on Respondent, asserting that he caused the loss of computer mice the year earlier.

I find the evidence fails to show that Grievant was responsible for the loss of mice. He testified that the mice had been lost the year earlier and that the school was experiencing a loss of mice overall, including in the technology rooms and the library. Respondent's testimony in this regard was supported by testimony of Assistant Principal Chapman who confirmed that there was an issue with missing computer mice at the school at the beginning of the year, that the missing mice were also an issue in the school library.

Respondent also testified that in September 2018, not only did the classroom not have computer mice, he did not begin the year with logins for students to use the computers in the classroom (testimony again confirmed by the assistant principal) and did not have a curriculum for any of the three grades he was teaching. I credit Respondent's testimony concerning the lack of mice, logins and curriculum.

Considering the evidence in this regard, I find the District has failed to show that Respondent was responsible for screaming coming from his classroom, the lack of mice

for the room's computers, the lack of logins for students or the confusion that would predictably occur in the absence of a curriculum in the classes assigned to Respondent. I find the District has failed to establish the truth of its tenure charges in such regards.

The "Slap Fight"

In support of its charge that Respondent's lack of competence or neglect of duty put students at risk, the District offered evidence of an incident of "slap boxing" or a "slap fight" in Respondent's classroom. When offering the video of the alleged "slap fight" incident into evidence, Superintendent Alton testified that the conduct of the students could have easily escalated into harmful conduct and that Respondent was not paying proper attention as he was sitting on the counter and looking at his cellphone. When asked at the hearing what Respondent should have done, Superintendent Alston testified that Respondent should have stopped the fight immediately and had the students sit down. Consistently with the conduct recommended by the superintendent, the video captures the two students smiling and engaged with one another and Respondent stating that the problem with what they were doing was that it could easily escalate into something more serious and that the students should stop and sit down. The video shows the students then stopping and sitting down. As for Respondent using the cellphone, the record establishes that the District offers a cellphone app for teachers to take attendance, and Respondent offered uncontracted testimony that he was taking attendance on his phone at the time as students came into the classroom.

The District characterizes the 30 seconds of horseplay captured on video by a student in Respondent's classroom as evidence of a "slap fight" or "slap boxing" between students that warranted intervention by Respondent and the calling of security, and that

the incident occurred when Respondent was on his cellphone and not paying attention. I find such an exaggerated characterization by the District is evidence of the District's predisposition to terminate Respondent. The video does not show a fight or a dangerous absence of control of the classroom by Respondent. Instead, it shows two apparent friends engaging in horseplay that was stopped by the teacher in a timely manner. The facts that the students were not disciplined by the school and that the principal's referral of the incident to the IAIU resulted in a finding of "unfounded" support my finding herein. I find that the District has failed to establish the truth of its allegation that the slap boxing incident shows neglect of duty or otherwise supports the termination of Respondent.

Formal Reprimand of October 2, 2018

By memorandum dated October 2, 2018, the day Respondent was attending a classroom management seminar, Respondent was formally reprimanded for leaving work early on October 1, allowing a slap fight in his classroom as evidenced by a video reviewed by the principal on October 2, 2018, failing to provide his class computer mice and failing to improve his classroom management skills. Respondent was reminded of the requirements of his CAP, signed the week earlier.

I have found that the District has failed to meet its burden of showing that discipline of Respondent was warranted relating to the "slap fight" or the District's lack of providing its students computer mice.

The CAP

CAPs are typically seen in cases involving Charges of Inefficiency under the Act. Inefficiency is not alleged here. The District offered evidence relating to the 2018-2019

CAP to show that Respondent's failure to comply with the CAP is evidence of his refusal to teach.

The evidence establishes that the CAP was created at the same time that the District was contemplating tenure charges against Respondent; circumstances that place the good faith of the District's collaborative effort to improve Respondent's performance through the CAP into question. The District alleges that in addition to his being absent and tardy (discussed above relating to Charge One) Respondent failed to comply with the requirements of his CAP relating to timely submission of lesson plans, creation of a classroom management plan and gaining the appropriate authorization from administration prior to his being absent or tardy.

In regard to gaining approval for absences, the CAP itself provides; "Unless prior approval is obtained from an administrator, ensure that you come to work each day," and in regard to tardiness; "Unless you receive prior approval for a late arrival, ensure that you arrive at work on time every day." It is undisputed that Respondent did not receive the prior approval required by the CAP. In regard to the approval for absences, Respondent testified that he used the District's electronic attendance system – a system that informed him each time he used it that no approval was required. Considering the circumstances and the ambiguity created by the District's own attendance system, I find that the record does not establish that Respondent's failure to receive in-person approval for his absences and tardiness was an intentional or wanton refusal to comply with the CAP, or otherwise support the allegations of the tenure charge three.

The District also cites Respondent's failure to submit a classroom management plan by October 5, 2018. The requirement for the creation of the plan actually comes

under the section of the CAP listing "Supervisor Responsibilities." There is no dispute that Respondent did not complete the plan by the October 5 date. However, the evidence establishes that he did complete the plan by October 15, 2018, a date established by an October 12, 2018 memorandum to Respondent from Principal Hendricks.

In addition to his failing to submit a management plan by October 5, Hendricks' October 12 memorandum also discussed Respondent's failure to submit lesson plans on Tuesdays as required of staff for four weeks in a row. Hendricks expressed her concern and directed Respondent to "Submit your lesson plans by midnight each Thursday." And to Submit your detailed classroom behavior plan by Monday, October 15, 2018."

Respondent offered un-contradicted evidence that he submitted his management plan prior to the October 15 deadline and having received curriculum for his classes, thereafter submitted his lesson plans as directed.

Importantly, the October 12 memorandum from Principal Hendricks concludes by providing:

> Failure to adhere to deadlines ***will result in a formal written reprimand from my office and possible action by the Central Administration.*** If there is any part of this letter that need clarification or you have further questions regarding my concerns, please let me know immediately.
>
> (Emphasis added)

The record establishes that Respondent met the deadlines contained in the principal's October 12, 2018 memorandum. Yet, Respondent's pre-October 12 conduct is included in the District's support for its Tenure Charges. I find that the CAP should be considered within its own context; it is meant to be a school-year-long collaborative effort between the administrators and teacher to improve performance. In is not unusual for parties to experience bumps in the road in the early stages of such an effort. Within

such a context, I do not find that Respondent's initial struggles to comply with his CAP establish the unbecoming or unprofessional conduct or neglect of duty alleged in the tenure charges.

The Corrective Nature of Discipline/Notions of Fairness and Due Process

In is widely recognized that in all but the most egregious cases, discipline in the employment context is primarily intended to be corrective in nature; discipline is an effort by an employer to correct questionable conduct or poor performance by employees. Only when efforts to correct have failed through reasonable efforts under the circumstances, is discipline justly used to terminate the employment relationship. The TEACHNJ Act recognizes such a corrective-focused paradigm when, for example, it provides that a school district shall not dismiss or reduce the compensation of a tenured teachers except for "inefficiency, incapacity, or conduct unbecoming …or other just cause," (emphasis added) or where the statute requires that school districts provide teachers who have received wanting annual evaluations the opportunity to correct their performance through the collaborative process of implementing a Corrective Action Plan (CAP) (emphasis added).

Necessary to any effort to correct conduct is the understanding that once the employee has received corrective discipline the employee actually be given the opportunity to correct his or her conduct. It is fundamentally contrary to any concept of justice in the workplace for an employee to receive further discipline for conduct before the employee has had a fair opportunity to reform his or her conduct. Similarly, it is fundamentally unfair for an employee: (1) to be placed within a set of circumstances by

the employer where the employee does not have the method or means of reforming the conduct at issue; (2) to be warned that further conduct could result in a less severe category of discipline such as a formal reprimand, only to then be terminated for the conduct subject to the warning; (3) be informed that his or her conduct has resulted in a formal written reprimand and thereafter - where no further similar conduct occurs – be subject to termination based upon the very same conduct subject to that reprimand; or (4) to be disciplined for the same conduct more than once.

Here, the District has engaged in each such unfairness toward Respondent. Thus; (1) the District required Respondent to teach 6th, 7th and 8th Grade tech without curricula, logins or computer mice; (2) Respondent was informed that if he did not meet deadlines established in an October 12 memorandum he would be discipline, but notwithstanding that he met such deadlines and remedied the conduct as directed by his principal, the then-remedied conduct was used as a basis for Tenure charges; (3) although Respondent engaged in no further conduct of the nature addressed in his October 22 formal reprimand the District's tenure charges thereafter subjected him to termination based upon the very conduct for which he had already been disciplined; and (4) a substantial portion of the District case was based upon conduct already the subject of Respondent's increment withholding.

Considering the record as a whole, including all documentary and testimonial evidence, and my observations of the demeanor of all witnesses presented, I am persuaded that in September 2018, soon after the start of the 2018-2019 school year, the District had already formed an intention to file tenure charges against Respondent largely based upon Respondent`s absences during the 2017-2018 school year, and that the

charges it eventually filed on October 26, 2018 were primarily motivated by those absences.

Respondent's 2017-2018 absences had already been the motivation for the District's withholding of Respondent's increment and the District's rush to judgment to terminate Respondent in the early weeks of the 2018-2019 school year because of his absences in the prior school year is insufficient basis to support the District's Tenure Charges. The Tenure Charges relating to the 2018-2019 school year are largely without substance, and even considering Respondent's disciplinary record and principles of progressive discipline, have not been shown by the District to support termination.

Conclusion

The District has failed to establish the truth of its conduct unbecoming charge against Respondent. The Tenure Charges shall be dismissed.

Award

The subject tenure charges against Respondent Edward J Furhmeister are dismissed.

The District is ordered to:

1. Promptly offer Respondent reinstatement to his former position.

2. Make Respondent whole for any and all losses of pay, seniority and other benefits he may have suffered as a result of his suspension from the date of his suspension to the date of her reinstatement by the District.

Dated: March 28, 2019

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket Case No. 305-12/18 relating to tenure charges against Edward J. Furhmeister on Thursday, March 28, 2019.

Timothy J Brown

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF TENURE CHARGES BY:

SCHOOL DISTRICT OF ROCKAWAY TOWNSHIP
Petitioner

- against -

ENRIQUE VALDEBENITO
Respondent

Agency Docket No. 29-2/19

Pursuant to N.J.S.A. 18A:28-5 and 18A:6-10

APPEARANCES:

FOR THE PETITIONER
SCARINCI HOLLENBECK
By: John G. Geppert, Esq.

FOR THE RESPONDENT
CARUSO SMITH PICINI
By: Nicholas Poberezhsky, Esq.

BEFORE:

Perry A. Zirkel, Arbitrator

ARBITRATOR APPROVAL

The School District of Rockaway Township (Petitioner) filed Sworn Tenure Charges against tenured custodian Enrique Valdebenito (Respondent) in accordance with N.J.S.A. 18A:28-5 and 18A:6-10, and served them on Respondent with notice of opportunity to submit evidence and argument inopposition. Thereafter, the Commissioner of Education, following review of the Charges and Respondent's answer, found the Charges were sufficient for referral to an arbitrator. On March 7, 2019 the Office of Controversies and Disputes appointed me as the arbitrator to hear and decide this tenure dispute. At a status conference with the parties, we agreed on hearing dates of April 18–19, with deadlines of March 18 for the Respondent's motion for partial summary judgment and March 29 for the Petitioner's reply brief. On March 17, based on a joint request of the parties and their assurance that they had settled the matter subject to ratification by the school board scheduled for March 20, I agreed to their request for a one-week extension of the aforementioned briefs. On March 21, the parties submitted to me the ratified settlement agreement, which the Petitioner and Respondent had duly signed.

After a careful review of the Agreement, I hereby conclude that it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6 based on the following findings:

1. The Petitioner specified the charges and provided them to the Respondent with the requisite accompanying documentation.

2. The Agreement incorporates the circumstances justifying the settlement. The Respondent has agreed to resign effective May 6, 2019. The Petitioner has agreed to provide his remaining salary and specified benefits for severance. The parties have agreed to waivers, releases, and confidentiality provisions to bring the matter to closure.

3. The signature pages attest to the consent of both parties.

4. Provisions 7 and 8 of the Agreement assure and confirm that the mutually signing amounts to informed consent, with legal representation on each side.

5. The Agreement is in the public interest by saving the notable transaction costs of the detailed statutory proceedings, while removing the Petitioner from any further conduct that is contrary to the District's effective working and educational environment.

6. The terms of confidentiality (provision 6) , including the specified permitted and required disclosures, are expressly bounded by the law applicable to public access to information and records. Moreover, the Agreement is relatively simple and straightforward, with no misrepresentation.

Thus, I approve the attached Agreement in full resolution of Agency Docket No. 29-2/19.

Perry A. Zirkel, Arbitrator
September 23, 2019

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March 15, 2019

Via Email to: jgeppert@sh-law.com
& Regular Mail
John G. Geppert, Esq.
Scarinci Hollenbeck
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1100 Valley Brook Avenue
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Re: I/M/O Enrique Valdebenito; Rockaway Township Bd. of Educ., Morris Co.
Agency Dkt. No.: 29-2/19

Dear Mr. Geppert:

Enclosed herewith, please find the signed / notarized settlement documents in the above-captioned matter, including *Stipulation of Settlement* and *Letter of Resignation*. Please be sure to forward a copy of the fully-executed version of the settlement agreement to my office following the Board's ratification of the same. A copy should also be submitted to the arbitrator for approval.

Thank you for your time and attention to this matter. Please do not hesitate to contact me if you have any questions or concerns.

Respectfully,
CARUSO SMITH PICINI, P.C.

By: _____
Nicholas Poberezhsky, Esq.

Enclosure

c: Enrique Valdebenito (via regular mail)
John C. Williams, UniServ Field Representative (via regular mail)
NJEA Legal Department (via e-mail only)

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Attorneys for Rockaway Township School District
Our File No. 13338.1005

In the Matter of	:	AGENCY DKT. NO. 29-2/19
ENRIQUE VALDEBENITO	:	**STIPULATION OF SETTLEMENT**
SCHOOL DISTRICT OF THE TOWNSHIP OF ROCKAWAY, IN THE COUNTY OF MORRIS	:	

The Board of Education of the Township of Rockaway (the "Board"), whose principal office is located at 16 School Road, Hibernia, New Jersey 07842, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and Enrique Valdebenito, residing at 197 South Main Street, Apt. 3, Wharton, NJ 07885 ("Valdebenito" or "Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS, Respondent is a tenured Custodian employed by the School District; and

WHEREAS, the Superintendent of the School District ("Superintendent") certified tenure charges of conduct unbecoming and other just case to the Commissioner of Education of the State of New Jersey, captioned In the Matter of the Tenure Hearing of Enrique Valdebenito, School District of the Township of Rockaway, Morris County ("Tenure Charges"), primarily

based upon allegations that Respondent had engaged in conduct unbecoming and other just cause, and such charges were assigned Docket No. 29-2/19; and Respondent filed an answer opposing the charges; and the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Perry A. Zirkel ("Arbitrator") for a hearing; and

WHEREAS, the parties have mutually agreed to resolve the above-referenced tenure charges; and

WHEREAS, the proposed Stipulation of Settlement is in the best interest of the Parties and the public;

NOW, THEREFORE, subject to approval by the Arbitrator, in consideration for the promises and mutual covenants set forth herein, the Parties hereby agree as follows:

1. Upon final approval by the Arbitrator of the signed Stipulation by the District Respondent agrees to resign from his tenured position effective May 6, 2019. Attached is a copy of Respondent's signed Letter of Resignation (Exhibit A). Respondent shall be returned to the payroll through the effective date of resignation, beginning March 6, 2019. The District shall also provide Respondent with three (3) months' health insurance benefits, for which the District shall pay the entire cost without contribution from the Respondent, effective February 6, 2019 through May 6, 2019. Upon resignation, Respondent shall receive any outstanding amounts owed, if any, between his period of suspension and two months' salary as severance pay. These payments will be in full and complete satisfaction of any and all claims due and owing to Respondent from the Board, including but not limited to any and all accrued sick leave and vacation. Upon completion of the three (3) month period during which benefits are paid,

Respondent shall be entitled to any benefits to which he may be lawfully entitled under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Respondent shall have the same COBRA rights as any other former employee and shall be solely responsible for any and all costs associated with said COBRA coverage.

2. In exchange for the consideration set forth in paragraph 1 above, the sufficiency of which is hereby acknowledged, Respondent hereby waives, releases and discharges any and all claims or rights that he has or may have against the School District, the Superintendent, its Board of Education and its Board members, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the School District or separation from employment with the School District. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment

Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss, except for workers compensation claims.

3. Notwithstanding the terms of Paragraph 2 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. However, should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the released claims, Respondent agrees not to seek or accept any resulting relief whatsoever.

4. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the

legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has 7 days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within 7 calendar days of signing and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the 7-day period.

5. This Stipulation shall not constitute a precedent in any matters involving other District employees.

6. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which he is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that he will inform the person to whom he is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. Respondent understands that this

provision is not a simple recital but is an important, integral part of this Stipulation. The District agrees that it will keep this Stipulation confidential to the extent permitted by law.

7. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

8. Valdebenito agrees that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Stipulation prior to executing this Stipulation, but Valdebenito may waive this twenty-one (21) day period by signing the space provided at the end of this Stipulation.

9. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties and there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

10. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation and Respondent consents to both personal and subject matter jurisdiction in the aforementioned courts or before the Commissioner of Education.

11. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signature or signatures in

electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

12. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

13. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

14. This Stipulation of Settlement is subject to the final approval of the Board and will only become effective upon the final approval of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue this matter.

15. This Stipulation is further subject to approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c) and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

SIGNATURE PAGE

Dated: 3/15/19

Enrique Valdebenito
ENRIQUE VALDEBENITO

Sworn and Subscribed to before me
this March day of 15, 2019.

Notary Public
State of New Jersey

Jeanette Velez
Notary Public
State of New Jersey
Middlesex County
My Commission Expires September 5, 2022

Dated: 3/20/19

Susan Salny
SUSAN SALNY
Township of Rockaway Board of Education
President

SIGNATURE PAGE

Dated: 3/15/19

Enrique Valdebenito
ENRIQUE VALDEBENITO

Sworn and Subscribed to before me
this March day of 15, 2019.

Notary Public
State of New Jersey

Jeanette Velez
Notary Public
State of New Jersey
Middlesex County
My Commission Expires September 5, 2022

Dated: _____

_____
SUSAN SALNY
Township of Rockaway Board of Education
President

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: _____

JOHN G. GEPPERT, JR.
Attorney for School District
of the Township of Rockaway

Dated: 3/15/19

NICHOLAS POBEREZHSKY
Attorney for Enrique Valdebenito

Approved:

Dated: 3/23/19

PERRY A. ZIRKEL
Arbitrator

CERTIFICATION

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS SETTLEMENT AND RELEASE AND UNDERSTAND ALL OF ITS TERMS, INCLUDING THE FULL AND FINAL RELEASE AND WAIVER OF CLAIMS SET FORTH ABOVE. I FURTHER ACKNOWLEDGE THAT I HAVE KNOWLEDGE THAT I HAVE KNOWINGLY AND VOLUNTARILY ENTERED INTO THIS SETTLEMENT AGREEMENT AND RELEASE, AND THAT I HAVE NOT RELIED UPON ANY REPRESENTATION OR STATEMENT, WRITTEN OR ORAL, NOT SET FORTH IN THIS SETTLEMENT AGREEMENT AND RELEASE.

Dated: 3/15/19

Enrique Valdebenito

ENRIQUE VALDEBENITO

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 days period referred to in the 8th recital of this Stipulation.

Enrique Valdebenito
ENRIQUE VALDEBENITO

DATED: 3/15/19

Exhibit A

March 15, 2019

Dr. James McLaughlin, Superintendent
Rockaway Township School District
16 School Road
Hibernia, New Jersey 07842

Dear Superintendent McLaughlin:

I hereby resign from my tenured position as a Custodian in the Rockaway Township School District, effective May 6, 2019. I understand that my resignation is irrevocable, and that as of the Effective Date, all of my rights of employment with the District, including but not limited to accrued salary, benefits and seniority, will permanently end.

Dated: 3/15/19

Enrique Valdebenito

ENRIQUE VALDEBENITO

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

JOSEPH DeSHAN, BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY

Agency Docket No. 311-12/18

Walt De Treux, Esq., Arbitrator

DECISION ON RESPONDENT'S MOTION TO DISMISS

Decision Date: 4/2/19

Introduction and Statement of Relevant Facts

Joseph DeShan has been a teacher at Cinnaminson Middle School and Rush Elementary School in the Cinnaminson School District for approximately 22 years. Prior to his employment with the District, DeShan was a Roman Catholic priest in the Bridgeport, Connecticut Diocese. In 1988, he had a sexual relationship with a 14-year old female. A child was born from their relationship in 1990 when the female was 16 years old. DeShan left the priesthood around 1994 and become a Cinnaminson school teacher in 1996.

In 2002, Connecticut newspapers reported on DeShan's relationship with the minor. On April 12, 2002, the Cinnaminson Board of Education (BOE), previously unaware of the relationship and DeShan's former vocation as a priest, placed DeShan on administrative suspension. Three weeks later, he was returned to the classroom with no further discipline or adverse effect on his employment.

On December 20, 2018, the Cinnaminson BOE filed tenure charges against DeShan with the New Jersey Commissioner of Education. The charges moved for DeShan's removal from his position for "Conduct Unbecoming a Staff Member." Specifically, the charges focused on current and past conduct as detailed in the Statement of Evidence, sworn to by Superintendent of Schools Stephen Cappello and stating in relevant part,

> "14. On one recent occasion, it was reported that DeShan told a young female student that, "Look at me. Let me see your pretty green eyes. You don't see them too much anymore." The student reported that the comment made her feel "uncomfortable." The student further noted that DeShan made the comment in a "weird voice."
>
> 15. Many parents have come forward requesting that their children be removed from DeShan's class.
>
> 16. Parents with children in the District came forward at the October 16, 2018 School Board Meeting to express their serious concern with DeShan remaining in the classroom, including:
>
> a. Because of DeShan's prior conduct, students do not trust their teacher, and are talking about their teacher being a "rapist."
> b. Wanting their children to feel safe at all times at school, and a person with his history should not be around children. Requests to "please protect our children."
> c. Child finds teacher "creepy" and parent would her child to be removed from his class if he is to remain in school.
> d. Concerns that the child DeShan had a sexual relationship with was the same age as their children that he is currently teaching.
> e. That DeShan should not be teaching their children because he is a "pedophile."

On January 4, 2019, Respondent DeShan filed a Motion to Dismiss Tenure Charges in Lieu of Answer. On January 17, 2019, I was appointed as Arbitrator to decide the Motion and hear the case, if necessary. The BOE filed a Brief in Opposition on January 30, 2019, and Respondent filed a Reply Brief on March 29, 2019. The Motion to Dismiss is ripe for decision.

Issue

Should Respondent's Motion to Dismiss Tenure Charges be granted?

Analysis and Decision

In his Motion to Dismiss, Respondent argues that the tenure charges are procedurally deficient as they are based on "hearsay, rumor, and innuendo without the necessary residuum of legally competent non-hearsay evidence." The BOE counters that the charges "contained enough information and facts in order for Respondent to articulate a response or defense."

The charges focus on both current and past conduct. The current conduct relates to Respondent's alleged comment to a female student regarding her "pretty green eyes." The past conduct refers to Respondent's pre-employment sexual relationship with a minor while he served as a priest in the Bridgeport, CT Diocese.

TEACHNJ regulations, N.J.A.C. 6A:3-5.1(b)(1), require in relevant part,

> 1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which will be executed under oath by the person(s) instituting such charges.

In the Matter of Tenure Hearing of Kevin Karp, Board of Education of the Township of Barnegat, Ocean County, Agency Docket #102-4/16 (May 26, 2016), Arbitrator Edmund Gerber dismissed tenure charges against the Respondent because the Superintendent swearing to the Statement of Evidence and certifying the tenure charges did not directly participate in the investigation of the allegations, but instead, relied on unsigned documents from school administrators who conducted the investigation and acted without signed statements from

complaining students and parents. He rejected the charges because they were "certified on the basis of double hearsay," citing the ALJ decision *In the Matter of the Tenure Hearing of Edwards, East Orange Board of Education*, 1982 S.L.D. (2011).

In the present case, Superintendent Cappello certifies in ¶14 of the Statement of Evidence that "it was reported" that Respondent made a comment to a female student regarding her "pretty green eyes." The paragraph also refers that "the student reported" feeling uncomfortable and that Respondent spoke in a "weird voice." The allegation provides no further context. It does not explain who reported the comment or to whom the comment was reported. The allegation does not indicate whether Supt. Cappello had personal knowledge of the alleged comment or whether it was investigated by school administration. There are no statements from the female student or notes/transcripts of interviews with the student or others. The tenure charges in ¶13 allege, "DeShan's prior conduct in addition to present conduct has caused his continued presence in the District to be a substantial disruption to the educational process." In the Statement of Evidence, the alleged comment to the student is not linked in any way to "substantial disruption to the educational process." The Statement does not indicate that parents or others were made aware of the alleged comment.

In short, the evidence in support of the current conduct – the alleged comment is the only incident cited – is clearly based on hearsay. The layers of hearsay are impossible to determine as the allegation does not indicate how and from whom school administration learned of the comment. Supt. Cappello certified the charges at least on the basis of hearsay, if not double or triple hearsay. For this reason alone, the tenure charges are procedurally deficient.

The BOE argues that Respondent had enough information to understand and respond to the allegation. Respondent did, as he provided a narrative of the event in his Motion to Dismiss; but the BOE's argument distracts from the reasons that charges are required to be supported by competent non-hearsay evidence. The procedural protections ensure that charges comply with due process. It is not the comment itself that appears to be the primary basis for the charges, but the student's alleged reaction to the comment. Respondent's proffered context for the comment strips it of any inappropriate interpretation. The BOE, to the contrary, insinuates that the comment was laced with improper intentions and sexual connotations. Yet it provides no non-hearsay evidence of the basis for that implication. A description of the student's reaction (feeling "uncomfortable') without any indication to whom, if anyone, she reported that reaction or to how the alleged comment and reaction came to the Superintendent's attention (i.e., the number of persons the account was passed through before he learned of it) gives Respondent no opportunity to properly respond to the allegation or to rebut those unknown persons that may have reported or passed on the alleged comment and description of the student's reaction.

For all these reasons, I find that the charges as they relate to alleged current conduct, i.e., the one alleged comment to the female student, are based on hearsay, and therefore, are procedurally deficient and must be dismissed.

The BOE first learned of Respondent's prior employment as a priest and his pre-employment sexual relationship with a minor in 2002. After a 3-week administrative suspension, the BOE returned him to the classroom.

In the tenure charges, the BOE is not alleging that Respondent has engaged in any other past conduct other than the pre-employment conduct. It argues that parental and societal views have changed so that the past conduct now renders Respondent unfit for the classroom. The Statement of Evidence cites to parents' comments at a Board meeting, decrying Respondent and questioning the safety of their children. The speakers of those comments are unidentified, and their comments are clearly hearsay. The larger point, however, is that the BOE is relying on the attitudes of some parents toward Respondent's past conduct to support the tenure charges alleging Conduct Unbecoming a Staff Member.

In *Bound Brook Board of Education v. Ciripompa,* 153 A.2d 931, 228 N.J. 4 (2017), the New Jersey Supreme Court reviewed the standard applied to a claim of unbecoming conduct. As part of a longer discussion, the Court observed,

> "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment." *At 938.*

The BOE has not alleged that Respondent engaged in any inappropriate conduct *while* holding public employment. Rather, it cites conduct prior to his employment for the District and for which it had administratively suspended, investigated, and returned him to the classroom more than 16 years ago. The fact that some parents now demand his removal from the classroom does not give the BOE a second opportunity to revisit pre-employment conduct of which it has been long aware. The charges do not cite to inappropriate conduct other than conduct that was already addressed by the Board in 2002 when it learned of the pre-employment conduct.

As the conduct unbecoming charges are based on alleged hearsay complaints from parents and on pre-employment conduct that was addressed by the BOE 16 years ago , I find the tenure charges as to past conduct procedurally deficient and insufficient to support a charge of Conduct Unbecoming a Staff Member.

For these reasons, the charges will be dismissed.

Award and Remedy

Respondent's Motion to Dismiss Tenure Charges is granted, and the tenure charges are dismissed. As remedy, the BOE is ordered to immediately reinstate Respondent to his former position with full backpay, benefits, and all emoluments associated therewith, as required by law and consistent with the operative collective bargaining agreement.

Walt De TReux

WALT De TREUX

Affirmation

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

Walt De TReux

WALT De TREUX

OAL Dkt. No. EDU 02624-18
Agency Dkt. No. 15-1/18

New Jersey Commissioner of Education

Final Decision

Dolores Abernathy,

Petitioner,

v.

Board of Education of the Township of Irvington, Essex County,

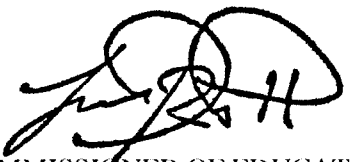
Respondent.

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

Under the terms of the Agreement, petitioner was to be reimbursed for all pay withheld from her during the pendency of the tenure charges and reinstated to her active work duties by February 19, 2019 – which date has preceded the consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 4/10/19
Date of Mailing: 4/10/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02624-18
AGY REF NO. 15-1/18

DOLORES ABERNATHY,

Petitioner,

vs.

TOWNSHIP OF IRVINGTON, BOARD OF EDUCATION,
ESSEX COUNTY,

Respondent.

Nicholas Poberezhsky, Esq., for Petitioner (Caruso, Smith, Picini, P.C., attorneys)

Yadira C. Duran, Esq., for Respondent (Hunt, Hamlin and Ridley, attorneys)

Record Closed: February 27, 2019 Decided: March 1, 2019

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

Petitioner seeks reimbursement for sick time improperly charged by the Board.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on February 20, 2018.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

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

ORDER

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

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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

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

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:
Db

SETTLEMENT AGREEMENT

Agreement is hereby effective February 11, 2019, by and between Dolores Abernathy (hereinafter "Ms. Abernathy") and the Township of Irvington Board of Education (hereinafter the "Board") (collectively the "Parties" or, individually, "Party") according to the following:

1. PETITION FOR RELIEF: Ms. Abernathy agrees to withdraw, with prejudice, the petition for relief filed against the Board, pending before the Office of Administrative Law, captioned Abernathy, Dolores v. Twp. of Irvington BOE, Essex County, OAL Dkt. No.: EDU 02624-2018 N, Agency Dkt. No.: 15-1/18.

2. TENURE CHARGES: The Board agrees to withdraw, with prejudice, the tenure charges filed against Ms. Abernathy, pending before the Commissioner of Education, captioned I/M/O Tenure Hearing of Dolores Abernathy, School District of the Township of Irvington, Essex County, Agency Dkt. No.: 80-4/18.

3. FITNESS FOR DUTY EXAMINATION: The Board agrees to withdraw its pending directive for Ms. Abernathy to appear for a fitness for duty examination, but reserves the right to issue the directive, in accordance with N.J.S.A. 18A:16-2, in the future based on incident(s) occurring or 504 request(s) submitted after the date of the execution of this agreement.

4. REIMBURSEMENT OF PAY AND RETURN TO WORK: Upon execution of this agreement, the Board agrees to reimburse Ms. Abernathy for all pay withheld from her during the pendency of the tenure charges. She will also be reinstated to active work duties effective February 19, 2019.

5. AMENDED ACCOMODATIONS REQUEST: Any accommodations requests previously submitted by Ms. Abernathy shall be deemed withdrawn. Ms. Abernathy agrees that future accommodations requests must be made to the 504 Committee.

6. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law.

7. ENTIRE AGREEMENT: This agreement contains the entire agreement and understanding between the Parties and constitutes a full and final agreement of any and all issues relating to this matter, except that the Parties reserve their right to enforce this agreement, if necessary.

8. CHOICE OF LAW: This agreement shall be governed by the laws of the State of New Jersey.

9. SEVERABILITY: If a specific clause of this agreement is determined to be illegal or in violation of any Federal or State laws, the remainder of the agreement shall not be affected by such a determination and shall remain in full force and effect.

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

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

12. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorneys or representatives all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion and duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

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

IN WITNESS THEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 22 day of February 2019.

Dolores Abernathy

Nicholas Poberezhsky, Esq.
Attorney for Dolores Abernathy

Dated: Feb. 18, 2019

On Behalf of the Board:

By: _____

Yadira Duran, Esq.
Attorney for the Board

Dated: February 22, 2019

OAL Dkt. No. EDU 14788-18
Agency Dkt. No. 230-9/18

New Jersey Commissioner of Education

Final Decision

S.G. and C.G. on behalf of minor child, T.G.,

Petitioners,

v.

Board of Education of the Township of Colts Neck, Monmouth County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/09/19

Date of Mailing: 4/09/19

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14788-18
AGENCY DKT. NO. 230-9/18

S.G. AND C.G. ON BEHALF OF MINOR CHILD, T.G.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF COLTS NECK, MONMOUTH COUNTY,
Respondent.

R. Armen McOmber, Esq., for petitioners (McOmber and McOmber, attorneys)

Douglas J. Kovats, Esq., for respondent (Kenny, Gross, Kovats and Parton, attorneys)

Record Closed: March 14, 2019 Decided: March 19, 2019

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 12, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the settlement agreement is attached and fully incorporated herein. Douglas J. Kovats, Counsel for the respondent, Colts Neck Township Board of Education, has signed the settlement agreement on behalf of the Board.

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

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

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

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

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

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

March 19, 2019
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 3.20.19

Mailed to Parties: 3.20.19

/vj

KENNEY, GROSS, KOVATS & PARTON
ATTORNEYS AT LAW
The Courts of Red Bank
130 Maple Avenue/Building 8
Red Bank, New Jersey 07701
(732) 530-7500, *Telefax*: (732) 530-1739
By: Douglas J. Kovats, Esq.
ID#030191983
Attorneys for the Respondent Board

RECEIVED
2019 MAR 14 P 1:09
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

S.G. and C.G. obo T.G. , Petitioner, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF COLTS NECK, IN THE COUNTY OF MONMOUTH, Respondent.	NEW JERSEY DEPARTMENT OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 14788-2018 S AGENCY DKT. NO.: 230-9/18 **SETTLEMENT AGREEMENT**

WHEREAS, the parties in this appeal have voluntarily resolved all disputed matters and wish to enter into the following settlement, which fully disposes of all issues in controversy between them; and

WHEREAS, the parties have agreed to the following:

1. Petitioners hereby withdraw their Petition of Appeal.

2. Petitioners shall pay to Respondent the sum of Twenty Thousand Dollars ($20,000) within 60 days of the date of this agreement.

3. In the event full payment is not made to the Respondent within 60 days of the date of this agreement, notice shall be given to Petitioners of their failure to make payment, affording Petitioners an opportunity to cure within ten (10) days. Thereafter judgment in the full amount of the tuition demand, Fifty-Six Thousand Seen Hundred Seventy-Nine Dollars and twenty cents ($56,779.20), shall be entered against Petitioners.

4. Except as hereinabove set forth, the parties waive all other claims against one another, including any award of counsel fees or other monetary relief.

5. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

This Agreement shall be effective on recommendation of the Honorable Susan Olgiati, A.L.J. and approval of the Commissioner of the Department of Education.

3-6-19
Date

Steven Garrett
Petitioner S.G. o/b/o T.G.

3-6-19
Date

Cynthia Garrett
Petitioner C.G. o/b/o T.G.

March 11, 2019
Date

Counsel for Respondent
Colts Neck Township Board of Education

GURBIR S. GREWAL
Attorney General of New Jersey
Attorney for New Jersey Department of Education,
School Ethics Commission
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

By: James M. Esposito
Deputy Attorney General
(609)376-3100
james.esposito@law.njoag.gov

	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
	:	
IN THE MATTER OF	:	OAL DOCKET NO. EEC 06180-2018S
JAMES MUELLER, KINGSWAY	:	AGENCY DOCKET NO. C85-17
REGIONAL BOARD OF EDUCATION	:	
	:	**CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC"), and Respondent, James Mueller ("Respondent"), have mutually agreed to settle the above-captioned matter, with GURBIR S. GREWAL, Attorney General of New Jersey, by James M. Esposito, Deputy Attorney General, appearing on behalf of the SEC, and Joshua I. Savitz, Esq., appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's decision of March 27, 2018, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24(b); and

WHEREAS, the settlement of this matter shall not constitute precedent or be considered an admission of guilt in this or other pending or future litigation:

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges his actions constitute a violation of

N.J.S.A. 18A:12-24(b).

2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a reprimand.

3. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a reprimand for the conduct described in the attached affidavit.

4. By accepting the penalty of a reprimand, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the reprimand.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's March 27, 2018 Probable Cause Notice.

Joshua I. Savitz, Esq.
Attorney for Respondent

Date: 2/25/19

James M. Esposito
Deputy Attorney General
Attorney for Petitioner

Date: 3/29/2019

Respondent, James Mueller, is hereby reprimanded for the conduct described in the attached affidavit:

Lamont O. Repollet
Commissioner of Education
As to penalty only.

Date: 4/5/19

GURBIR S. GREWAL
Attorney General of New Jersey
Attorney for Petitioner
New Jersey Department of Education,
School Ethics Commission
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

By: Geoffrey N. Stark
Deputy Attorney General
P: (609) 376-3100
F: (609) 943-5853
Geoffrey.Stark@law.njoag.gov

	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
DREW PACKARD, Petitioner, v. MARTIN MURRAY, CARTERET BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent.	AGENCY DOCKET NO. C68-17 **CONSENT ORDER**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC"), and Respondent, Martin Murray ("Respondent"), have mutually agreed to settle the above-captioned matter, with Gurbir S. Grewal, Attorney General of New Jersey, by Geoffrey N. Stark, Deputy Attorney General, appearing on behalf of the SEC, and Jennifer L. Personette, Esq., DeCotiis, FitzPatrick, Cole & Giblin, LLP, appearing on behalf of Respondent; and

WHEREAS, this matter arose from the SEC's letter, dated November 29, 2017, finding probable cause based upon the third-party complainant's allegations to proceed with a plenary hearing on Count 1, Count 2, and Count 4 of the Complaint against Respondent, but dismissing with prejudice Count 3 of the Complaint on the pleadings for lack of probable cause; and

WHEREAS, Respondent contested the allegations in the remaining counts of the Complaint, denied liability as a matter of law and sought a plenary hearing; and

WHEREAS, prior to the plenary hearing or a full airing of the facts and legal defenses, the parties determined to amicably resolve this matter without further litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that by serving on the Carteret Board of Education's Building and Grounds Committee, Respondent was involved in policy-making and general administrative oversight, together with the other members of the Committee, of the facilities department where his brother works. Respondent took no action whatsoever to directly affect the terms and conditions of his brother's employment, however, Respondent acknowledges that by sitting on the Building and Grounds Committee he created

the perception that he had the ability to provide his brother with an unwarranted privilege, advantage, or employment in violation of N.J.S.A. 18A:12-24(b). Respondent has since voluntarily removed himself from the Building and Grounds Committee and is no longer serving the Board in that capacity.

2. The SEC will recommend that the Commissioner impose the penalty of a reprimand for the conduct referenced in Paragraph 1 above, consistent with Count 4 of the Complaint. Counts 1 and 2 of the Complaint will be dismissed with prejudice upon the full execution of this Consent Order.

3. By accepting the penalty of a reprimand, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and that he will not oppose the reprimand.

4. The Parties agree that in the event the Commissioner does not accept the recommendation of the SEC and imposes a different or higher-level reprimand, the Consent Order shall automatically be rendered null and void and Respondent retains his right to a plenary hearing.

5. The settlement of this matter shall not constitute precedent or be considered an admission of guilt in this or any other pending or future litigation

6. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's November 29, 2017, Probable Cause Notice.

Jennifer L. Personette, Esq.
Attorney for Respondent

Date: 2/28/19

Geoffrey M. Stark, D.A.G.
Attorney for Petitioner

Date: 3/26/19

Respondent Martin Murray is hereby reprimanded for the conduct described in the attached affidavit:

Lamont O. Repollet, Ed.D.
Commissioner of Education
As to penalty only

Date: 4/5/19

96-19E

OAL Dkt. No. EDU 3502-19
Agency Dkt. No. 46-2/19

New Jersey Commissioner of Education

Order On Emergent Relief

Jennifer Tambakis,

Petitioner,

v.

Board of Education of the Township of Boonton, Morris County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that Boonton Township Board of Education has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Specifically, the Board failed to establish that it would suffer irreparable harm if the emergent application is not granted.[1]

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/09/19

Date of Mailing: 4/09/19

[1] It appears that the ALJ inadvertently inserted the following sentence on page 5 of the Order. "I CONCLUDE petitioner did not meet all of the criteria of N.J.A.C. 6A:3-1.6(b) because they have not shown a likelihood of prevailing on the merits."

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 03502-19
AGENCY DKT. NO. 46-2/19

JENNIFER TAMBAKIS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,

Respondents.

Arnold Mellk Esq. for petitioner (Mellk O'Neill)

James Plosia, Jr. Esq., for respondent Township of Booton Board of Education (Plosia Cohen)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, Jennifer Tambakis (Tambakis) challenges the Township of Booton Board of Education's (Board or respondent) right to the results of her drug/alcohol test of February 20, 2019. On March 8, 2019, respondent filed a Motion for Emergent Relief to compel petitioner to provide respondent with the results of her drug/alcohol test of February 20, 2019. The matter was filed with the Office of Administrative Law (OAL) as a contested matter with the March 13, 2019. Oral argument on the motion was held on March 19, 2019.

FACTUAL DISCUSSION

I **FIND** the following to be the **FACTS** of this matter.

Tambakis is a tenured teacher employed by the Board. On February 20, 2019, teaching staff Leah Birchler and Robin Schwalb reported to the principal of Boonton Town High School (Boonton), Jason Klebez, that Tambakis "reeked of alcohol." Birchler is the substance abuse counselor at Boonton and is trained in recognizing substance abuse in students. Schwalb is a School Social Worker and has experience recognizing and dealing with students with substance abuse issues.

The School Nurse, Marcia Tucci spoke to Tambakis, at that time, and determined that she should be transported to undergo substance abuse testing. Beven Hugen, the president of the Boonton Education Association was advised and came to Boonton. Hugen meet with Tambakis, who agreed to go for alcohol/substance abuse testing. Tambakis did not sign the release of information, which would allow Boonton to to receive the results of the alcohol/substance abuse testing. Hugen and Tambakis went to Concentra to have the testing done. There was a two hour wait for the testing to be done. Tambakis underwent the alcohol/drug testing at Concentra.

Boonton has not been provided with Tambakis alcohol/substance abuse testing results. Tambakis has not returned to work since February 20, 2019.

Tambakis students would be preparing for state testing which begins in April. Some students can use this time to prepare to qualify for honors English classes during the next school year. Tambakis is presently on administrative leave. Her classes have been covered by High School teachers as well as per diem substitute teachers.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:16-2 (a) provides:

> Every board of education may require its employees and shall require any candidate for employment who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data. Nothing in this section shall be so construed as to affect screening for tuberculosis or fitness examinations for bus drivers as required pursuant to statute, rule or regulation.

N.J.S.A. 18A: 16-5 provides:

> All records and reports relating to any such examination shall be the property of the board and shall be filed with its medical inspector as confidential information but shall be open for inspection by officers of the state department of health and the local board of health.

In this matter Bircher, a substance abuse counselor and Schwalb, a school social worker, who has experience recognizing students with substance abuse issues informed Klebez that Tambakis reeked of alcohol. Tambakis agreed to an alcohol/drug test but refused to sign an authorization for the Board to obtain the results of the test. Reeking of alcohol is a deviation from normal and physical health. Based on that, the Board could require Tambakis to be tested, which it did. The records from the testing are the property of the Board in accordance with N.J.S.A. 18A: 16-5.

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following

standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The respondent will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying respondent's claim is settled;

3. The respondent has the likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the respondent will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Respondent has the burden of establishing each of the above requirements in order to warrant relief in his favor.

It is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In this matter, the respondent will not suffer irreparial harm by not being given Tambakis drug/alchol results. Tambakis is on administrative leave as a result of this

matter. Her classes have been covered by High School teachers as well as per diem substitute teachers. Since her classes can be covered by others, I **CONCLUDE** that respondent will not suffer irrepable harm.

There is a likelihood of prevailing on the merits and the law is well settled. Tambakis evidence a deviation form normal and physical health by coming to work "reeking of alcohol." In addition, she was seen upset and crying by Klebez. The Board could require her to be tested and the results of the test are the property of the Board.

The balancing of the harms in this matter is greater for respondent. Respondent does not know if it has Tambakis has an alcohol or substance abuse problem. They do not want a teacher with an active substance abuse problem or alchol problem to teach until the problem is addressed. Petitoner would only be required to provide the alcohol and drug test results.

All of the criteria of N.J.A.C. 6A:3-1.6(b) must be met in order for petioner to prevail on a motion for emergent relief. I **CONCLUDE** petitioner did not meet all of the criteria of N.J.A.C. 6A:3-1.6(b) because they have not shown a likelihood of prevailing on the merits.

Accordingly, it is **ORDERED** that petitioner's application for such relief be and hereby is **DENIED**.

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

3-19-19
DATE

KIMBERLY A. MOSS, ALJ

ljb

97-19

New Jersey Commissioner of Education

Final Decision

S.H.P., on behalf of minor children, O.P. and Z.P.,

Petitioner,

v.

Board of Trustees of the Elysian Charter School, Hudson County,

Respondent.

Synopsis

Petitioner challenged the respondent Board's determination that O.P. and Z.P. were ineligible to attend Elysian Charter School because the family resides out of state. Petitioner traveled to India with the children in February 2008, informing the school that they would return about two weeks later. There were numerous subsequent delays in the family's plans, and petitioner later informed the school that the children were being home-schooled in India. The family continued to represent that the children would be returning to the charter school, but failed to meet the Board's requirement that O.P. and Z.P. return to class by April 30, 2018, and provide proof of residency within the district. The Board filed a motion for summary decision, as well as a counterclaim for tuition for the period of the children's ineligible attendance.

The ALJ found, *inter alia*, that: petitioner failed to sustain her burden of proving that her family was domiciled in New Jersey as of the date of the Board's notice of final ineligibility on April 30, 2018; there was sufficient evidence in the record to support that petitioner and her children were not residing in Hoboken, Jersey City, or the surrounding community at the time that the April 30, 2018 ineligibility letter was drafted; further, as of the date of the Office of Administrative Law (OAL) hearing in this matter – in November 2018 – the children were still in India. The ALJ concluded that petitioner failed to satisfy her burden of proving that the children were eligible for a free education at Elysian Charter School as of April 30, 2018; further, the ALJ denied the Board's counterclaim for tuition as no evidence was submitted in support of the claim. The ALJ dismissed the petition.

Upon review, the Commissioner found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1, public school in New Jersey is free to students who are domiciled in a school district; and as of February 2018, petitioner and her children were not domiciled in any school district in the State of New Jersey, as S.H. vacated her apartment and moved the family to India indefinitely. Accordingly, the Commissioner concluded that the minor children are not entitled to a free education in the charter school, or in any other school in New Jersey. With respect to the Board's counterclaim for tuition, the charter school may not seek tuition from petitioner as O.P. and Z.P. were not attending school during the time period at issue. Further, any attempt to recover tuition for a charter school student's period of ineligible attendance must be initiated by the child's district of residence. The Initial Decision was adopted with these modifications, and the petition was dismissed.

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

April 9, 2019

97-19

OAL Dkt. No. EDU 09675-18
Agency Dkt. No. 121-5/18

New Jersey Commissioner of Education

Final Decision

S.H.P., on behalf of minor children, O.P. and Z.P.,

Petitioner,

v.

Board of Trustees of the Elysian Charter School, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1]

In this matter, petitioner is challenging the Board's determination that the minor children were ineligible to attend the charter school because the family resides out of state. The Administrative Law Judge (ALJ) found that petitioner traveled with the children to India on or about February 9, 2018, and informed the school that they would return on February 26, 2018. The family's plans were delayed numerous times, but petitioner informed the school that she and her husband were home-schooling the minor children while they were in India. The Board informed petitioner on April 16, 2018 that the children were ineligible to attend the charter school because they did not reside at their former Jersey City address. Petitioner's husband attended the Board hearing on April 23, 2018, and the Board voted to allow the minor children to re-enroll so long as they returned to school by April 30, 2018. When the children did not return

[1] Petitioner's exceptions were not considered for failure to comply with *N.J.A.C.* 1:1-18.4, as petitioner did not serve a copy on the opposing party or the OAL.

by that date, the charter school issued a notice of final ineligibility. Petitioner appealed to the Commissioner and the school filed a motion for summary decision. As of the date of oral argument, November 13, 2018, the minor children were still in India. The ALJ concluded that petitioner had failed to sustain her burden of proving that her family was domiciled within New Jersey as of the Board's notice of final ineligibility on April 30, 2018, and as early as February 9, 2018, and the minor children were therefore ineligible to attend the charter school. The ALJ also denied the Board's request for tuition as no evidence regarding the calculation was presented.

Upon review, the Commissioner notes that public school in New Jersey is free to people over 5 and under 20 years of age who are domiciled in a school district. *N.J.S.A.* 18A:38-1. Petitioner and her minor children were not domiciled in any school district in the State of New Jersey, as she vacated her apartment and moved the family to India indefinitely in February 2018. As such, the minor children are not entitled to a free education in the charter school, or any school in New Jersey for that matter. Any attempt by petitioner to hold open her children's seats at the charter school while home-schooling them in India is inappropriate. With respect to the Board's counterclaim for tuition reimbursement, *N.J.S.A.* 18A:38-1b provides that tuition shall be assessed for the period of the student's "ineligible attendance" in the district.[2] The Commissioner notes that in this case, the charter school may not seek tuition from petitioner

[2] Although the ALJ dismissed petitioner's counterclaim for failure to present evidence regarding tuition, a dismissal for that reason at this juncture is improper because the matter was decided by way of summary decision. However, the Commissioner agrees, for different reasons, that the counterclaim should be dismissed.

because the minor children were not attending school during the time period at issue and were instead being home-schooled.[3]

Accordingly, the Initial Decision of the OAL is adopted – as modified herein – as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 4/05/19
Date of Mailing: 4/09/19

[3] The Commissioner further notes that tuition for students at a charter school is paid directly by the school district of residence. *N.J.S.A.* 18A:36A-12. As such, the appropriate party to seek tuition for a charter school student's period of ineligible attendance is the district of residence that is responsible for tuition.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY

INITIAL DECISION

OAL DKT. NO. EDU 09675-18

AGENCY DKT. NO. 156-6/18

S.H.P, ON BEHALF OF MINOR CHILDREN,
O.P., AND Z.P.,

Petitioner,

v.

THE ELYSIAN CHARTER SCHOOL BOARD OF TRUSTEES, HUDSON COUNTY,

Respondent.

S.H.P., petitioner, pro se

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs attorneys)

Record Closed: December 31, 2018 Decided: February 21, 2018

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.H.P. challenges the action of the Elysian Charter School Board of Trustees (Board) removing her two children from the Elysian Charter School effective April 30, 2018.

By letter dated April 16,, 2018, the superintendent of schools notified the parents of O.P. and Z.P. that by Notice of Initial Determination of Ineligibility the Board of Trustees of the Elysian Charter School determined that their children were not entitled to attend the school due to excessive absences and the fact that the entire family was no longer living within the geographic area within or surrounding the district, as they were all living in India. On April 23, 2018, the Board conducted a hearing which was attended by the children's father.

On May 18, 2018, petitioner filed a Pro Se Residency Appeal with the Department of Education. The Board filed its answer on July 7, 2018. On July 9, 2018, the Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9. The District filed the within summary proceeding.

Oral argument was held on November 13, 2018. A telephone conference was held on December 28, 2018, to discuss a few remaining questions raised by the undersigned In furtherance of the telephone conference, the petitioner sent some additional documents on December 31, 2018 and the record was again closed.

FACTUAL DISCUSSION AND FINDINGS

Petitioner argued on her own behalf. Jodi Howlett represented the District during argument. The District argues that it extended all courtesies to petitioner and her two children who were matriculated as students in the third and first grades respectively at the Elysian Charter School. The school acknowledged the receipt of communications

from petitioner, starting in February 2018 advising the district that due to a family emergency, petitioner was travelling to India to join her husband who was already there and was taking the children with her, with an expected return date some time in March 2018. Petitioner further represented that she and her husband would be responsible for "at home" schooling during this period, so when the children returned, there would be no disruption in what they were being taught in the classroom.

Speaking for the District, Ms. Howlett argued that while the school was initially aware that petitioner had temporarily removed the children and taken them out of the country, it was not the District's understanding this would be a long-term situation.

Ms. Howlett presented correspondence that the District waited two months, until April 16, 2018 before it wrote to petitioner to inform them that the children were no longer entitled to a free education at the Elysian Charter School, and that they had a right to a hearing. (Exhibit A). the letter was preceded by a visit by an investigator for the school to petitioner's former home where the family was no longer residing.

Ms. Howlett also presented correspondence on April 25, 2018 that the Elysian Board met concerning petitioner's family situation and had voted to allow them to remain in the school, provided the children returned to school by April 30, 2018, and petitioner was able to provide proof of residency within the district. (Exhibits B and C).

According to Dr. Laub's affidavit, the children did not return to the school by the deadline, and a Final Notice of Ineligibility was issued. (Exhibit D).

On behalf of her children, petitioner argued that it was always the family's intention to return to reside within the district, but due to circumstances beyond their control, they were unable to return by April 30th. During the course of the oral argument, the children's father was unable to satisfactorily explain why when he returned for the board meeting, he did not bring the children with him to re-enroll in school and finish the academic year.

During her portion of the presentation, petitioner admitted she was unable to provide the District with a copy of a signed lease or mortgage demonstrating proof of continued residency within the District, but it was their intention to temporarily "live with a friend" until a more long-term housing situation could be found. Petitioner did not present an affidavit from anyone to confirm such an arrangement existed, and the District pointed out that several pieces of mail it sent to petitioner's last known address were returned without being forwarded. Despite this, petitioner continued to argue that the family never gave up its status as New Jersey residents, and therefore should still be considered as residing within the District, even if they could not provide a permanent address.

There was a brief discussion about a proposal the District made to petitioner prior to the matter becoming a contested case in the Office of Administrative Law. Essentially, the district proposed allowing the children to return to the District provided residency could be demonstrated before the start of the next school year, with the children repeating the third and first grades respectively. Petitioner explained that this pre-hearing proposal was not agreed to as she and her husband felt that the "home schooling" they gave to the children was sufficient to cover the material that was being taught. The proposal became a moot issue, and it should be noted that as of the date of the oral argument, the entire family still remained in India which was confirmed by petitioner.

The District did not present proof of its tuition costs and reimbursement that it sought pursuant to its Counterclaim for the amount of days the children failed to attend school.

UNDISPUTED FINDINGS OF Facts

After due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following facts:

1. S.H.P. is the mother of O.P. (grade 3), Z.P. (grade 1) and E.M.

2. At the start of the 2017-2018 school year, petitioners enrolled their two children O.P. and Z.P. in the Elysian Charter School located in Jersey City, New Jersey.

3. The children attended the school until February 8, 2018, at which time petitioner took them to India for family and health reasons. Petitioner's husband who is the father of O.P. and Z.P. had already been in India for several weeks prior to the time petitioner took the children with her. Petitioner advised the school on February 14, 2018 that the children were in India and expected to return to school on February 26, 2018. (Exhibit C). The next day, February 15, 2018, petitioner provided the school with a new home address, specifically, 500 Manila Avenue, Apt. 1M, Jersey City, New Jersey. Mail to this address was returned to sender and petitioner was unable to prove this was a good address. Therefore, most communications between the parties were done by email.

4. On February 26, 2018, the Enrollment Coordinator at the school, Susan Gilbertson, sent a communication to petitioner asking for a definitive date when the children would be returning to school. Responding to this inquiry, petitioner advised Ms. Gilbertson that the family's travel plans were delayed, but they would return before the weekend. (Exhibit E).

5. Thereafter, another communication was sent by Ms. Gilbertson on March 6, 2018 to petitioner, informing her that the children had been absent from school for 12 consecutive days. Hearing nothing, on March 10th, another communication was sent to petitioner asking for information on the children's' whereabouts. Petitioner then responded they would be back in late March "at the earliest."

6. Petitioner further represented that while the children were out of the country and not attending school, she and her husband would continue to be responsible for 'at home' schooling.

7. On April 16, 2016, the District advised petitioner that the children no longer had a right to attend Elysian and they had a right to a hearing before the District board. Prior thereto, an investigator for the District reported that the family no longer resided within the District. Other than email, "snail mail' sent by the district to the family's former address continued to be returned without a forwarding residence.

8. The Board met on April 23, 2018, and petitioner's husband came back and attended the meeting. The Board voted to allow the children to re-enroll, provided they were back by April 30, 2018.

9. Again, the children did not return, and petitioner indicated that due to circumstances beyond the family's control they were unable to return.

10. Petitioner never produced a copy of a lease or deed demonstrating that when they returned, the family had a place to live within the District. Although petitioner stated it was the family's intention to live with a friend while searching for more permanent housing, no affidavit was produced from such an individual to confirm such an arrangement existed.

11. Prior to the matter being forwarded as a contested case to the Office of Administrative Law, the District gave the family an opportunity to re-enroll the children for the next school year, provided they agreed to repeat the grades they were in when they left the country, as well as demonstrating proof of residency within the District.

12. Petitioner did not accept this alternate arrangement as she felt that the "at home" schooling she and her husband provided was sufficient.

13. No evidence was submitted by petitioner that as of April 2018, the family was domiciled within the District.

14. No evidence was submitted by the District in connection with its Counterclaim for tuition reimbursement.

Petitioner presented the following documentation in opposition to the summary application:

Exhibit A- Driver's license

Exhibit B- 2007 Social Security statement

Exhibit C- 2016 Certificate of Naturalization

Exhibit D- 2017 Bank statement

Exhibit E- 2016 Voter registration

Exhibit F- PSE&G bill from 1 River Court, Jersey City

Exhibit G- Indian Tourist Visa

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Additional Findings of Fact

A credibility determination requires an "over-all evaluation of the testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). For "testimony to be believed, it must not only proceed from the mouth of a credible witness, but must be credible in itself." Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). It must be "such as the common experience and observation of mankind can approve as probable in the circumstances." Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "'The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Petitioner and her husband was not forthcoming about the family's residency at the Board hearing on April, 23 2018, or in her Pro Se Residency Appeal. and there was sufficient evidence in the record to support that petitioner and her children were not residing in Hoboken, Jersey City or the surrounding community at the time the April 30th, 2018, ineligibility letter was prepared. Accordingly, I **FIND** that petitioner and her children were not residing within the District since at least April 30, 2018, and remained out of the District through the time of argument November 13, 2018.

LEGAL ANALYSIS AND CONCLUSION

Schools are free to persons over five and under twenty years of age who are domiciled within the school district or are kept in the home of another person domiciled within the school district and supported by such other person gratis as if he were such other person's own child. N.J.S.A. 18A:38-1(a). If the school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by such person gratis as if the child was the person's own child, the superintendent or administrative principal may apply to the board of education for the removal of the child. N.J.S.A. 18A:38-1(b)(2). The parent or guardian is entitled to a hearing before the board and, if in the judgment of the board, the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported gratis, the board may order the transfer or removal of the child from school. Ibid. The parent or guardian may contest the board's decision before the Commissioner within twenty-one days of the date of the decision and is entitled to an expedited hearing. Ibid. The parent or guardian has the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. Ibid.

Pursuant to N.J.A.C. 6A:22-3.1(a)(1), a student is eligible to attend a school district if he or she is domiciled within the school district, and a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

> "Domicile" is defined as "the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning." T.B.W. ex rel. A.W. v. Bd. of Ed. of the Township of Belleville, Essex County, 1998 N.J. AGEN LEXIS 122, Agency Dkt. No.l 159-5/96, 1998 WL 668678 (N.J. Adm. June 18, 1998). As the court noted in Collins v. Yancey, 55 N.J. Super. 514, 520–21, 151 A.2d 68 (Law Div. 1959), a person may have several residences or places of abode, but only one domicile at a time. Id.
>
> [D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273–74 (App. Div. 2004).]

Respondent seeks summary decision. The rules governing summary decision in an OAL matter are embodied in N.J.A.C. 1;1-12.5. These provisions mirror the language of Rule 4:46-2 and the Supreme Court's decision in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67 (1954) Under N.J.A.C. 1:1-12.5 (b), the determination to grant summary judgment should be based on papers presented as well as any affidavits, which may have been filed with the application. In order for the non-moving party to prevail in such application, responding affidavits are usually submitted showing there is indeed a genuine issue of fact, which cn only be determined in an evidential proceeding. See also: Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995).

The record is clear that petitioner's children were not domiciled in the District as of April 30, 2018, and as early as February 9, 2018 due to mail being returned, and an investigator for the District reporting that there was no proof or evidence that the family continued to reside within the District, as well as petitioner's admission that they had no lease or deed to property showing that they still lived within the District. I therefore **CONCLUDE** that petitioner has failed in her burden to prove by a preponderance of the evidence that her children were domiciled within the District. Accordingly, I further **CONCLUDE** that petitioner has failed to prove by a preponderance of the evidence that her two children were eligible for a free education at Elysian Charter School as of April 30, 2018.

Tuition is sought by the Board by way of Counterclaim for the period of ineligible attendance. Without evidence to determine and calculate and place a value on this claim, this request is denied

ORDER

It is **ORDERED** that petitioner's Petition of Appeal be and hereby is **DISMISSED**.

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

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

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

2/21/19

DATE

ANDREW M. BARON, ALJ

Date Received at Agency: February 21, 2019

Date Mailed to Parties: 2/25/19

mm

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

None

Exhibits

For Petitioner:

P-1 Packet A-G

For Respondent:

R-1 Packet A-Q

98-19

STATE OF NEW JERSEY
COMMISSIONER OF THE DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE CHARGES AGAINST JESSICA C. SHERWOOD -by- THE LOPATCONG BOARD OF EDUCATION	X X X X X X X X X	Dkt. No. 236-9/18

Before		Patrick R. Westerkamp, Impartial Arbitrator
Appearances	Jessica W. Sherwood	Sanford R. Oxfeld, Esq. Jesse Humphries, Esq.
	The Lopatcong Board Education	John B. Comegno II, Esq. Alexandra A. Stulphin, Esq.
Hearing Dates	January 30, 2019 January 31, 2019	

Statement of Approval of Settlement: Based a review of the record the proposed settlement, attached hereto, is consistent with the established standards governing the settlement of tenure matters established by *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd, State Board April 6, 1983, 1990 S.L.D. 842, 846.

INTRODUCTION

This matter was brought to arbitration before the undersigned pursuant to P.L. 2012 Chapter 26 of Title 18A *N.J.S.A.* It involves charges filed on September 14, 2018 against Respondent Jessica W. Sherwood by the Lopatcong Township Board of Education, New Jersey. The charges seek to remove Ms. Sherwood from her position as a tenured member of the School District's faculty. The Statement of Tenure Charges sets forth Unbecoming Conduct (Counts One through Ten), and Incapacity (Count 11.)

BACKGROUND INFORMATION COMMON TO ALL CHARGES

Jessica W. Sherwood was employed by the Board in September 2000, and thereafter taught Fourth Grade at Lopatcong Elementary School. She gained tenure in her teaching position, and continued to teach Fourth Grade at the Elementary School through mid-2017. At all times during this period she was evaluated as "effective," or "highly effective," and did not receive discipline.

In September 2017, Ms. Sherwood was relocated to the District's Middle School and assigned to Special Education. Although she "tried to put on a brave face," Ms. Sherwood missed the elementary school environment, and eventually sought to return. The Board found she publicly lambasted "her colleagues on line, in an effort to demean, humiliate and belittle their professional credibility, [and] eroded all professional boundaries and norms with certain eighth-grade students." Her contacts with these students included use of social media.

On May 24, 2018 Ms. Sherwood received positive news from her school Principal about returning to the Elementary School for the upcoming school year. The next day she posted a lengthy statement on her Facebook page. It began, as follows:

> Change is a good thing, right?
>
> PSA . . . this is an account of my professional experiences this past year. Some readers may take offense. If you do, please take it as an opportunity to change and improve, just as I have this year.

(Statement of Tenure Charges, p. 5.) A fellow teacher took offense, and E-Mailed a complaint to

the Administration. This triggered an investigation, which resulted in the submission of the within Statement of Tenure Charges.

PROCEDURAL HISTORY OF ARBITRATION

The undersigned was appointed as Arbitrator, and assisted the parties with several discovery disputes. Hearings were initially scheduled for December 2018, and then were rescheduled for January 30, 2019; January 31, 2019; and February 4, 2019. A full hearing day was held on January 30th. On the afternoon of the next day, the parties entered settlement discussions that lasted for several hours. They reached a resolution toward 5:30pm. Its terms were reviewed on the record with Ms. Sherwood, who gave her consent. See January 31, 2019 Transcript prepared by Mastroianni & Formaroli, Inc.

A formal Separation Agreement was drafted, approved, and signed by both parties. It is attached hereto as Appendix "A."

IN RE CARDONICK REVIEW

Once certified by a board of education the settlement of any tenure charge requires approval by the Commissioner of Education. As a prelude to consideration of approval an arbitrator assigned to the matter is to address the standards established by the State Board of Education. Under *In re Cardonick*, 1990 *S.L.D.* 842, 846 those standards:

1) require documentation as to the nature of the charges;
2) include an explanation of the circumstances justifying settlement;
3) evidence of all parties' consent;
4) show the charged party entered into the agreement with a full understanding of her rights;
5) must demonstrate the agreement is in the public interest; and
6) indicate, where the charged party is a teaching staff member, that 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 action against the staff member's certificate.

These standards have been met herein.

The nature of the charges is fully documented in the Certification of Superintendent Roncoroni on file with the Commissioner of Education, while the attached signed, Separation

Agreement evidences: the parties mutual consent; Ms. Sherwood's voluntary and knowing entry into the settlement; and the Commissioner's duty to refer the tenure determination to the State Board of Examiners for possible action.

Additionally, the settlement is justified and in the public interest given the uncharacteristic events preceding filing of the tenure charges, and Ms. Sherwood's previously unblemished educational career. For seventeen years she served as a Fourth Grade teacher receiving effective, or highly effective evaluations. Her unbecoming conduct over eight months (October 2017 to May 2018) was atypical, unexpected, and partially the product of untreated anxiety. There is every reason to believe that by allowing her to resign effect January 31, 2019 she will be available to obtain future employment and to serve the educational community with the effectiveness that she demonstrated for 17-years.

Accordingly, based on a review of the record from my vantage as arbitrator, the Separation Agreement--attached hereto--is consistent with the established standards governing settlement of tenure matters as established by *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd, State Board April 6, 1983, 1990 S.L.D. 842, 846.

April 10, 2019
Matawan, NJ

Patrick Westerkamp

Digitally signed by Patrick Westerkamp
DN: cn=Patrick Westerkamp, o=Westerkamp ADR Services, LLC, ou, email=mediatorpat@verizon.net, c=US
Date: 2019.04.10 15:27:56 -04'00'

Appendix A

SEPARATION AGREEMENT

THIS SEPARATION AGREEMENT ("Agreement") is made by and between Jessica C. Sherwood, (hereinafter referred to as "Teacher" or "Ms. Sherwood") and the Lopatcong Board of Education 321 Stonehenge Drive, Phillipsburg, NJ, 08865, its predecessors, successors, individual Board members, officers, directors, administrators, representatives, employees, attorneys, agents, and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Teacher is employed as a tenured Teacher by the Board;

WHEREAS, the parties are in the pendency of the matter In the Matter of the Tenure Charges Against Jessica C. Sherwood, Agency Docket No. 236-9/18, seeking her termination, with the Commissioner of Education;

WHEREAS, the parties wish to avoid the further expense and uncertainty of the proceedings and at the express recommendation of the assigned Arbitrator, Mr. Patrick Westerkamp;

WHEREAS, by the terms of this Agreement, the employment of Teacher is to end effective end of business on January 31, 2019;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Teacher and the Board hereby agree as follows:

1. Teacher, for and in consideration of the undertakings of the Board as set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators ("Released Parties"), of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or hereafter may have, known or unknown, or which her heirs, executors or administrators hereafter may have by reason of any actual or perceived disability, any actual or perceived discrimination, her entire employment relationship and/or the termination of her employment relationship and/or affiliation with the Board, including, but not limited to the following:

- All claims of discrimination, harassment and retaliation based upon age, race, color, religion, gender, sex, sexual orientation, handicap, disability, national origin or any other legally protected class, including claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 through 29 U.S.C. § 634, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, et seq.,the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, et seq., Executive Order 11246, as amended,, the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., the New Jersey

Family Leave Act, N.J.S.A. 34:11B, et seq., COBRA, the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq. & 5 U.S.C. §6381, et seq., the National Labor Relations Act, as amended, The Equal Pay Act, as amended, the New Jersey Wage and Hour Law, as amended, the New Jersey Worker Health and Safety Act, as amended, as well as any other anti-retaliation provision of any statute or law, and any other applicable federal, state or local, constitutional or statutory provision, order or regulation, arising from any event or act of omission or commission;

- All claims for breach of contract, whether express or implied;
- All tort claims, including claims for libel, slander, negligence, invasion of privacy, intentional or negligent infliction of emotional distress, fraud, interference with actual or prospective contractual rights or relations, and violation of public policy;
- All claims for wrongful discharge or termination;
- All claims under any federal, state and municipal laws, regulations, ordinances or court decisions of any kind;
- All claims for wages and benefits (including bonuses, health and welfare benefits, vacation pay, sick pay and/or any other fringe benefits;
- All claims for any type of monetary damages, including back pay, front or prospective pay, compensatory damages, and punitive damages, except as otherwise provided in this Agreement;
- All claims for equitable relief, including injunctive relief and reinstatement; and
- All claims for attorneys' fees, litigation expenses and costs.

The sole exception to the waivers set forth above are as follows: claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Act, *N.J.S.A.* 18A:66-1 *et seq.*, the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions, claims by third parties, as well as claims arising from any breach of this Agreement. The Board does not waive any rights that it may have to oppose indemnification pursuant to *N.J.S.A.* 18A:16-6 and 6.1.

This release is not meant to limit Teacher's claim(s) to unemployment compensation or to retirement benefits to which she may be entitled.

2. Teacher confirms that no charge, complaint, action, or grievance is pending in any forum or form. Further, Teacher covenants and agrees not to bring any charge, complaint, action, suit, grievance or administrative proceeding in any forum whatsoever, including before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement or the date of the resignation; provided, however, it does not interfere with or limit either of the Parties protected right to file a charge with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nothing contained herein shall in any manner be deemed a waiver or extension of any applicable statute of limitations, whether administrative or otherwise. Nonetheless, the Parties understand that, by signing this Agreement, they each waive any rights they may have to recover money or other relief in any lawsuit or proceeding they bring or that is brought on his behalf by any agency or third party against any of the Released Parties based on events arising out of Teacher's employment with the Board. Except where otherwise permitted under this paragraph, the Parties

agree that any such action shall be dismissed with prejudice upon presentation of this Agreement. Nothing in this paragraph is intended to limit either of the Parties from instituting legal action for the sole purpose of enforcing this Agreement.

3. In consideration of the terms herein, Teacher will, simultaneously with the execution of this Agreement, execute and submit the attached letter of resignation, attached hereto as Exhibit "A," which shall become irrevocable upon the Board's approval of this Agreement, thereby ending tenured employment with the Board as of the end of the day on January 31, 2019. Teacher agrees that her signature on this Agreement constitutes an acknowledgment that her rights to employment, including any and all tenure rights and any and all future rights to employment and/or re-employment with the Board will end as of the end of the day on January 31, 2019. Teacher acknowledges that her employment relationship with the Board is permanently and irrevocably severed. Teacher agrees she shall never again seek employment and/or reemployment with the Board. Teacher waives any and all rights or claim of right to be reinstated to her former or any other position with the Board and agrees that she shall not at any time seek or accept future employment with Board. Teacher acknowledges that Board has no obligation, contractual or otherwise, to re-hire or re-employ her in any capacity. A breach of this paragraph by Teacher will constitute lawful and just cause to refuse to employ her or to terminate her if already employed, and she shall have no cause of action against the Board for such refusal or termination.

4. Upon approval of this agreement by the Board, the Board will notify the Commissioner of the withdrawal of its tenure charges in In the Matter of the Tenure Charges Against Jessica C. Sherwood, Agency Docket No. 236-9/18.

5. It is understood that, pursuant to N.J.A.C. 6A:9B-4.3, the Board will communicate with the New Jersey State Board of Examiners ("Examiners") with regard to the resignation upon approval of this Separation Agreement by the Board. In that regard, the Board will send the attached correspondence, Exhibit "B" to the Examiners. It is understood that the Board may need to communicate further with the Examiners, or other governmental entity or agent assigned to review the matter. The Board reserves all other rights to provide appropriate information to the Pennsylvania Department of Education, if directed to do so by that entity or the New Jersey State Department of Education. The Board agrees that beyond contacting the Examiners with Exhibit "B" and cooperating with the Examiners or other assigned governmental entity or agent, it will not act on its own initiative to bring about any action with regard to Teacher's certificate. Teacher understands that the Board will have an obligation to cooperate with the Examiners and/or assigned governmental entity or agent in the event of any proceeding. The Board shall provide the Examiners, or other assigned governmental entity or agent, with any information or documentation requested. Teacher disputes any wrongdoing on her part and reserves all rights, if necessary, to assert no action whatsoever should be taken.

6. To the extent applicable, the Board waives any notice of resignation requirements in connection with the January 31, 2019 employment end date or should Teacher tender resignation prior to that date.

7. The Board agrees to the extent it is applicable that Teacher may be entitled to continued health care coverage thereafter under the *Consolidated Omnibus Budget Reconciliation Act*, ("*COBRA*"), 29 *U.S.C.* §§1161-1168, should she elect and pay for such

coverage. The Board agrees not to oppose any application by Teacher for *COBRA* benefits. The Board also agrees not to oppose any application by Teacher for or receipt of unemployment compensation benefits in the event she applies for or receives unemployment benefits.

8. Both parties agree and acknowledge that this Agreement does not constitute an admission of any kind by either party.

9. Teacher agrees not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any defamatory, disparaging, or derogatory remarks or otherwise make statements that could injure the business or reputation of the Board, Board members, or employees of the Board. In the event that Teacher is alleged to have breached the non-disparagement provision of Agreement, then the Board may commence appropriate legal action and the prevailing party will be responsible for all attorneys' fees and costs associated with the litigation.

10. The Parties mutually understand and agree that the existence of this Agreement, and the terms herein, are completely confidential. The Parties, including their representatives or agents, further agree that they shall not reveal to anyone, other than as may be mutually agreed upon in writing, any information, facts, or terms and conditions concerning this Agreement. This non-disclosure provision does not bar the following disclosures by Releasor: (1) disclosures to members of their immediate family; or (2) disclosures for the purpose of obtaining legal, tax, accounting, or financial advice; or (3) disclosures which may be required by law; or (4) disclosures for the purpose of obtaining or maintaining publicly or privately funded benefits or insurance. This non-disclosure provision does not bar the following disclosures by Releasees: (1) disclosures pursuant to a lawful request under the Open Public Records Act; or (2) disclosures as may otherwise be compelled by law or Court Order. The Parties agree to inform those persons with whom they are permitted to share such information as to the confidentiality of this Agreement, and further agree to require such persons to hold information received by them about this Agreement as confidential pursuant to the terms herein. Upon all other inquiries, the Parties shall only respond that the matter has been resolved to the satisfaction of all those concerned. In the event that a party or parties is alleged to have breached the confidentiality provision of this Agreement, then the other party or parties may commence appropriate legal action.

11. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

TEACHER ACKNOWLEDGES THAT SHE HAS BEEN ADVISED THAT HER LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND SHE ACKNOWLEDGES THAT SHE HAD THE OPPORTUNITY TO BE REPRESENTED BY HER OWN ATTORNEY AND CONSULT WITH HER ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT.

13. In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

14. This Agreement, including the letters attached, respectively, is contingent upon Board approval. In that regard, Teacher waives any rights under the decisions in Rice v. Union County Regional High School Bd. of Education to advanced written notice of the Board's consideration of this Agreement at a public meeting, as well as to request a public discussion of this Agreement at a public meeting.

15. By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved and consented to as to terms.

16. Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 et seq., Teacher acknowledges that she has been given the opportunity, if she so desires, to consider this Agreement for twenty-one (21) days before executing it. In the event that she executes this Agreement within less than twenty-one (21) days of the date of its delivery, Teacher acknowledges that such decision was entirely voluntary and that she had the opportunity, if he had so desired, to consider this Agreement for the entire twenty-one (21) day period. She further acknowledges that for a period of seven (7) days from the date of his execution of this Agreement, she shall retain the right to revoke this Agreement by written notice to Comegno Law Group, PC, 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Agreement shall not become effective or enforceable until the expiration of such revocation period.

17. The Board agrees that it will respond to inquiries regarding Teacher from prospective employers with the written communication on Board letterhead attached as Exhibit "C." No other information is to be provided to prospective employers without the consent of Teacher. An original, fully-executed Exhibit "C" will be provided to Teacher within thirty (30) days of the date of the Board's approval of this Agreement.

Intending to be legally bound hereby, Teacher and the Board execute the foregoing Agreement as indicated below.

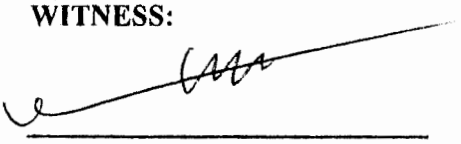
WITNESS:

Stanford R Oxford, Esq
An atty at law of NJ

Jessica C. Sherwood
JESSICA C. SHERWOOD

DATED: 1/31/2019

WITNESS:



BOARD SECRETARY

LOPATCONG BOARD OF EDUCATION

BOARD PRESIDENT

DATED: 2/28/2019

Letter of Resignation

January 31, 2019

To the Lopatcong Board of Education;

Effective January 31, 2019, I hereby irrevocably resign my employment as a tenured teaching staff member.

Jessica C. Sherwood

Jessica C. Sherwood

Rainie Roncoroni, Superintendent

Lopatcong Township Elementary School
Noelle S. Kondikoff, Principal
263 Route 57
Phillipsburg, New Jersey 08865
Phone: 908-859-0800
Fax: 908-213-1339

Lopatcong Township Middle School
Richard A. Bonney, Principal
321 Stonehenge Drive
Phillipsburg, New Jersey 08865
Phone: 908-213-2995
Fax: 908- 213-0373

January 31, 2019

Dear Sir/Madam:

Ms. Jessica C. Sherwood was employed as a Teacher by the Lopatcong Board of Education for approximately nineteen (19) years from September 1, 2000 to January 31, 2019. Her final salary was $74,025.00 per year.

Sincerely,

_____

Rainie Roncoroni,
Superintendent

Agency Dkt. No. 298-11/16

New Jersey Commissioner of Education

Order

J.T., on behalf of minor children, J.T., A.T., and B.T.,

Petitioner,

v.

Board of Education of the Township of South Brunswick, Middlesex County,

Respondent.

On June 19, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found J.T. liable for tuition in the amount of Thirty-Five Thousand Four Hundred Sixty-Two Dollars and Zero Cents ($35,462.00), representing tuition for a period of ineligible attendance by his minor children, J.T., A.T., and B.T., in the Board's school district during the 2016-17 school year. The Board subsequently notified the Commissioner that J.T. has failed to comply with the decision and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. J.T. offered no reasons why the judgment against him should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Jerry Tomaselli is now subject to entry of a judgment by the court in the amount of $35,462.00, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/19
Date of Mailing: 4/22/19

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Commissioner

April 22, 2019

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
6th Floor, North Wing
P.O. Box 971
Trenton, New Jersey 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the April 19, 2019 Order of the Commissioner of Education finding that Jerry Tomaselli is subject to entry of a judgment on the docket of the court due to his failure to pay the tuition assessment ordered in the matter of *J.T., on behalf of minor children, J.T., A.T. and B.T. V. Board Of Education of the Township of South Brunswick, Middlesex County.*[1] By copy of this letter, I am advising Mr. Tomaselli, as well as counsel for the South Brunswick Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 376-9079.

Very truly yours,

Jennifer Killough-Herrera, Acting-Director
Office of Controversies and Disputes

JKH
Enclosure

c: Jerry Tomaselli *(with Order)*
Kerri A. Wright, Esq. *(with Order)*
State Law Library *(with Order)*

[1] Please note that, although the case caption reflects only Mr. Tomaselli's initials, his full name is included within the body of the Commissioner's Order.

106-19

New Jersey Commissioner of Education

Final Decision

L.R., on behalf of minor child, J.R.,

Petitioner,

v.

New Jersey Department of Education, Office of Special Education,

Respondent.

Synopsis

Petitioner alleged that the respondent, New Jersey Department of Education, Office of Special Education (OSEP), violated her rights under the New Jersey Pupil Public Records Act (NJPRA) for sending electronic correspondence regarding J.R.'s file to a person not involved in this matter. Petitioner demanded an order requiring respondent to: recover or destroy the disclosed records at issue; institute a system-wide investigation into the handling of student records; and review and correct respondent's policy on the dissemination of student records. OSEP filed a motion to dismiss.

The ALJ found, *inter alia*, that: the issue for determination here is whether petitioner is entitled to relief from OSEP under the NJPRA for wrongful dissemination of student records, or whether respondent should be granted summary decision; petitioner claimed that the NJPRA, and specifically *N.J.S.A.* 18A:36-19, provides him with a cause of action against OSEP due to its inadvertent carbon copying of an unrelated party on an email related to student J.R.; respondent claimed that *N.J.S.A.* 18A:36-19 gives petitioner a cause of action against the school district, but not against OSEP, and therefore its motion to dismiss should be granted; and *N.J.S.A.* 18A:36-19 does not provide a private cause of action against the State or OSEP, *State v. J.S.G.*, 456 N.J. Super. 87, 105 (App. Div. 2018). The ALJ concluded that petitioner has failed to state a claim upon which relief can be granted. Accordingly, the ALJ granted respondent's motion to dismiss.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the matter 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.

April 22, 2019

106-19

OAL Dkt. No. EDU 05087-18
Agency Dkt. No. 39-2/18

New Jersey Commissioner of Education

Final Decision

L.R., on behalf of minor child, J.R.,

Petitioner,

v.

New Jersey Department of Education, Office of Special Education,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the petition fails to state a cause of action upon which relief can be granted against respondent because the New Jersey Pupil Records Act, *N.J.S.A.* 18A:36-19, does not provide a private right of action. *State v. J.S.G.*, 456 N.J. Super. 87, 105 (App. Div. 2018), *certif. denied,* ___ N.J. ___ (2019).[1] Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/19
Date of Mailing: 4/22/19

[1] This decision denying certification was filed on March 9, 2019, and is therefore not yet published in the New Jersey Supreme Court Reporter.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION TO DISMISS
OAL DKT. NO. EDU 05087-18
AGENCY DKT. NO. 39-2/18

L.R. ON BEHALF OF MINOR CHILD, J.R.,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
OFFICE OF SPECIAL EDUCATION,
Respondent.

Jamie Epstein, Esq., for petitioner

Caroline Jones, Deputy Attorney General, for respondent Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record closed: January 25, 2019 Decided: March 5, 2019

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

STATEMENT OF THE CASE

Petitioner, L.R. on behalf of minor child, J.R., has alleged that respondent, the New Jersey Department of Education, Office of Special Education (OSEP), violated her rights under the New Jersey Pupil Records Act (NJPRA) for sending electronic correspondence

regarding J.R.'s file to a person not involved in this matter. Petitioner has requested an order requiring respondent to: recover or destroy the wrongfully disclosed records; institute a system-wide investigation into the handling of student records; and review and correct its policy on the dissemination of student records.

PROCEDURAL HISTORY

On or about December 6, 2017, petitioner filed a petition with OSEP's Bureau of Controversies and Disputes (BCD), claiming OSEP had wrongfully disseminated electronic correspondence concerning student J.R. On or about February 8, 2018, OSEP requested additional time to investigate petitioner's claim, and petitioner responded by filing a motion with BCD, on or about March 1, 2018, seeking a default judgement for OSEP's failure to respond to his petition. On March 27, 2018, OSEP filed a motion to dismiss with BCD. On April 6, 2018, this matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 20, 2018, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A telephone prehearing was held on June 6, 2018.

Oral argument on the parties' motions was held at OAL on October 24, 2018. Additional information was required and OSEP filed a supplemental letter brief on November 30, 2018. Petitioner did not submit a supplemental brief.[1] A second oral argument was heard at OAL on January 25, 2019, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the petitioner's filing, respondent's briefs, and the two oral arguments, and for the purpose of deciding the motion for summary decision, I **FIND** the following:

[1] Respondent's submission of November 30, 2018, reiterated its motion to dismiss from March 27, 2018, and has been treated as if respondent had filed a motion to dismiss with OAL as of November 30, 2018. Petitioner has not filed any motions or briefs with OAL. On January 26, 2018, counsel for petitioner submitted another verified petition seeking relief, with the Commissioner of the Department of Education and not OAL, which was not accompanied by a legal brief setting out the basis for petitioner's claims.

1. Petitioner, L.R., resides in Camden, NJ, with her minor child, student J.R. J.R. attends school in the Camden School District. J.R. has been classified as autistic.

2. On October 31, 2017, respondent sent an email regarding a special education order concerning J.R., to an attorney in Philadelphia, who responded on November 6, 2017, that the email had been inadvertently sent to him.

3. Respondent OSEP had provided no evidence that it had taken any remedial action to protect, secure or destroy the wrongfully disclosed email.

4. Petitioner had provided no evidence that the email of October 31, 2017, was a protected, confidential student record.[2]

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether petitioner is entitled to relief from respondent OSEP under the NJPRA for a wrongful dissemination of student records, or whether respondent should be granted a summary decision in its favor.

Petitioner has claimed that the New Jersey Pupil Records Act (NJPRA), and specifically N.J.S.A. 18A:36-19, should provide him with a cause of action against OSEP due to its inadvertent carbon copying of an unrelated party on an email related to student J.R. Respondent has claimed that N.J.S.A. 18A:36-19 gave petitioner a cause of action against the school district but not against OSEP, and that therefore its motion to dismiss should be granted.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving

[2] Petitioner has represented to this tribunal that another case filed on behalf of student J.R., L.R. v. Camden City Public School District, 452 N.J.Super. 56 (App.Div. 2017), had been granted certification by the New Jersey Supreme Court, and would further define what is a protected, confidential school record.

party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm'r (May 12, 2014), http://njlaw.rutgers.edu/collections/oal/ (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the "movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of fact." Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

Respondent is considered the moving party in its motion to dismiss. It has asserted that it is entitled to prevail as a matter of law because there is no cause of action under the NJPRA allowing a student to seek relief from the State of New Jersey through OSEP for the wrongful dissemination of records. Petitioner has not provided a legal brief for its position, but in its second petition to the Commissioner of Education, petitioner relied on the NJPRA, N.J.S.A. 18A:36-19. (Petitioner's Verified Petition dated January 26, 2019.)

However, N.J.S.A. 18A:36-19 does not provide a private cause of action against the State or OSEP. Respondent correctly cited to State v. J.S.G., 456 N.J.Super. 87, 105 (App.Div. 2018) for the holding that the NJPRA does not provide a private right of action. ("Like FERPA[3], the NJPRA and its governing regulations merely provide administrative remedies for a violation and do not provide for a private right of action or suppression.") See also L.S. v. Mount Olive Bd. Of Education, 765 F.Supp. 2d 648 (D.NJ. 2011)(holding

[3] The Family Educational Rights and Privacy Act, 20 U.S.C. section 1232g.

that "NJPRA, FERPA . . . do not provide for a private right of action.) Rather, the NJPRA permits parents to challenge the content and handling of student records by a school district, allowing them to seek to expunge inaccurate or irrelevant information from or insert additional correct information into student records, or request a stay of disclosure by a school district.

The limited administrative remedies available to petitioner under NJPRA are only available against school districts, because school districts are responsible for creating and maintaining student records under NJPRA. See N.J.A.C. 6A:32-7.1, 7.3 and 7.4. In the within matter, the email in question was created by OSEP, not the Camden City School District. Petitioner has not sought to avail itself of any remedies against the school district in this matter.

Further, petitioner has not provided any evidence that the email in question met any existing definition of a protected, confidential student record under NJPRA, nor that the email had any statutory or regulatory protections.

Accordingly, I **FIND** that petitioner has failed to state a claim upon which relief can be granted, because there is no cause of action against OSEP under NJPRA. This is sufficient to hold that respondent's motion to dismiss must be granted.

It must be noted that petitioner's counsel, in his oral arguments on October 24, 2018, and January 25, 2019, claimed that there were validity problems with how the pertinent statute and regulations regarding student records were written. Petitioner claimed that NJPRA and its associated regulations were in fact written by OSEP, which is why no cause of action was created against OSEP. Petitioner argued for this tribunal to apply a standard of fairness to this issue. Petitioner asked for a finding that, despite the black letter language of NJPRA and the holding of the various courts, respondent be ordered to locate and destroy the email in question, and that OSEP conduct a system-wide investigation into how student records are handled and implement remedial measures to address the problem.

OAL is not the proper forum for a litigant to challenge the validity of a statute or regulation. "The Appellate Division, and not the OAL, is the proper forum in which to challenge the facial validity of an administrative regulation specifically where the matter as here, is purely a question of law." Wendling v. New Jersey Racing Comm'n, 279 N.J. Super 477, 484; [quoting Christian Bros. Inst. v. No. N.J. Interschol. League, 86 N.J. 409, 416, (1981)]. Further, "normally in administrative proceedings, petitioners can attack the constitutionality of rules as applied, but may not mount facial attacks." 37 New Jersey Practice, Admin. Law & Practice, § 3.8 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).

Petitioner has, in essence, made a facial attack on the constitutionality of both the statute and implementing regulations. These are purely questions of law which should be addressed by the Appellate Division pursuant to the court in Wendling. I therefore **CONCLUDE** that the OAL is not the proper forum for the consideration of those issues. For the within matter, it must be accepted that NJPRA and the related regulations do not provide petitioner with a cause of action against OSEP.

Accordingly, as petitioner has set forth no cause of action against respondent, this matter is ripe for summary decision.

ORDER

I hereby **ORDER** that respondent's motion to dismiss is **GRANTED**, and this matter is hereby **DISMISSED**.

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

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

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

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

March 5, 2019
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 3.5.19

Date Mailed to Parties: 3.5.19

JNR/dw

APPENDIX

EXHIBITS

For petitioner:

1. Petitioner's Verified Petition, dated January 26, 2019

For respondent:

1. Motion for Summary Decision and brief, dated March 27, 2018
2. Brief, dated November 30, 2018

107-19

New Jersey Commissioner of Education

Final Decision

L.K. and T.K., on behalf of minor child, A.K.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioners challenged the determination of the respondent Board that their daughter, A.K., committed an act of harassment, intimidation or bullying (HIB) against an elementary school classmate, N.V., pursuant to the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioners sought a determination that the Board's decision was arbitrary, capricious or unreasonable, and requested the removal of the HIB finding from A.K.'s student records. The Board contended that its actions were in compliance with the requirements of the Act, and that the HIB investigation was conducted properly. The parties filed cross motions for summary decision.

The ALJ determined that summary decision was not appropriate in this case, as there were material facts in dispute; the legal issues for determination were whether petitioners received adequate procedural due process, and whether petitioners could prove by a preponderance of credible evidence that the Board's determination of HIB was arbitrary, capricious or unreasonable. The ALJ found, *inter alia*, that: the HIB investigation conducted by the school district was not thorough and complete; despite that, petitioners were provided adequate due process, and failed to meet their burden to prove otherwise; the superintendent violated statute and policy by failing to provide A.K.'s parents with information regarding the nature of the investigation; the Board's decision herein was arbitrary, capricious and unreasonable because the superintendent misstated the law when he directed the Board not to consider A.K.'s age in their determination of HIB; A.K. did not know, nor should have known, that her conduct would have the effect of harming a student, and did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students; and although the Board decision was not made in bad faith, the decision relied on faulty information. The ALJ concluded that A.K.'s conduct did not meet the statutory definition of HIB, and petitioners proved by a preponderance of evidence that the Board's actions were arbitrary, capricious and unreasonable; the ALJ ordered the Board's decision reversed and the finding of HIB removed from A.K.'s student file.

Upon review, the Commissioner disagreed with the ALJ's findings and rejected the ALJ's determination. In so doing, the Commissioner found, *inter alia*, that: petitioners did not meet their burden of proof to show that the HIB determination was arbitrary, capricious or unreasonable; A.K.'s conduct was clearly motivated by N.V.'s gender identity and expression; and, although the Commissioner is mindful of A.K.'s young age at the time of the incidents, A.K. should have known that her persistent conduct was causing N.V. emotional harm as she was repeatedly counselled that her behavior was not appropriate. Accordingly, the Initial Decision was rejected and the petition was dismissed with prejudice.

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

April 22, 2019

OAL Dkt. No. EDU 07067-16
Agency Dkt. No. 82-3/16

New Jersey Commissioner of Education

Final Decision

L.K. and T.K., on behalf of minor child, A.K.,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and replies thereto, filed pursuant to *N.J.A.C.* 1:1-18.4, have also been reviewed and considered by the Commissioner.[1] In this case, the petitioners are challenging the Board's determination that their minor child, A.K., committed an act of Harassment, Intimidation, and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.*, towards her classmate, N.V.[2] Following a hearing in this matter, the Administrative Law Judge (ALJ) concluded that the conduct did not meet the statutory

[1] The Parties' sur-replies and subsequent correspondence were not considered by the Commissioner, as such documents do not meet the criteria in *N.J.A.C.* 1:1-18.4; moreover, the parties failed to obtain permission from the Commissioner prior to submitting any additional documents for the Commissioner's review.

[2] The use of N.V. in this decision is based on the initials used in the record. For the purposes of this decision, "N." represents N.V.'s preferred name. The record further uses male gender pronouns when referencing N.V.; therefore, this decision will do the same. The Commissioner notes that N.V. is a gender nonconforming student who was assigned "male" at birth. The record reflects that N.V. dresses in clothes that are typically associated with the female gender and prefers to be called by a name typically associated with the female gender.

definition of HIB and that the Board acted in an arbitrary, capricious, or unreasonable manner when it determined that an incident of HIB had occurred.

Upon a comprehensive review of the record, the Commissioner disagrees with the ALJ's findings and rejects the ALJ's determination for the reasons set forth below. The Commissioner restores the Board's finding of HIB, mindful of the standard of review of such matters and the deference granted to a board of education's determination. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *See Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 131 *N.J. Super.* 37 (App. Div. 1974).

Here, the petitioners had the burden of proving by a preponderance of the evidence that the Board acted in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. *See T.B.M on behalf of M.M. v. Moorestown Board of Education*, OAL Dkt. No. EDU 12780-07, decided February 6, 2008 (citing Thomas v. Morris Township Board of Education, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966)), *adopted* Commissioner Decision No. 157-14, April 7, 2008. Based on the evidence in the record, including the transcripts of the hearing at the OAL, the Commissioner finds that the petitioners did not meet their burden.

Pursuant to *N.J.S.A.* 18A:37-14, harassment, intimidation and bullying is defined as "[A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other

distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In the instant case, A.K. admitted that she repeatedly questioned N.V. and made comments to him about his name, his hair, and the clothing that he wore. A.K. persisted despite warnings from school staff that such remarks were unacceptable, and instructions from her mother to discontinue such queries.[3] In addition to her harassment of N.V., A.K. threatened N.V. regarding his reporting of her behavior, which was verified by N.V. during the course of the HIB investigation. It is clear from the record that A.K.'s behavior was motivated by N.V.'s gender identity and expression. Moreover, A.K.'s conduct took place on the school bus and on school grounds, and consequently interfered with N.V.'s rights and the rights of other students. In fact, for a period of time, N.V.'s parent drove him to school because he did not want to ride on the same bus as A.K. A.K.'s behavior was not only demeaning to N.V., but also caused him emotional harm and created a hostile educational environment.[4] Although the Commissioner is mindful that A.K. was only seven years old at the time

[3] T.K.'s testimony also detailed her efforts to address with A.K. the incident(s) and the differences among individuals with regard to their gender identities and expressions.

[4] Petitioners' exceptions substantially recast the arguments made below and reiterate their claim that the Board violated A.K.'s due process rights. A review of the record and the determination set forth in the Initial Decision pertaining to petitioners' due process claims reveal that the Board followed the procedures set forth in the Act and in its policy. The procedures set forth in the Act are sufficient to allow all parties involved adequate notice and due process of the law. Petitioners seek to expand the

of the incidents, the Commissioner finds that she should have known that her persistent conduct was causing emotional harm to N.V. given that she was repeatedly counselled that her behavior was not appropriate. Therefore, the Board's determination that A.K. committed an act of HIB was not arbitrary, capricious or unreasonable.

Accordingly, the Initial Decision is rejected and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/19
Date of Mailing: 4/22/19

investigatory process and the HIB determination procedures to mirror discovery and trial-like adversarial proceedings, which is not the intent of the Act. The Commissioner is, therefore, unpersuaded by petitioners' exceptions.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7067-16
AGENCY DKT. NO. 82-3/16

L.K. AND T.K. ON BEHALF OF MINOR CHILD, A.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, BURLINGTON COUNTY,
Respondent.

David R. Giles, Esq., for petitioners

Casey P. Acker, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, LLP, attorneys)

Record Closed: April 16, 2018 Decided: January 22, 2019

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

Petitioners L.K. and T.K. appeal respondent Mansfield Township Board of Education's (the Board) finding that their daughter, A.K., committed an act of

harassment, intimidation, or bullying (HIB), N.J.S.A. 18A:37-13 et seq. Petitioners seek a determination that the Board's decision was arbitrary, capricious, or unreasonable. The Board seeks affirmance of its decision based on the findings of an investigation.

PROCEDURAL HISTORY

By way of petition dated March 14, 2016, petitioners sought to have the Commissioner of Education (Commissioner) remove the HIB determination from A.K.'s student records. Petitioners filed an Amended Petition on or about March 28, 2016. Respondent filed an answer on May 3, 2016. On May 5, 2016, respondent filed an answer to the amended petition. The matter was transmitted 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. It was filed at the OAL on May 9, 2016.

On September 7, 2016, respondent moved for summary decision pursuant to N.J.A.C. 1:1-12.5. Petitioners filed an opposition and cross-motion for summary decision on October 11, 2016, and an amended brief was submitted on October 12, 2016. Respondent replied on October 27, 2016. Oral argument was held on January 3, 2017. On March 6, 2017, I issued an Order denying the motion and the cross-motion for summary decision due to there being facts in dispute. A hearing was scheduled for September 18 and 19, 2017. I heard the case on September 18, 2017; however, petitioners were not able to complete their case, and their next witness was unavailable for the second scheduled hearing date of September 19, 2017. New hearing dates were scheduled for September 26, October 11, and November 15, 2017, and February 14, 2018. The record closed after receipt of petitioners' 118-page written summation and respondent's summation on April 16, 2018.

Pursuant to my Order denying summary decision, the issues on which there was a material factual dispute that needed resolution at hearing were: 1) What process were the petitioners afforded with regard to their right to a hearing; and 2) What evidence did respondent consider in making its HIB determination? The legal issue is whether petitioners received adequate procedural due process as afforded by the HIB statute. Last, the ultimate issue is whether petitioners can prove by a preponderance of

the credible evidence in the record that the Board's decision was arbitrary, capricious, or unreasonable.

STIPULATED FACTS

1) Petitioners' minor child, A.K., was a student at the Mansfield Township Board of Education's (Board) John Hydock Elementary School (JHES) during the 2015–2016 school year;

2) On September 29, 2015, an incident occurred on the morning school bus involving students A.K. and N.V. ("the incident");

3) As a result of the incident, an investigation into harassment, intimidation, or bullying (HIB) was conducted by JHES anti-bullying specialist (ABS) Cheryl Strickland and JHES principal Stacy Cullari;

4) Petitioners were notified of the HIB investigation;

5) An HIB report ("HIB report") was rendered, which found a confirmed incident of bullying by A.K. against N.V.;

6) The HIB report was submitted to the superintendent of the Mansfield Township School District, Tiffany Moutis;

7) During executive session on October 19, 2015, Moutis shared with the Board the HIB report, and the HIB report and incident were discussed;

8) The Board approved the HIB finding from the HIB report;

9) Petitioners were notified that the Board approved the HIB finding from the HIB report;

10) Petitioners were provided with a summary of the HIB investigation;

11) Petitioners requested a hearing before the Mansfield Board to appeal the approval of the HIB finding;

12) The appeal hearing was initially scheduled for November 9, 2015, and, with the consent of petitioners, rescheduled for November 16, 2015;

13) The appeal hearing was placed on the agenda of the November 16, 2015, Board meeting;

14) Petitioners' appeal was heard by the Board in executive session at the November 16, 2015, Board meeting;

15) At its December 14, 2015, meeting, the Board, in public session, approved a resolution to affirm the superintendent's decision, "John Hydock Elementary School HIB case #1"; and

16) Petitioners were notified of the Board's decision on their HIB appeal by way of letter dated December 15, 2015.

Additional Stipulations of Fact were also submitted:

1) Prior to the hearing, petitioners, through counsel, requested that the Board produce records in its possession that would have included any notes related to the investigation of the HIB complaint against A.K. ("HIB complaint") and related meetings or hearings before the Board.

2) The Board produced some notes in response to that request, but handwritten notes taken by Cheryl Strickland and Stacy Cullari, respectively, during their investigation of the HIB complaint were not identified or produced prior to the hearing in this matter before the OAL ("the hearing").

3) During their testimony during the hearing, Strickland and Cullari, respectively, stated that they had taken such notes and that they had provided them to the Board in response to a records request from the petitioners.

4) Thereafter, petitioners' counsel requested copies of those notes.

5) Neither the Board nor Cullari has a copy of her notes or knows what happened to them.

6) The Board did produce on October 5, 2017, a copy of notes which it has identified as all of Cheryl Strickland's handwritten notes related to the HIB investigation in the possession of the Board. A copy of those notes has been admitted into evidence in the hearing as Exhibit J-28.

7) Although Brett Gorman testified that he believed that the Board's business administrator would have taken "meeting notes" for the meeting minutes of executive sessions, Joyce Goode, the Board's business administrator who was present during the executive sessions of October 19, 2015, and November 16, 2015, and during the November 16, 2015, HIB hearing, does not recall taking any notes during those sessions or hearing, and neither she nor the Board has a copy of any such notes.

8) During her testimony, Alison Perrone stated that among other things she reviewed in preparing to testify during the hearing were notes that she had written on a copy of the agenda during the executive session of the Board held on October 19, 2015.

9) Thereafter, petitioners' counsel requested a copy of those notes, but Perrone can no longer locate them and the Board does not have a copy of them.

10) By stipulation to the above facts, the Board does not admit that any of the notes referenced above are "government records" within the meaning of the

Open Public Records Act (OPRA), or that there is any legal obligation for such handwritten notes to be maintained by a school district.

11) Petitioners acknowledge that it is the position of the Board that none of the notes referenced above are "government records" within the meaning of OPRA, and there is no legal obligation for such handwritten notes to be maintained by a school district.

12) Petitioners also agree that nothing in the above stipulations or the fact that the Board disclosed the mentioned notes may be used to imply or suggest that the Board concedes that such notes are "government records" or that it was legally obligated to maintain them.

FACTUAL DISCUSSION

Testimony

T.K.

Petitioner T.K., mother of A.K., testified that A.K. was seven years old at the time of this incident. T.K. has another child, who is two years younger. T.K. is a self-employed board-certified behavior analyst (BCBA) who works in homes for families. She has done so for nine years. She also has a teacher-of-the-handicapped certificate and more than twenty years of experience in the school setting. Her husband, L.K., is a federal officer with U.S. Customs. They moved to Columbus, New Jersey, in the Mansfield School District in February 2015, and her children started attending school there after Presidents' Day.

A.K. was seven years old and in the first grade in Ms. Morse's class in JHES with approximately twenty other children. T.K. communicated regularly with Ms. Morse, met with her, and emailed her. A.K. rode the bus to school every day. The typical school bus had forty children on it. The bus driver was the only adult on the bus. T.K. did not

hear of student N.V. during the first year of school. A.K. attended the second grade in Ms. Papero's class with approximately twenty other students.

A.K. is a girl who likes to dress up in fancy, nice clothes. Cheryl Strickland was a guidance counselor at JHES during A.K.'s second-grade year. T.K. testified that she received a call on September 29, 2015, at approximately 10:00 a.m. when she was working at a school district. Ms. Strickland called to say that her daughter had a "little situation" with a student. She explained that there is a student in A.K.'s school who went by a male name last year but now wants to be called by a female name.[1] The student now wears clothes associated with girls, and A.K. asked the student many times why he[2] does so, and he did not have an answer. When they got off the bus, both of them were crying. The student was upset because A.K. kept asking, and A.K. was upset because he was going to tell on her.

Ms. Strickland told T.K. that as far as she understood, the situation was worked out. Ms. Strickland explained that it is "difficult for all of us," and more so for a kid. T.K. wanted mostly to talk to her daughter when she got home. She did not hear anything else from the school that day. When T.K. spoke to A.K., A.K. did not know why she got in trouble. T.K. talked to A.K. about differences, and told her there is a child who dresses differently. She talked about the fact that he chooses to dress that way, and A.K. still did not get it. She went out to look for books on the issue, because it was new, and she was able to find children's books about it. T.K. told her daughter not to ask questions of that student anymore, but to talk to T.K. instead. They talked about his name, and said that if he wants to be called by the girl's name N3, then A.K. should call him by that name. A.K. was very confused, even after they spent an hour on it. She likes the student and just wants to be friends. He likes American Girl dolls as much as she does and he likes to shop at Justice like she does.

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[1] At the hearing, the parties agreed that to protect the identity of the student, we would use N3 to refer to the student's female name; N2 to refer to the old nickname; and N1 to refer to the name given at birth.
[2] During testimony, T.K. referred to the alleged victim as "he" or "him," so I am using that terminology in summarizing her testimony.

A.K. has asked a lot of questions since she could talk. She perseverates about anything in her life she does not understand. There was a child in her class who could not talk and used an augmented-communication device. He had a teacher with him all day long. She knew that the boy could not answer her, so she asked her mother about it and had her questions answered. You must answer her or else the situation will snowball.

When A.K. went to school the next day, nothing happened. T.K. found in her daughter's backpack a sheet of paper on which her daughter was trying to understand that her friend now wants to be called N3 by writing the old name and then the new name. (P-2.) A.K. is a visual learner, and that was her way of trying to understand, by writing a note to herself. Ms. Strickland and principal Stacey Cullari had meetings with A.K. to try to help her understand. Then, on October 1, 2015, T.K. heard from Ms. Cullari that there was another incident with the student. Ms. Cullari said now she needed to investigate it as an incident of HIB. Apparently something happened in the lunchroom with A.K. and the student, but she did not make clear what A.K. had done. Ms. Cullari said that they would have to go through the HIB process with an investigation. A.K. was practically in tears and very upset and confused. Ms. Cullari also said she already had given A.K. detention that day. When T.K. asked A.K. about it, she immediately broke down crying. She had to spend a day in detention in the principal's office. A.K. told her that she did nothing, and was very confused. T.K. wanted to get information from Ms. Cullari as to what exactly her daughter did. Ms. Cullari told A.K. that she may be expelled, and A.K. asked what "expel" means. T.K. tried to tell her, but did not know what to say. She did try to say that Ms. Cullari would never do that, but A.K. still talks about it.

T.K. emailed Ms. Cullari after having spoken to A.K. A.K. denied having said anything to the student, and she was upset that no one believed her. A.K. now hates school. T.K. asked to know exactly what had happened, but was never told. Ms. Cullari wrote her an e-mail reply, but did not answer her question. She basically said that everything was okay, and that A.K. seemed okay as well.

T.K. tried several more times to get a response to her question as to what A.K. did, but did not receive anything. She was just told that she would get a letter in the mail on October 15, 2015. She researched everything regarding HIB—the laws, guidance from the Department of Education, and school guidance—and really thought everything would remain the same regarding her daughter. When she received a letter from Ms. Cullari in October, she questioned the written report that was submitted to the Board. (J-8.) She still was not really concerned. On October 20, 2015, T.K. received the letter from the District and the summary of the investigation. (J-17.) She was shocked, based on all the previous calls with Ms. Cullari and Ms. Strickland, that A.K. had been found guilty of HIB. The summary referenced only an incident date of September 29, 2015. It relied on N3's report that A.K. was mean to him. No one ever said that A.K. had threatened N3, as he alleged. No one ever said that A.K. was being mean to or teasing N3. A.K. admitted to asking questions, but does not see why that was wrong. Apparently the threat was that A.K. said her parents are lawyers, and that if N3 told on her, she would tell on him. As set forth above, neither parent is a lawyer. A.K. admitted that she was asking him questions, and that it was difficult to call him by his new name, but she still did not understand what she had done wrong. T.K. had also never heard that A.K. had made fun of N3. The letter said that the investigation was completed on October 13, 2015. T.K. had no idea what evidence the Board had relevant to her daughter being found guilty of an HIB incident.

T.K. received the letter from Ms. Strickland and Dori Levy, anti-bullying coordinator, informing her that the HIB investigation was presented to the Board on October 19, 2015. Prior to that, she did not know that it had been reported to the Board. (J-17.) Tiffany Moutis, superintendent, sent the report with the results of the HIB investigation under separate letter dated October 20, 2015. It advised that they concluded that an HIB incident had occurred. At that point, T.K. still did not know what A.K. had done that was considered to be HIB. T.K. strongly disagreed, so she did more investigation. She tried to reach out to Ms. Moutis, because she was completely blindsided by the finding. She was supposed to have a meeting with the school staff for them to give her information. However, she received a call from Ms. Moutis saying that if she disagrees with the finding she has to appear before the Board. All Ms. Moutis would say is that it is clear that it is HIB. T.K. requested a hearing after she tried

unsuccessfully a few more times to have a meeting with Ms. Moutis. She was given the date of November 16, 2015, to appear before the Board. She expected that it would be the time to get more information and ask questions. She put together a four-page set of notes, statements, and questions for the Board. She talked to the parents of A.K.'s friends. She knew A.K. had trouble with new information, as well as trouble with her social skills. What she heard from parents is that there are a lot of issues on the bus, and that there were other students who picked on N3.

On November 16, 2015, the day of the scheduled hearing, Ms. Moutis introduced herself to petitioners, as they had not met before. Mr. Gorman went into the meeting with the Board members, along with Ms. Cullari, Ms. Strickland, and Ms. Levy, and stayed approximately five minutes. Mr. Gorman then said that the petitioners could go in and present to the Board. However, he said that they would not be allowed to ask questions. T.K. was completely confused, as Ms. Moutis had said that they would get their questions answered. She was a little upset, so she asked for some time to collect herself before presenting to the Board. She had the statement she had prepared for the hearing. (P-7.) She did not see anything, nor was she given anything, that was handed to the Board. When she tried to ask when the alleged harassment was first reported, Mr. Gorman answered for the Board, and no one else could respond. She asked how the team determined that A.K.'s conduct was HIB, and Mr. Gorman gave the textbook definition of HIB and not what A.K. did. Mr. Gorman talked over them. One of the Board members asked if she thinks A.K. knew that what she said to N3 was mean. She said, "No, I don't believe she knew." Ms. Strickland then jumped in and said she disagrees, and that A.K. said that she knew it hurt N3 and she would try to be nicer. T.K. said that A.K. was aware after all this had occurred that she had hurt N3, because adults had told her that she had hurt him. Ms. Cullari tried to talk to T.K., and Mr. Gorman said, "Please don't say anything." Ms. Cullari then said, "I wish I could tell you."

Petitioners were told at the end of the hearing that the Board would make a decision at the next Board meeting, so they left and everyone else remained. At the next Board meeting, the Board agreed to accept the superintendent's recommendation. Although there was miswording in the letter that the Board had not found an HIB

violation, T.K. knew that the HIB determination had been upheld. After that, T.K. made an Open Public Records Act (OPRA) request to obtain more information, and the Board provided the records. (J-2.) She requested A.K.'s record and all the information regarding the HIB investigation, including reports and notes.

A.K.'s current relationship with N3 is that they are in the same class, as well as on the same bus. They play together and they are just typical students. A.K. is more nervous and anxious and scared of doing anything wrong. N3 is allowed to bring a friend to his counseling session, and invited A.K.

In the records, other children had reported that other kids were doing things to N3. One student pushed him down on the bus and squeezed his hand really hard. These things were left out of the summary. There were three separate versions of N3's mom's report. Each one was modified, until the last one was just talking about A.K., and the comments about the other students were removed. None of the students interviewed said that T.K.'s daughter was mean, or teased or bullied N3. Two of them said N3 was being mean to A.K. She still has no idea how they looked at the witnesses' reports and concluded that A.K. did something wrong. The other items were never conveyed to the Board, as far as she knows. They were in neither the summary nor the report from Strickland and Levy. When she reviewed N3's mother's email to the school principal dated October 5, 2015 (J-7), the concerns expressed were significantly different than the concerns N3's mother had expressed on September 29, 2015. She never saw any more notes of interviews with A.K. She was never given another opportunity to respond to the mother's email. Also received in her OPRA response was the HIB checklist that was filled out the day she got the call from Ms. Strickland, September 29, 2015. Ms. Strickland never mentioned hurtful teasing, as noted on the second page of the report. No one mentioned insulting remarks or threats. After having read all of it, she does not believe A.K. did anything intentionally. The Bullying Incident Report Form dated October 1, 2015 (J-3) indicates that things were done in a classroom and playground that were never mentioned to her. She still did not see records mentioning a demeaning comment that A.K. made to N3. There were no interviews of teachers, or school staff, or the bus driver, or the aide. The very last page of the report form asks why the harassment occurred, and the "other" box is checked, with a

handwritten note saying "gender identity." A.K. has no idea what that is. T.K. went on to say that her husband became a member of the Mansfield Board of Education in 2016, and he had just recently resigned.

T.K. admitted that her daughter has told her things that she later found out were not true but attributed that to her being a kid. She recalled that on September 23, 2015, two parents informed her that her daughter was not very nice. (R-1.) She knows her daughter has social issues, and she has numerous concerns for her daughter dating back to infancy and childhood. The parents did not say she was mean, but said they had to intervene due to conflicts. On September 29, 2015, Ms. Strickland told her the reason why N3 was upset, and it was because of the conflict. When she spoke to A.K. about differences, she believes A.K. understood in a broad sense. A.K. said she would stop the conduct that was bothering N3. When she asked her daughter why she wrote the handwritten note (P-2), A.K. said she wanted to remember to call her friend by the preferred name, N3. On October 1, 2015, Ms. Cullari told her all about the HIB process and investigation, but never specified what occurred that day. It was a twenty-four-minute conversation. After the call with Ms. Cullari, she spoke to her daughter again. However, she never got a number regarding how many times A.K. asked N3 why he dressed as he did. Ms. Cullari did say that A.K. said something to N3 and mentioned something about a threat made and that an investigation was to occur. The nature of the threat was not clear, but there was a reference to the police. Her daughter denied making any threat. Even though T.K. knew an investigation was going to be done, she was still shocked that they found HIB.

T.K. believes that the summary gave new and different information than she had been told, and she wanted to talk about it. Her daughter admitted to asking N3 why he wore a dress, but denied that she was teasing him about it. T.K. never had her questions answered as to what occurred on October 1, 2015. The only threat she heard about was A.K. saying that her parents were lawyers, but she did not think that was HIB. She was aware that when she went to the hearing she could bring evidence, but she did not bring anything other than the documents set forth at Exhibit P-7. She believes that the Board should have looked at environmental factors, developmental age, and assessment of behavior. She brought with her literature consisting of the

Department of Education's guidance to schools, but Mr. Gorman said it was not relevant. She left him a copy of the front page of it anyway. She did not have the OPRA documents when she went to the hearing. She received them later. She considered bringing her daughter, but decided against putting her through that. She believed she was before the Board for at least a half hour. To this day, she still does not know what investigation reports the Board considered. She also does not know whether the investigation reports were presented to Ms. Cullari or Ms. Moutis.

Stacy Cullari

Stacy Cullari testified that she has been the principal of JHES since 2014, and was supervisor of curriculum and instruction at the school in the year prior. Every year, all staff must be trained in HIB.

On September 29, 2015, students came up to her in a frenzy as she greeted students in the morning. Student N3 was upset because A.K. was teasing him on the bus. Student A.K. was upset because N3 was going to tattle on her. She let Cheryl Strickland, anti-bullying specialist, know what occurred. N3 said he liked Shopkins and Monster High, and A.K. said, "you can't like those things because you're a boy." Also, N3 said he wanted to wear a dress on picture day, and A.K. said N3 can't wear a dress because he's a boy. Ms. Cullari first spoke to the students individually, and then spoke to them together in the presence of Ms. Strickland. N3 said A.K.'s remarks were upsetting to him. A.K. disagreed, but did not recall exactly what she had said. Ms. Strickland took the lead in the questioning. They had mediation, where they talked about differences. A.K. seemed receptive, and said that she would stop her questions and comments.

Ms. Cullari filled out an HIB checklist. She notified T.K. about the incident by telephone. She also spoke to N3's mother by phone. N3 was born a male. N3 dressed mostly in female clothing and had pierced ears. N3's mother was quite upset. She said that there were prior incidents involving A.K. Ms. Cullari said that if she felt that it was bullying, she had to put it in writing, which she did.

Ms. Cullari believed that A.K. understood that her conduct made N3 upset. The next day she spoke to other students and took their statements. On September 30, 2015, Ms. Cullari interviewed student J. N3 said that he and J. had arguments on the bus, but they are friends. J.'s behavior did not seem to bother N3 the way A.K.'s did. She next interviewed student M., who rode the same bus, and student W., who said that the whole group had issues and could not get along. They are all second graders. After the interviews, she believed that A.K. knew that what she did was wrong, because she said she did not want N3 to tattle on her.

Ms. Cullari filled out the Bullying Incident Report Form (J-3), which then goes to the superintendent. She selected "gender identity" as the distinguishing characteristic for the report. She and Ms. Strickland conducted the investigation and completed the report. On September 30, 2015, other students brought to her attention that A.K. was continuing to bother N3 in the cafeteria. They said that A.K. was threatening that if N3 told on her, she would get her parents on N3. N3 confirmed that she said that. A.K. denied that it happened. N3's mother also reported that N3 told her it happened. Ms. Cullari spoke to A.K.'s parents on October 1, 2015. She and Ms. Strickland deemed it to be an HIB incident. Ms. Strickland authored the HIB report. (J-9.)

There were two ABS reports, one of which was read at the executive-session meeting of the Board. The results of the investigation were presented to the Board. The Board agreed that A.K. committed HIB, and a letter was sent to A.K.'s parents advising of the Board's decision. (J-16.) Ms. Cullari attended the appeal hearing, but not the executive session where the investigation was presented to the Board. She recalled T.K. reading a statement in response to questions.

Ms. Cullari stated that the evidence confirmed the HIB finding, in that the conduct was based on distinguishing characteristics that created a hostile environment that had an emotional effect on the student. A.K. knew that N3 was a boy dressing like a girl, and created a hostile environment for N3 such that N3 was not comfortable riding the bus any longer. Ms. Cullari testified that N3's mother said that student J.T. said things to N3 also, but N3 was not affected by the behavior of J.T. Ms. Cullari did not include in her report N3's references to being teased for liking Monster High and Shopkins and not

being able to wear a dress for picture day. She believes that there has to be an intent to harm, and believes that the intent occurred after A.K. was told to stop and she continued. Although Ms. Cullari said that she spoke to N3's mother on the day of the incident, she seemed to already know about the incident with A.K. teasing N3 about wanting to wear a dress to school pictures and being told to wear a suit. She explained that it was not the only time. The cafeteria incident the next day convinced Ms. Cullari that A.K. knew what she was doing.

Ms. Cullari did not talk to N3's teachers, lunch aides, bus driver, or any adults. She only talked to the students. Although student J. admitted to pushing N3 down, and student M. said that student J. teases N3, saying that he is a boy and should not dress like a girl, J. was not investigated for HIB because N3 did not seem to be affected by J.'s behavior. The third student interviewed, W., said that N3 is mean to A.K., and A.K. is not mean to N3. None of the other three students corroborated that A.K. was mean to N3. Ms. Cullari did not believe M. and W. She has three versions of Ms. V.'s statement, the last of which (in the order in the binder) removes any reference to the conduct of J. (J-2.) Ms. Cullari does not know the order in which they were written.

There is no documentation of the threat in the cafeteria incident other than the account by N3's mother. "Students" reported it. Ms. Cullari did not respond to T.K.'s request to be told exactly what the threat was that A.K. was said to have made. (J-6.) She was in the process of conducting the investigation. She told T.K. that the allegations were being investigated in a letter dated October 15, 2015, although the investigation had already occurred. There was no HIB incident between A.K. and N3 after October 1, 2015. The one incident on September 29, 2015, would not constitute HIB, and the only thing after that was A.K.'s threat. A.K. admitted to asking the questions and having a hard time calling N3 by his female name.

Cheryl Strickland

Cheryl Strickland testified that she has been a school social worker in Mansfield for ten years. She has been the anti-bullying specialist since the law came into effect in 2010. She was advised of the incident regarding A.K. and N3 by Ms. Cullari on

September 29, 2015. She testified, similar to Ms. Cullari, that they met separately with the students in Ms. Cullari's office. N3 was very upset and said that he tried to get A.K. to stop, but she would say things like he should not like Shopkins, and "you can't dress like a girl." He said A.K. told him that if he tattles on her, her parents are lawyers and they will take him to court, or some threat like that. When they interviewed A.K. she seemed to understand that what she did was hurtful, but she told them that she did not want to call N3 by his female name. They told her not to ask any more questions of N3. They then called the students' parents. N3's mother thought her child was being bullied. They told the parents of A.K. that they would be investigating.

Ms. Strickland and Ms. Cullari authored the report cooperatively. They then met with other students, M. and W. N3 had said that these were the students who witnessed the incident. W. said that there was difficulty with other students on the bus.

The next day there was another incident, where N3 said A.K. was harassing him at lunch, and N3 was upset. A.K. was still bothering him, when she had agreed not to do so anymore. A.K. also accused N3 of tattling on her and told other students. This made him feel bad. When they spoke to A.K., she said she knew she was doing hurtful things, and was trying to be better at saying nice things to N3.

Every year the district trains staff on HIB. Ms. Strickland concluded that the incident met the criteria to be an HIB incident. When they prepared the Bullying Incident Report Form (J-3), she thought the investigation was done, but the process was still ongoing because they had not written the final summary yet. The form added all the actions that were taken. They felt that gender identity was the distinguishing characteristic upon which the bullying was based. Ms. V. wrote a letter to put her concerns in writing, because they felt the parent's point of view was important. A quote from her letter was given to the superintendent. Ms. Strickland drafted the final summary. (J-9.) When she initially met with the students on September 29, 2015, she thought the incident could be an HIB incident based on the criteria and what the students said. A.K. knew her actions could cause harm, and they caused a hostile environment for N3. There were different versions of forms because the required paperwork changed in the middle of the investigation. They used the summary to

explain why she and Ms. Cullari felt it was an HIB case. The report went to the Board for review. She was not at that Board meeting. She is required to make a professional judgment based on the law, and that is what she did. Ms. V. said that N3 did not want to take the bus anymore and felt bad. Even second graders have to understand the rules.

She was asked to attend the executive session with petitioners in case there were any questions. Petitioners were given the chance to ask questions and present their case. She does not recall any specific questions asked. She believes that she was asked questions and she answered them. The whole session was with petitioners, so they were given more than just an opportunity to make a statement in the hour or more that they were before the Board. She recalled answering questions of Board members and petitioners.

Ms. Strickland admits to not being present when any of the incidents took place. She does not have her notes from her meetings with the students. She used them to make the summary. She disagrees that A.K. did not continue to bother N3 after they talked on September 29. She bothered N3 and teased him. Students reported to the teacher that A.K. was bothering N3 at lunch. The reason A.K. was concerned about N3 tattling was because she knew her behavior was wrong. There had been incidences of conflict in the past between A.K. and N3, but nothing serious. The reason they did not go after student J., who another student said pushed N3 down, was that N3 was not bothered by J., but by A.K. N3 did not report anything about J. the way he reported the things A.K. did. Ms. Strickland believes the investigation was completed by October 5, 2015. A.K. admitted asking questions about N3's clothes and having trouble calling N3 by the female name, and admitted that she did not want to write the female name on her paper.

Brett Gorman, Esq.

After debate on whether he should be allowed to testify, Brett Gorman testified that he was an attorney from the firm of Parker McKay, which represented the Board in 2015. He recalled a meeting involving the petitioners having to do with an alleged HIB

incident. Prior to the meeting before the Board on November 16, 2015, he recalled taking the parents aside and explaining to them the ground rules as to what would take place. They then went into the executive session for hearing. He told the petitioners that they could not ask questions of the Board because the Board was there to make a factual determination. He believes they did ask questions of the administration. He recalled petitioners making a long presentation, and the Board discussing it for a long time, as well. It was longer than the usual HIB hearing. Present at the meeting were the principal, the anti-bullying specialist, the anti-bullying coordinator, and the superintendent.

Mr. Gorman did not recall the petitioners being upset at what he told them. He disputes telling them that they could not ask any questions. The parents' argument was that the child did not understand what she was saying when she made comments to N3. They said that their child is young, so she was just inquisitive. He recalled the parents asking questions of the principal, and the principal and the ABS answering. The parents left when the hearing was over, and the Board continued to discuss the issue. The Board then returned to public session.

Alison Perrone

Alison Perrone testified that she is a current Board member, who served in November 2015. She has been an attorney since 1996. She recalled Ms. Moutis presenting the HIB report at the closed session in October 2015. She recalled receiving the report and reading it at the executive session. They did not get it before. She and the Board members had received training on HIB prior to October 2015.

Ms. Perrone recalled the petitioners addressing the Board at their appeal, along with Ms. Strickland and Ms. Cullari. She recalled Ms. Strickland responding to their questions. The parents said that the alleged bullying incident occurred due to their daughter's curiosity. Ms. Cullari had an exchange with A.K.'s father regarding conversations had with A.K. The parents were present in their meeting for approximately thirty minutes, but she does not recall exactly how long. She knows that the parents asked questions about the investigation and what had been done. After the

parents left, the Board stayed in executive session for further discussion. They then went to the public session and voted to uphold the determination of HIB. Ms. Perrone believed that there was a distinguishing characteristic: the incident impacted N3 and it caused emotional harm. She believed that the young age of A.K. was balanced with the fact that the effects of her conduct had been explained to her and she had understood.

Ms. Perrone did not know at the time of the meeting who the involved students were, but she did know by November. The mother of N3 became a member of the Board as of October 2017. Ms. Moutis shared the entire chain of events with the Board. The Board was told that A.K. persisted in making comments to N3 after the bus incident. N3's mother told the HIB investigators that the comments started the previous year, and they continued and made N3 upset. N3 was visibly upset several times in school. Ms. Perrone identified the HIB policy that was in effect until December 2015 (P-10) and the HIB policy that is currently in effect (P-10a). The administrators explained that after A.K. was told the comments upset N3, she continued to ask questions. It would have been a factor if that were not true. The Board members were not provided copies of the interviews, only the report of what N3, A.K., and N3's mom said. The mother conveyed the emotional harm inflicted on N3 and how upset he was, such that he was unable to ride the bus any longer. Perrone was not aware that the parents did not have the superintendent's determination prior to the Board meeting. Ms. Moutis talked to the Board prior to the parents' entry into the meeting. When the parents were there, they asked questions about the investigation.

Tiffany Moutis

Tiffany Moutis testified that she has been the superintendent for the Mansfield School District for approximately two and a half years. Previously she was an assistant superintendent in Kenilworth, and before that she spent nineteen years in the Union School District as a teacher, supervisor, and curriculum director.

Ms. Moutis recalls that she came to know A.K. when she had a meeting with the two building principals and Cheryl Strickland on or about September 29, 2015. Ms. Strickland shared the details of the incident and the investigation. They showed her

the district's HIB forms. After the investigation, which she does not participate in, the administrators submit a report, which she then submits to the Board. In the present case, upon her receipt of the report, she read it, copied it, and placed it in the file for the Board meeting on October 19, 2015. The report did not go home with Board members in their packets. After reading the report, she thought it was very clear that there had been an HIB incident based upon gender identity.

Ms. Moutis presented the report in the Board's executive session. She does not recall how long the executive session lasted, but there was a lot of discussion. She wanted to make sure that everyone understood the process before voting. She gave the members time to read the report and gave them time to ask questions. One Board member was interested in knowing the age of the students, but she explained that age of the alleged bully is not a factor; rather, it is what was stated and how it was stated.

The Board voted to support her decision. After the Board vote, she sent a letter to the parents with the decision of the Board and advising of the right to appeal, which they did. On October 23, on her way home from the New Jersey School Boards Association conference, she had a conversation with T.K. about what would take place. T.K. was confused as to why she was receiving the letter and what her child had done. Ms. Moutis explained that it was a finding of bullying, and that she had the right to appeal. On the day of the appeal, she asked the ABS to be there, as well as the attorney, for questions. Mr. and Mrs. K. came in with guns blazing, and the conversation was immediately heated. They explained that their daughter was inquisitive and asks a lot of questions. They said it should not be determined to be an HIB incident. They asked questions like the staff was on the witness stand. It was a very lengthy executive session, where they asked questions like, "Why did you do it this way?" She did not recall Ms. Strickland's responses, but Ms. Strickland was very nervous. Ultimately, after the executive session the Board voted in public to support the decision of the superintendent. A.K. exhibited HIB on the bus and on the playground. It continued after administrators told her to stop. Ms. Moutis did not speak to any students, but spoke with Ms. Strickland and Ms. Cullari.

Ms. Moutis spoke with Ms. Strickland mainly about writing reports and the various incidents. The incidents were asking why N3 dressed like a girl on the bus, continuing to tease N3 on the playground, and not letting N3 write her female name on her paper. The executive session went from 7:00 to 8:25 p.m. The report given to the Board had identification numbers instead of names or initials. (J-12.) N3's mother had said things that A.K. had done to N3 the year before, but they were not presented.

Everything Ms. Moutis knows regarding the investigation is in her report. She does not communicate with the parents before giving her report to the Board. At the appeal hearing, she brought the binder and a copy of the report for those members who were absent for the vote. She recalled Ms. Strickland answering the parents' questions about the process. The administrators stopped answering questions when the questions became accusatory. The attorney conveyed that it was not the place to discuss the administrators' process. The parents were unable to persuade the Board that its decision was incorrect.

FINDINGS OF FACT

The majority of the facts are not in dispute. However, there are some disputed facts that will require a credibility analysis. Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

T.K. was mostly credible in her testimony; however, her view of the meeting was tainted by the desire to have her daughter exonerated from the bullying charge. For instance, her view that she was prohibited from asking questions was contradicted by

her own notes. However, the Board's witnesses often contradicted each other, such that it has been difficult to discern what actually happened between the two students. While I attribute this mostly to the length of time that had passed between the incidents in question and the hearing, the administrators could not agree on the most important fact presented to the Board, which is that the HIB continued after September 29, 2015. They confused information that they received from N3's mother with information they received from students. A.K.'s alleged teasing of N3 that he cannot wear a dress to picture day and A.K.'s alleged threat to N3 were from N3's mother. Ms. Perrone seemed to have the best recollection.

Based on the testimony, the documents in evidence, and my credibility determinations, I **FIND** the following facts, in addition to the stipulated facts above.

At all relevant times, petitioners' minor child was a student at JHES. On or about September 29, 2015, an incident occurred on the school bus between second graders A.K. and N3. N3, who is biologically male, had begun wearing clothes that are closely associated with female children.[3] A.K. questioned N3 about his choice of clothing. N3 was upset about the questions, and A.K. was upset because N3 was going to tell on her. Later that morning, both children were called into a meeting with principal Stacy Cullari and school ABS Cheryl Strickland to discuss what had happened.

N3 stated that A.K. was "always mean to him" and was asking him questions about why he dressed like a girl. When N3 asked A.K. to stop asking questions, A.K. would not stop. N3 reported that the questioning made him feel "bad." N3 also reported that A.K. makes fun of him for liking Monster High and Shopkins toys. Although Ms. Strickland testified that N3 also said that A.K. threatened him that if he tells on her, she will have her parents (who are lawyers) take his parents to court, that statement is not in her notes of her conversation with N3, but in her notes of her conversation with N3's mother.

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[3] It is unclear exactly when N3 began dressing in this manner.

A.K. admitted that she was asking N3 questions about the clothes that N3 wore. She also explained that it was difficult for her to remember to call N3 by the preferred female name, N3, as A.K. had always known him as the male names N1 or N2. When asked about an occasion when A.K. told N3 that he could not write the name N3 on a piece of paper, A.K. said that it was her paper and she wanted N3 to write his old name.

After meeting with both children, Strickland called petitioner T.K., A.K.'s mother, to advise her of the incident on the bus and the meeting with A.K. and N3. Strickland told T.K. that A.K. had an issue on the bus with a peer, and recounted the morning's events. That evening, petitioners T.K. and L.K. talked to A.K. about the incident. They explained to her that N3 did not like to answer her questions and told her that she had to stop. A.K. was upset because she felt like she was in trouble.

On September 29, 2015, Cullari talked to N3's mother, who believes that A.K.'s conduct qualifies as bullying. N3's mother reported that another student, J., pushes her son down on the school bus, doesn't like to sit next to him because he is different, and squeezed his hand really hard one day. She also reported that A.K. teased N3 about wanting to wear a dress on picture day, messed up his hair and teased him about it, and threatened that if he tattled on her, she would have her parents (who are lawyers) take his parents to court. Cullari subsequently revised her notes to remove first one reference to student J., then all references to student J., such that only references to A.K.'s conduct were in the report of the interview with N3's mother.

On September 30, 2015, Strickland interviewed three other students about the events of the previous day.[4] None of the other children supported the claims of N3. An interview with one student, M., indicated that another student, J., "teases N., saying that he is a boy and shouldn't dress like a girl." Neither Strickland nor Cullari spoke to the bus driver or any adults who may have witnessed any alleged bullying behavior.

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[4] Notes from these interviews are not provided in the record. Additionally, they are not mentioned in the HIB investigation report.

On October 1, 2015, Principal Cullari called petitioner T.K. and informed her that A.K. had said something again to N3 and that an HIB investigation would be conducted. Ms. Cullari did not clearly state to T.K. what the allegation was, but indicated that A.K. had said something to friends at lunch about N3 telling on her. There are no notes that support that students came to Ms. Cullari and told her that A.K. threatened or harassed N3. Although she testified that she spoke to N3 about it and he confirmed it happened, there are no notes of that conversation. A.K. denied it. Ms. Cullari gave A.K. recess detention for continuing to harass N3 after she had spoken to her. A.K. was very upset.

N3's mother's October 5, 2015, email to Cullari reported much more than her telephone conversation with Ms. Cullari. The email stated that A.K. had been questioning N3 about his choice of clothing since the previous year. N3 had explained to his mother that A.K. makes fun of him, and when he ignores her she just gets louder. N3's mother also noted that these interactions were having a negative effect on N3 emotionally and academically. N3's mother put in her October 5, 2015, email to Cullari that "A.K. retaliated against N3 the next day and continued her harassment in the cafeteria, telling fellow students that N3 had threatened her." There is no indication in the notes of Ms. Strickland or Ms. Cullari that N3's mother's claim of continued harassment was investigated.

Principal Cullari sent a letter to petitioners dated October 15, 2015, notifying them that she had received a written report on October 5, 2015, which set forth that A.K. had committed an alleged act of HIB and that those allegations were being investigated by ABS Strickland. ABS Strickland provided her report to Superintendent Moutis. Upon her receipt of the report, Moutis read it, copied it, and placed it in the file for the Board meeting on October 19, 2015. The report did not go home with Board members in their packets. The Board members saw the summary for the first time at their meeting on October 19, 2015. They were not advised of the identities of the students. After reading the report, Ms. Moutis thought it was very clear that there had been HIB based upon gender identity.

Ms. Moutis presented the report in the Board's October 19, 2015, executive session. In executive session, the Board discussed the HIB report, the HIB protocol,

the rights of the students, and the Board's role. The minutes indicate that the Board convened to executive session at 7:01 p.m. and did not return to open session again until 8:25 p.m. There was a lot of discussion to ensure that the Board members understood the process before voting. Ms. Moutis gave the members time to read the report and gave them time to ask questions. One Board member was interested in knowing the age of the students, but she explained that age of the alleged bully is not a factor; rather, it is what was stated that is important.

The Board then returned to public session. The minutes indicate that a vote was passed in public session with four yes votes and two abstentions to accept Ms. Moutis's recommendation. No other matter was discussed. Ms. Moutis sent a letter to petitioners dated October 20, 2015, stating that the Board had approved the findings of the ABS investigation at a meeting held on October 19, 2015. The letter informed petitioners that they had a right to request a hearing before the Board, and the request must be in writing.

The same day, ABS Strickland and Dori Levy, the District's anti-bullying coordinator, sent a letter to the petitioners, along with a "Summary of the Bullying Investigation," although what was attached was called a report. The report indicates in the first paragraph that the ABS investigator spoke to N3, and sets forth what he said. However, it attributes to N3 remarks actually made by his mother, specifically, the threat that if he told on A.K. she would have her parents take action against him. The second paragraph references what A.K. told the investigator. The third paragraph references the conversation the investigator had with N3's mother. The summary report did not contain information regarding any other aspects of the investigation, any other evidence considered by the ABS, or the findings of fact upon which the conclusion was based. Those findings were in the separate form entitled HIB Investigation ABS Report, which was not provided prior to the Board hearing. The summary indicates that the investigation was completed on October 13, 2015, and that enumerated support services were offered to the student. It also states at the end that student discipline was administered in the form of a recess detention on October 1, 2015.

On October 27, 2015, petitioners called the superintendent's office and scheduled a meeting with Superintendent Moutis, Principal Cullari, and ABS Strickland to discuss the HIB investigation and the Board's HIB determination. The following day, Superintendent Moutis cancelled the meeting with petitioners, explaining that she could not meet with them to discuss or answer any questions about the HIB conclusion. Superintendent Moutis informed petitioners that if they disagreed with the HIB determination, their only recourse was to request a hearing to appeal it before the Board.

Petitioners requested a hearing. The letter advising of their right to a hearing did not advise whether they could bring witnesses or documents. The hearing was scheduled for November 9, 2015, but it was rescheduled to November 16, 2015, when petitioners could not make the meeting and waived the right to have the hearing in ten days. Prior to the hearing, Gorman explained the process to petitioners. During the hearing, no one from the Board or the administration presented anything to the Board in front of petitioners. Petitioner T.K. asked the questions that she had brought with her at the hearing. The list showed she had checked off nearly all of them as having been asked. She has notes of some answers in the margins of her questions. Attorney Brett Gorman responded to most of the questions by reading from the HIB Investigation ABS Report. However, Ms. Cullari responded to a comment by A.K.'s father. Petitioner T.K. presented additional facts about A.K. and her inquisitive personality. Gorman permitted petitioners to ask questions of ABS Strickland, but not about the process they used for the investigation.

Petitioners received a letter dated December 15, 2015, from Joyce A. Goode, secretary of the Board, notifying them that the Board had denied their appeal and affirmed the superintendent's determination. Secretary Goode's letter indicated that the Board had considered petitioners' "appeal of the finding that no HIB violation occurred" (J-25, emphasis added), even though petitioners had appealed the superintendent's finding that A.K. had engaged in HIB.

On February 17, 2016, pursuant to New Jersey's Open Public Records Act, petitioners requested copies of all records pertaining to A.K. The Board complied with

the request on February 26, 2016. Petitioners then received copies of the HIB allegations made against A.K. and learned what was entailed in the school's investigation of the HIB allegations, including the notes of the interviews with the students.

A.K.'s current relationship with N3 is that they are in the same class, as well as on the same bus. They play together and they are just typical students. A.K. is more nervous and anxious and scared of doing anything wrong. N3 is allowed to bring a friend to his counseling session, and invited A.K.

LEGAL DISCUSSION

The New Jersey Anti-Bullying Bill of Rights Act (ABA), N.J.S.A. 18A:37-13 to -32, is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be conducted by a school anti-bullying specialist and shall take no longer than ten school days to be completed. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the

investigation. N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Ibid.

The board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966)), adopted, Comm'r (April 7, 2008), http://njlaw.rutgers.edu/collections/oal/. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., EDU 2780-07, Initial Decision (February 6, 2008), http://njlaw.rutgers.edu/collections/oal/; see W.C.L. & A.L. ex rel L.L. v. Tenafly Bd. of Educ., EDU 3223-12, Initial Decision (November 26, 2012), aff'd, Comm'r (January 10, 2013), http://njlaw.rutgers.edu/collections/oal/ (The petitioners challenged the school board's decision that a student committed an act of HIB. The administrative law judge (ALJ) found that the board's actions were consistent with the

letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioners failed to establish that the board's actions were arbitrary, capricious, or unreasonable. The Commissioner affirmed the ALJ's decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., EDU 4144-12 (November 27, 2012), adopted, Comm'r (January 9, 2013), http://njlaw.rutgers.edu/collections/oal/ (The petitioner challenged the board's determination that the actions of the petitioner's son constituted HIB. The board found that the student called another student "gay" and said he "danced like a girl." The demeaning remarks constituted HIB.). In both cases, the petitioners failed to satisfy their burden to show that the board's actions were arbitrary, capricious, or unreasonable.

Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > b. has the effect of insulting or demeaning any student or group of students; or

> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Mansfield Township School District's HIB Policy 5131.9, "Harassment, Intimidation and Bullying," mirrors the New Jersey law. P-10; P-11. Additionally, the policy sets forth a detailed process by which complaints are investigated to see whether an action meets the definition of HIB as set forth in the policy and the ABA.

Petitioners' first argument is that the Board's investigation was not complete or properly documented as required by Board policy 5131.9. While it is true that the only source of the allegation of continued harassment in the cafeteria after the bus incident was N3's mother, who was told that by N3, the issue is how much support for the allegation is necessary. N3's mother said in her email that "[A.K.] retaliated against [N3] the next day and continued her harassment in the cafeteria, telling fellow students that [N3] threatened her." If Principal Cullari or ABS Strickland confirmed the remarks with N3 and made a note that they did so, that would be sufficient, but the fact that there are no notes that they interviewed N3 makes it unbelievable that either of them did, as all other interviews are documented. Neither of them testified that they tried to determine who the students were and confirm it with a staff member who was assigned to the cafeteria at that time. Board policy 5131.9 states that the investigation shall include "taking of statements from victims, witnesses and accused." While the ABS and principal can get statements from the mother of the victim, such a statement should not be the sole source of an allegation. They simply took the mother's word as written in the email, which, as petitioners rightly argue, had to be N3's mother's recounting of what N3 had told her, and was thus triple hearsay.

Petitioners also argue that by ABS Strickland and Principal Cullari investigating the allegations together, they contravened the terms of the ABA and the Board's policy. Petitioners argue that Strickland's therapeutic relationship with N3 caused her to focus almost exclusively on the impact on N3 rather than A.K.'s culpability, and that she was biased. The investigation could have been more thorough by interviewing the teacher or the bus driver. ABS Strickland completely ignored the statements of the other

students, who refused to corroborate N3's account of what occurred on the bus. She should have disclosed those interviews and indicated why she did not consider those students' statements. She has the right to make credibility determinations, especially when A.K. even admitted to some of the conduct N3 alleged, but the Board should be provided with complete information. By not providing all the information, and attributing statements to N3 that were actually made by his mother, Ms. Strickland made it impossible for the Board to make a truly informed decision. I **CONCLUDE** that the investigation was neither thorough nor complete, as required by the Board policy, and caused the Board to make a decision based on incomplete and questionable facts.

Petitioners next argue that the Board's decision was arbitrary, capricious, or unreasonable because the appeal hearing did not comply with the ABA, the Board's policies, or due process. They argue that implicit in the right to a hearing is the right to an evidentiary hearing. However, the Legislature could have simply added the word "evidentiary" if it intended it to be that type of hearing. Instead, N.J.S.A. 18A:37-15(b)(6)(d) provides that, "[a]t the hearing the board **may** hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." Emphasis added. Petitioners state that the student-conduct regulations, N.J.A.C. 6A:16-7.2 and -7.3, which address procedural requirements for student suspensions, should apply to a student engaged in HIB, as it remains in the student's permanent school record. However, the HIB regulations do not set forth such procedural requirements. They allow boards to set rules regarding the conduct of appeal hearings.

Both petitioners and the Board cite the Commissioner's decision in Gibble v. Board of Education of the Hunterdon Central Regional School District, EDU 2767-15, Initial Decision (April 12, 2016), adopted, Comm'r (July 13, 2016), http://njlaw.rutgers.edu/collections/oal/, in support of their positions. Petitioners cite it for the holding that the ABA entitles individuals accused of HIB to due process. The Board cites it for the holding that there is no right to a full adversarial hearing, including the right to call witnesses. Thus, the issue is whether the Board provided petitioners with adequate due process. The Board provided petitioners a separate hearing at which they were allowed to present materials and to ask questions. Petitioners were

not provided much information regarding their rights to present evidence at the hearing, but they were not prohibited from bringing witnesses and documents or being represented by counsel. T.K. familiarized herself with the HIB procedures prior to attending the hearing.

The report set forth the factual basis of the HIB finding, although the allegation of harassment after the mediation was vague at best. Petitioners were provided with ample time to present their appeal of the HIB finding, setting forth that A.K. was just curious and that she did not believe that she had done anything wrong to merit the recess detention the day after the bus incident. Petitioners went through all of their comments and questions. The fact that they did not receive answers to their satisfaction does not obviate the fact that they were able to present their case. The hearing was not to cross-examine the ABS or the principal about their process. Petitioners' citations to the rules governing student suspensions are not applicable to HIB hearings. For these reasons, I **CONCLUDE** that petitioners did not meet their burden of proving that the Board's decision was arbitrary because the hearing deprived petitioners of due process as set forth in the ABA and Board policies. I **CONCLUDE**, based on my findings of fact, that petitioners were provided adequate due process in the conduct of the Board hearing.

Petitioners also argue that the Board's notice of the specific charges was inadequate, in that neither A.K. nor her parents were allowed to respond to the specific allegations against A.K. before the conclusion of the HIB investigation. Superintendent Moutis canceled a meeting at which the petitioners were seeking to learn the charges against A.K. Petitioners argue that they should have been notified of what was found and the specific factual basis for concluding that A.K. engaged in HIB. Petitioners argue that the report did not so notify them. The report sets forth that the charge of HIB is based on the reports of N3 and N3's mother and the admissions of A.K. when she was first interviewed. It goes on to note that the harassment continued after Principal Cullari and ABS Strickland told A.K. to stop when questioned about the bus incident. This allegation of continuing harassment, upon which the Board heavily relied, was vague and unsupported. The petitioners and the Board should have been advised of all of the aspects of the investigation. As set forth above, the parents of the students involved in

any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. N.J.S.A. 18A:37-15(b)(6)(d). The parents are to be provided this information within five days after the results of the investigation are reported to the board. If the Board had done so, petitioners would have had it prior to the Board hearing. The letter from the Board secretary after the hearing says that the Board considered "investigation reports, witness statements and other pertinent materials" in addition to petitioners' presentation, but the Board had nothing but the summary report. I **CONCLUDE** that the failure of the superintendent to provide the parents the information regarding the nature of the investigation was in violation of the statute and Board policy 5131.9.

Petitioners' next argument, that the Board's decision was arbitrary, capricious, or unreasonable because it was not supported by substantial evidence, is again based on citations from regulations governing student suspensions, N.J.A.C. 6A:16-7.3. Petitioners note that such regulations can serve as a guide in HIB hearings, but nowhere does it say that the same standard—that the Board's decision must be based on the preponderance of the competent and credible evidence—applies to HIB hearings. However, ABS Strickland relied heavily on the statements of N3's mother, both on the phone and in writing. N3's mother received her information from N3, as she was not present in the school during the incidents, so it was hearsay. ABS Strickland had the right to believe N3, given her knowledge of N3, but N3's mother's statement that A.K. engaged in a pattern of harassment against N3 that continued after ABS Strickland spoke to her needed to be corroborated. Petitioners argue that this shows bias on the part of Strickland. While I disagree with this argument, since the Board policy requires that the investigation include support for the victim, corroboration at least from the victim was needed. I therefore **CONCLUDE** that the statements set forth in the report presented to the Board were insufficient to sustain the superintendent's recommendation of HIB.

Next, petitioners argue that the Board's decision was clearly erroneous because the superintendent applied the wrong legal standard when she concluded that A.K.'s age did not matter in the analysis of whether she committed HIB. N.J.A.C. 6A:16-7.7(a)(2)(vi)(1) provides that a board's HIB policy must include consequences for a

student who commits an act of HIB that are "[v]aried and graded according to the nature of the behavior; the nature of the student's disability, if any, and to the extent relevant; the developmental age of the student; and the student's history of problem behaviors and performance."

The Board's HIB policy states, "The board expects students to conduct themselves, in keeping with their level of maturity, with a proper regard for the rights and welfare of other students . . . ." (P-10 at 1.) It goes on to repeat the standard set forth in the regulations. Petitioners argue that Superintendent Moutis did not take into account A.K.'s developmental age or maturity level, as she believed it was irrelevant. When a Board member asked about A.K.'s age, she insisted that under the law the Board must consider the student's conduct without regard to his or her age. The Board spent more than an hour discussing A.K.'s alleged HIB at its October meeting, and Superintendent Moutis testified that the primary focus of that discussion was the issue of A.K.'s developmental age and the relevance of her age to the question of whether she engaged in HIB. The Superintendent's conclusion was affirmed by a vote of four in favor and two abstaining. The Board discussed the issue again after the November appeal hearing, and the Superintendent's decision was affirmed as part of the Board's consent agenda on December 14, 2015. The Board did not produce any written opinion or decision. Ms. Perrone testified that she considered A.K.'s age, but concluded that A.K. understood that she was upsetting N3 and persisted, and that what really mattered was the impact of her conduct on N3, not her actual intent.

The superintendent was incorrect that A.K.'s developmental age was irrelevant, based on the HIB regulations and the Board's HIB policy. The superintendent's opinion on this point was relevant to the Board members because they asked about it in a lengthy closed-session meeting in October. If Superintendent Moutis had said that A.K.'s young age was not a bar to finding HIB, that would have been correct; however, saying that it had no bearing on the Board's decision was incorrect. The issue is whether the superintendent's misstatement of the law means that the Board was arbitrary, capricious, or unreasonable in its decision to uphold the superintendent's conclusion that A.K. committed HIB. I **CONCLUDE** that it was.

Petitioners argue that A.K.'s developmental age is relevant not just under the regulations and Board policy, but as to whether her behavior can actually be HIB. They cite N.J.S.A. 18A:37-14 for the proposition that the behavior must be "motivated by any actual or perceived characteristic." However, the actual wording of the statute says that HIB means "any gesture, any written, verbal or physical act, . . . that is **reasonably perceived** as being motivated either by any actual or perceived characteristic, such as . . . gender identity and expression." N.J.S.A. 18A:37-14 (emphasis added). Thus, based on the "reasonably perceived" language, Ms. Perrone was correct that the statute focuses on the impact of A.K.'s conduct on N3 and what N3 reasonably perceived. However, Ms. Perrone's determination of the impact on N3 was made based on the "fact" that A.K.'s conduct persisted. There was no allegation that A.K. continued to question N3 about his choice of clothing after the mediation. The allegation that A.K. continued "harassment" of N3 in the cafeteria the next day was not supported by one person who was there, hence, the vagueness of the charge. T.K. was never told what the harassment consisted of because the allegation was not investigated. Ms. Perrone's decision was also made without knowing that there was at least one other student, J., who harassed N3 on the bus and could have been an additional source of N3 being upset and not wanting to ride the bus. This fact was hidden by the investigators. There is no requirement that the Board find that A.K.'s conduct was actually motivated by the perceived characteristic, because, as petitioners argue, A.K. most likely does not even know what "gender identity" means. However, even under the actual wording of the statute, the only corroborated finding from the investigation was that A.K. asked questions about why N3 dressed like a girl even though N3 asked her to stop. Therefore, the age of A.K. was relevant to whether A.K.'s conduct was motivated by the perceived characteristic or because a seven-year-old would be curious about why a student she knew as a boy was dressing like a girl. The investigators had the time to find and interview someone in the cafeteria who may have heard A.K. continue the "harassment," but they did not. I **CONCLUDE** that the misstatement of the law that age was not to be a factor in the Board's determination was a major factor in the Board's decision and it made the Board's decision arbitrary, capricious, or unreasonable.

Petitioners also argue that the Board's decision was clearly erroneous because the facts do not support the conclusion that A.K. committed HIB, in that they did not show that her conduct "substantially [disrupted or interfered] with the orderly operation of the school or the rights of other students" and that A.K. knew or should have known that it would have the effect of emotionally harming a student. N.J.S.A. 18A:37-14. The Board accepted the superintendent's report that A.K. demonstrated that she knew her conduct would emotionally harm N3 because she was concerned about N3 tattling on her. The superintendent advised the Board that there is no reason for A.K. to fear N3 telling the teacher or principal if she really believed she was just asking a question out of curiosity. When A.K. got off the bus on September 29, 2015, she was upset that N3 would tell on her. A second-grade student knows when she is in trouble, even if she does not necessarily believe that she did anything wrong. Strickland and Cullari told her that she did something wrong by asking N3 so many questions, and there is no allegation that she continued to ask him questions after that. In addition, T.K.'s testimony that A.K.'s current relationship with N3 is that they are in the same class as well as on the same bus was unrefuted. The testimony that they play together and are just typical students also was not disputed by any of the Board witnesses. In fact, the testimony demonstrated that the incident had a more lasting effect on A.K., making her more nervous and scared of doing anything wrong. In addition, N3 chose to bring A.K. as his friend to his counseling session. Therefore, I **CONCLUDE** that A.K. did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students, and that A.K. neither knew nor should have known that her conduct would have the effect of emotionally harming a student.

Petitioners insist that the Board had to find "malicious intent" in A.K.'s actions; however, that language is not in the statute or regulations governing HIB. The Legislature could have set a higher standard for a finding of HIB, but it did not. As a result, the reasonable perception of motivation by gender identity is sufficient to support a finding of HIB. Here the Board did not have evidence that A.K.'s conduct was motivated by anything other than curiosity, confusion, and being scared that N3 would tell on her. The impact on N3 that he was upset and no longer wanted to ride the bus may not have been solely the fault of A.K. The investigators did not ask about whether the conduct of J. or any other student on the bus made N3 upset. If the Board had the

information that other students harassed N3, and still decided that A.K. was the source of the substantial impact on N3, that would have been fine. However, the Board was not provided that information.

Ms. Strickland, Ms. Cullari, and Ms. Moutis concluded that A.K. engaged in HIB based on their findings that A.K. admitted that she asked questions that made N3 uncomfortable and upset, that she knew her actions made N3 uncomfortable and upset, that she was concerned that N3 would tell on her, and that, the next day, she continued to express concern that N3 would tell on her and threatened him if he did. The conclusion was provided to the Board when there was no corroboration for the finding that A.K. expressed a threat to N3 if he told on her. The Board relied heavily on the continuing nature of the conduct, which was not corroborated. The Board accepted the administrators' conclusion that the conduct was reasonably perceived to be motivated by N3's gender identity because they were told that A.K.'s age was not a factor in that determination. The Board accepted the conclusion that A.K.'s conduct substantially interfered with the rights of N3 because information was withheld from them that there was at least one other student who may have contributed to N3 being upset and not wanting to ride the bus. For these reasons, I **CONCLUDE** that the Board's acceptance of the administrators' determination of HIB was inconsistent with evidence, the law, and Board policy.

Thus, in determining whether A.K. committed HIB pursuant to N.J.S.A. 18A:37-14, the Board did not have evidence that A.K. knew that her asking questions would have the effect of emotionally harming N3. In fact, there is no evidence that her conduct did emotionally harm N3, other than he was upset when getting off the bus. The Board did not have evidence from the alleged victim, the accused, or any witness that A.K.'s conduct had the effect of insulting or demeaning N3. The only source of such information was N3's mom, and her allegations referenced conduct that occurred prior to the September 29, 2015, bus incident. There were no allegations that A.K. said anything insulting to N3 after the September 29, 2015, incident. Last, the Board had no evidence that A.K.'s conduct created a hostile educational environment. The investigators never talked to N3's teacher or any staff members to determine whether

N3 was acting differently in school at that time. For these reasons, I **CONCLUDE** that A.K.'s conduct did not meet the statutory definition of HIB, N.J.S.A. 18A:37-14.

The Board decision was not made in bad faith; however, it was made with reliance on faulty information of the circumstances that led to the HIB determination and incorrect statements of the law. For the foregoing reasons, I **CONCLUDE** that the petitioners proved by a preponderance of the credible evidence that the Board's actions were arbitrary, capricious, or unreasonable.

ORDER

I **ORDER** that the decision of the Mansfield Township Board of Education be **REVERSED**, and that the finding of harassment, intimidation, or bullying be removed from A.K.'s student file.

I hereby **FILE** my initial decision with the **COMMISSIONER OF EDUCATION** for consideration.

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

January 22, 2019
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: _____

Date Mailed to Parties: _____

caa

APPENDIX

WITNESSES

For Petitioners:

T.K.

For Respondent:

Stacy Cullari
Cheryl Strickland
Brett Gorman, Esq.
Alison Perrone
Tiffany Moutis

EXHIBITS

Joint:

J-1 Initial HIB report dated September 29, 2015
J-2 Notes from HIB investigation
J-3 Bullying Incident Report Form
J-4 HIB Investigation Form 1 dated October 1, 2015
J-5 HIB Investigation Form 2 dated October 1, 2015
J-6 Email from T.K. to Stacy Cullari dated October 1, 2015
J-7 Email from M.V. to Stacy Cullari dated October 5, 2015
J-8 Letter from Stacy Cullari to petitioners dated October 15, 2015
J-9 HIB report for N.V. and A.K.
J-10 HIB Intervention Plan Documents
J-11 HIB Investigation Anti-Bullying Specialist Report 1 dated October 15, 2015
J-12 HIB Investigation Anti-Bullying Specialist Report 2 dated October 15, 2015
J-13 BOE Meeting Agenda dated October 19, 2015
J-14 BOE Public Meeting Minutes dated October 19, 2015
J-15 BOE Executive Session Meeting Minutes dated October 19, 2015

J-16 Letter from Tiffany Moutis to petitioners dated October 20, 2015

J-17 Letter from Cheryl Strickland and Dori Levy to petitioners dated October 20, 2015, enclosing the Bullying Report

J-18 Letter from Tiffany Moutis to petitioners dated November 2, 2015

J-19 Letter from petitioners to Mansfield Township School District dated November 3, 2015

J-20 BOE Meeting Agency dated November 16, 2015

J-21 BOE Public Meeting Minutes dated November 16, 2015

J-22 BOE Executive Session Meeting Minutes dated November 16, 2015

J-23 BOE Meeting Agenda dated December 14, 2015

J-24 BOE Public Meeting Minutes dated December 14, 2015

J-25 Letter from Joyce Goode to petitioners dated December 15, 2015

J-26 Handwritten notes—bus incident of 9/29/15

J-27 Handwritten notes—Ms. V. and T.K.—dated September 29

J-28 Handwritten notes dated October 5, 2015

For Petitioners:

P-1 Pictures of A.K.

P-2 A.K. note dated September 30, 2015

P-3 Ms. Cullari email to T.K. dated October 7, 2015

P-4 T.K. email to Cullari dated October 7, 2015

P-5 Email exchange between T.K. and Ms. Cullari dated October 15, 2015

P-7 T.K.'s HIB appeal outline/presentation

P-10 Mansfield Township School District HIB Policy 5131.9

P-11 Mansfield Township School District Conduct/Discipline Policy 5131

P-12 Mansfield Township School District Parent/Student Handbook—2015--2016

P-13 N.J. Department of Education Anti-Bullying Bill of Rights Act, Questions and Answers

P-14 N.J. Department of Education Model Policy and Guidance for Prohibiting HIB

P-15 Draft HIB report for review

P-16 Email Cheryl Strickland to T.K.

P-17 Email exchanges re: HIB

P-18 Email exchanges of Stacy Cullari re: HIB report

P-19 N.J. Department of Education Guidance for Schools for the Anti-Bullying Bill of Rights Act

For Respondent:

R-1 Email from T.K. to Cheryl Strickland

108-19

New Jersey Commissioner of Education

Final Decision

Sterling Education Association, individually and on behalf of member Simone Colancecco,

Petitioner,

v.

Board of Education of the Sterling Regional School District, Camden County,

Respondent.

Synopsis

Petitioner Sterling Education Association, on behalf of member Simone Colancecco, challenged the findings of the respondent Board's (Board) Affirmative Action investigation into an alleged violation of the Board's sexual harassment policy. Petitioner complained that the Board's investigation – which did find that a violation of the policy had occurred when Ms. Colancecco's former male supervisor sent her emails and text messages with sexual overtones – failed to substantiate an additional allegation that she had been groped. Further, the investigation found that any conduct with respect to the groping allegation was not gender-based. The Board's investigation resulted in the perpetrator's suspension from employment and subsequent resignation. Here, the petitioner challenged the Board's determination that the alleged groping incident did not amount to sexual harassment. The Board filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found, *inter alia*, that: Ms. Colancecco's claim of sexual harassment was proven through the investigation and accepted by the Board, so there is no actual controversy for the Commissioner to resolve herein; the Commissioner need not consider appeals of a portion of a Board's findings where the overall decision has agreed with the complainant; in this case, the Board determined that petitioner had suffered sexual harassment and sanctioned the perpetrator, who subsequently resigned from the Board's employ; the review requested by petitioner herein would involve the Commissioner and the OAL in proceedings that would have no practical value in regard to school law, and would drain judicial and administrative resources better reserved for controversies that involve actual disputes over outcomes that are meaningful in the administrative context; if petitioners decide to pursue this matter further, they may choose to seek relief from Public Employment Relations Commission and the federal Equal Employment Opportunity Commission (EEOC). The ALJ concluded that the within petition before the Commission must be dismissed for failure to state a claim for which any meaningful relief can be granted, and for mootness.

Upon comprehensive review, the Commissioner adopted the Initial Decision of the OAL with modification and dismissed the petition. In so doing, the Commissioner noted, *inter alia*, that his jurisdiction is limited to controversies and disputes arising under New Jersey school law. Petitioner's contention – that this matter arises out of school law because discrimination based on sex is prohibited by *N.J.S.A.* 18A:6-6 – is baseless, as this statute does not apply to the sexual harassment alleged in this matter. *N.J.S.A.* 18A:6-6 prohibits employment discrimination based on sex, and petitioner's allegations do not pertain to her employment. As the Commissioner does not have jurisdiction here, he need not reach the issue of whether an actual controversy exists. Further, the Board's policy prohibiting sexual harassment stipulates that the employee may appeal the Board's action or inaction to the New Jersey Division on Civil Rights or the EEOC; thus, petitioner has recourse to pursue her claim in an appropriate venue.

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 23, 2019

OAL Dkt. No. EDU 00295-19
Agency Dkt. No. 277-11/18

New Jersey Commissioner of Education

Final Decision

Sterling Education Association, individually and on behalf of member Simone Colancecco,

Petitioner,

v.

Board of Education of the Sterling Regional School District, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, petitioner challenges the findings of the Board's Affirmative Action investigation regarding an alleged violation of the Board's sexual harassment policy. The investigation found that a violation of the policy had occurred involving inappropriate communications from Simone Colancecco's former male supervisor, including email and text messages with sexual overtones. Petitioner's allegation that she had been groped, however, was not substantiated, and the investigation found that any conduct with respect to that allegation was not gender-based. The perpetrator was suspended from his employment with the District and subsequently resigned from his position. Petitioner challenges the Board's determination that the alleged groping did not amount to sexual harassment. The Administrative Law Judge (ALJ)

granted the Board's motion to dismiss the petition. The ALJ concluded that there was no actual controversy for the Commissioner to resolve. Specifically, the ALJ found:

> [I]t is not the case that the Commissioner need consider appeals of a portion of a Board's findings where the Board's overall decision has agreed with the complainant that she suffered sexual harassment in violation of the Policy and the Board has acted to sanction the perpetrator in a manner and to an extent that is not contended to be legally insufficient. A review of this nature would involve both the Commissioner and the OAL in proceedings that would be of no practical value in regard to education law and would involve a drain on judicial and administrative resources better used for controversies that involve actual disputes over outcomes that are, in the administrative context, meaningful.
> (Initial Decision at 8)

In her exceptions, petitioner disagrees with the ALJ's interpretation that the requested relief is not meaningful or of practical value. Petitioner argues that this matter is not moot because "an ultimate finding of sexual harassment on some, but not all, of [petitioner's] complaints does not put beyond review the [Board's] actions, procedures and findings." (Petitioner's exceptions at 6). Petitioner maintains that there is meaningful and practical value in having all of the conduct of her harasser fairly investigated and condemned by her employer. By carving out the alleged groping incident as not being gender-based, and by incorrectly stating that the incident took place at a training, when it actually occurred separately from the training, petitioner contends that the Board violated its own policy and acted arbitrarily and capriciously.

Petitioner also argues that the Commissioner has jurisdiction over this matter pursuant to *N.J.S.A.* 18A:6-9 because it arises under the school laws of this State – specifically under *N.J.S.A.* 18A:6-6, which provides that "[n]o discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matters pertaining to the employment of teachers in any school . . . in this state." Further, petitioner contends that while the Public Employment

Relations Commission (PERC) and the Equal Employment Opportunity Commission (EEOC) can review certain claims and issues, only the Commissioner has the authority to revise the findings of an Affirmative Action Officer. Accordingly, if the Commissioner chooses not to exercise jurisdiction, petitioner would be left without recourse.

Petitioner contends that there is a controversy and conflict about whether the Board complied with its sexual harassment policy with respect to whether the Board provided the applicable regulations to petitioner and complied with the timelines. A conflict also exists regarding the findings and conclusions of the investigation that the groping incident was not "gender based." Finally, petitioner makes the policy argument that the Initial Decision sends the wrong message to victims of sexual harassment.

In reply, the Board contends that the ALJ did not make a specific finding that the matter was moot and instead based his decision on the lack of a controversy or dispute, as the Board did find that petitioner had been sexually harassed. The Board maintains that the Affirmative Action Officer thoroughly investigated the groping allegations, including multiple witness interviews, and found that although it was inappropriate, it was not gender-based. Regardless of the finding on that individual allegation, the overall outcome of the investigation was that a sexual harassment violation had occurred. Accordingly, the outcome of the investigation would not change if the specific finding was amended. Nevertheless, the Board points out that it did allow petitioner to include her factual concerns about the groping allegation in the investigatory file.

The Board argues that petitioner's claim that the Commissioner has sole jurisdiction over amending the Affirmative Action report, and that she otherwise has no recourse,

is disingenuous. If the Commissioner had jurisdiction, he would not revise the report but instead make determinations that certain findings were erroneous, which is within the EEOC's purview.

The Board contends that petitioner's argument that it failed to provide policies and follow its own self-imposed timelines is not an issue of school law, so no relief can be granted. Finally, the Board maintains that the Initial Decision is not contrary to public policy, as the Board had already decided in petitioner's favor. Overall, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner notes that he has jurisdiction over controversies and disputes that arise under the school laws of this State. *N.J.S.A.* 18A:6-9. Petitioner argues that this matter arises out of school law because discrimination based on sex is prohibited by *N.J.S.A.* 18A:6-6. Pursuant to *N.J.S.A.* 18A:6-6:

> No discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter *pertaining to the employment of teachers* in any school . . . in this state, supported in whole or in part by public funds unless it is open to members of one sex only, in which case teachers of that sex may be employed exclusively.
> [Emphasis added.]

The Commissioner finds that this statute applies to sexual discrimination in employment but does not apply to sexual *harassment*, as alleged by petitioner in this matter. It is clear that this statute prohibits discrimination based on sex by a Board when making employment decisions regarding an employee; this matter, however, does not pertain to the employment of petitioner. Further, the alleged harassment did not involve the Board, but rather an individual employee over whom the Commissioner does not have jurisdiction.

The Commissioner may have jurisdiction to the extent that petitioner alleges that the Board violated a Board policy. However, it is undisputed that the Board's Affirmative

Action Officer conducted an investigation, as required by the Board's policy prohibiting sexual harassment. Petitioner claims she was not provided with copies of the policies, but no relief can be granted as petitioner has since received them. Petitioner's remaining claims stem from the substance of the investigation and its findings, which are beyond the Commissioner's jurisdiction.[1] Notably, the Board's policy prohibiting sexual harassment indicates that the employee may appeal the Board's action or inaction to the New Jersey Division on Civil Rights or to the United States Equal Employment Opportunity Commission. As such, petitioner is not without recourse to pursue her claim.

Accordingly, the Initial Decision of the OAL is adopted – as modified herein – as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/19
Date of Mailing: 4/23/19

[1] As the Commissioner does not have jurisdiction over this matter, he need not reach the issue of whether an actual controversy exists.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 295-19
AGENCY DKT. NO. 277-11/18

STERLING EDUCATION ASSOCIATION, INDIVIDUALLY AND ON BEHALF OF MEMBER SIMONE COLANCECCO,

Petitioners,

v.

BOARD OF EDUCATION OF THE STERLING REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Matthew B. Wieliczko, Esq., for petitioners (Zeller & Wieliczko, attorneys)

Jeffrey R. Caccese, Esq. for respondent (Comegno Law Group, attorneys)

Record Closed: March 1, 2019 Decided: March 14, 2019

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

The Sterling Education Association and one of its members, Simone Colancecco, filed a Verified Petition of Appeal with the Commissioner of Education, seeking relief from what the Petition describes as improper conduct by the Board in connection with an Affirmative Action investigation of alleged improper conduct by its employee, Michael Eckmeyer, Director of Student and Personnel Services/Special Services. This was

conduct directed toward Simone Colancecco, an Instructional Assistant and his subordinate employee. The Affirmative Action Complaint claimed that Colancecco was "continually harassed from the time of her hiring in August 2016 until January 2018." The actions included inappropriate text messages, email and in-person conversations, unwanted sexual advances and sexually offensive groping and speech, and Eckmeyer's "overall attitude towards women."

After Ms. Colancecco filed her complaint, Mr. Eckmeyer was suspended with pay in accordance with N.J.S.A. 18A:25-6. After his suspension, Eckmeyer did not return to work with the District and resigned his position effective September 1, 2018.

Although the Affirmative Action investigation led to a determination by the Affirmative Action Officer that Eckmeyer did violate the Board's Policy "4352-Sexual Harassment," by means of "inappropriate communication with sexual overtones, via certain email and text messages", the Petition claims that the determination improperly failed to find that a portion of the complained conduct was "gender based." This specifically involved a claim of inappropriate "groping" that Colancecco claimed occurred in December 2017. More specifically, she claimed that this incident took place "outside of any training session" regarding "student restraint technique," but instead during "free time." The Affirmative Action Officer's, May 11, 2018, summary of her findings reports that she found that the allegation that Colancecco was "groped during a restraint training" was unsupported by the evidence adduced. Colancecco contends that this finding is factually and legally false. Further, the Petition contends that the Board failed to provide certain policies when requested and limited, or barred, Association member witnesses, as well as Colancecco, from having legal representation during the investigation. In addition, the Board improperly denied the appeal from the Affirmative Action Officer's findings when it concurred with those findings. The Petition seeks referral to an administrative law judge for a hearing to determine whether the Board improperly refused to revise the findings; to determine that the Board acted arbitrarily and capriciously in denying the appeal at the superintendent and Board level, in violation of applicable laws and in violation of the Collective Bargaining Agreement; and that the Board deprived Colancecco of her right to have counsel to assist her with the filing of the Affirmative Action Complaint and the

investigation thereof; as well as directing that the Board post all Board policies and regulations on its website. Finally, it seeks to have the Board found to have deprived Colancecco of her procedural rights by depriving her of all policies and regulations applicable to her complaint, findings and appeal, and such other relief as may be deemed appropriate.

In response to the Petition, the respondent filed a Motion to Dismiss in Lieu of Answer. It notes that the petitioners failed to identify any school law that they assert serves as grounds for invoking the jurisdiction of the Commissioner, in violation of N.J.S.A. 18A-16.9. Further, it points out that the petitioners failed to note that they had filed two other administrative matters, one with the Equal Employment Opportunity Commission (EEOC) and the other with the Public Employment Relations Commission (PERC), each involving a "similar issue of both fact and law," in violation of N.J.A.C. 6A:3-1.5.[1] Finally, it argues that even if the Petition survives these challenges, the petitioners' claim is moot.

A Motion to Dismiss is recognized in the Administrative Code at N.J.A.C. 6A:3-1.5(g). While the Commissioner may dismiss the petition based on such motion prior to referral of the matter to the Office of Administrative Law, it is also the Commissioner's prerogative to transfer determination of the motion to the OAL. Lack of jurisdiction is a classic basis for such a motion, see New Jersey Court Rule, R. 4:6-2(e), as is failure to state a claim upon which relief can be granted. In assessing such a motion, the claims made by the party who filed the petition must be deemed to be true and all reasonable inferences such allegations may support must be accepted. The standard utilized by the courts in judging such motion is traditionally quite liberal towards the non-moving party. Green v. Morgan Props., 215 N.J. 431, 451 (2013).

[1] N.J.A.C. 6A:3-1.5 provides "[a]ny party to a controversy or dispute before the Commissioner, who is a party to another action before any other administrative agency . . . involving the same or similar issue of fact or law, shall indicate the existence of such action or complaint with the petition of appeal." Further, "[f]ailure to so certify may be deemed sufficient cause for dismissal of the petition of appeal when . . .such failures result in the duplication of administrative procedures for the resolution of a controversy or dispute." According to the respondent, the EEOC matter was initially filed with the United States Department of Education, Office of Civil Rights, and was then transferred by the Office of Civil Rights to the EEOC on August 7, 2018. Thus, that filing involves federal jurisdiction, and there is no indication of any referral to or filing with the New Jersey Division on Civil Rights

As background, in response to Ms. Colancecco's complaint, Vice Principal Curriculum and Affirmative Action Officer Robynn Considine issued a letter to Colancecco, dated May 11, 2018, in which Considine explained that the investigation determined that a violation of Policy 4352-Sexual Harassment had occurred.[2] This was found to include "inappropriate communication with sexual overtones, via certain email and text messages from Mr. Eckmeyer to" Colancecco. Considine continued

> Although you alleged that Mr. Eckmeyer groped your (sic) during a restraint training, the evidence adduced during the investigation did not support that allegation. Although it was evident that the experience was inappropriate and uncomfortable for you and several witnesses, it could not be concluded that the conduct by Mr. Eckmeyer was gender based. Nevertheless, the overall conduct by Mr. Eckmeyer violated the policy as he was your supervisor.

When Ms. Colancecco sought to appeal Considine's findings, Superintendent Mark Napoleon found no grounds for appeal. He noted Considine's findings, including the denial of a gender-based element during what Considine styled as "restraint training." However, given Considine's finding on this element of the complaint, and, to Napoleon, the more significant finding that the Board's sexual harassment policy had been violated and "remedial steps have been taken, there is no grounds for an appeal." However, Napoleon added, "Regardless, after reviewing Ms. Considine's report and your appeal letter, I concur with Ms. Considine's findings." When the Board of Education next considered Colancecco's correspondence appealing the decisions of the Affirmative Action Officer and the Superintendent, Board President Paul Sims wrote, on September 6, 2018, that the Board concurred in those findings, again noting that remedial steps had been taken to address Eckmeyer's conduct which found to have violated the Sexual Harassment policy. President Sims added that Colancecco's appeal of the investigation findings would be included in the investigation file "to note the areas you feel there are discrepancies."

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[2] The Sexual Harassment policy defines "sexual harassment" as including "all unwelcome sexual advances, requests for sexual favors and verbal or physical contacts of a sexual nature that would not have happened but the employee's gender." As such, by definition, a violation of the policy must be "gender based." Here, Colancecco seeks to add to the already determined gender-based harassment an additional episode of physical harassment that she claims was, despite the Board's conclusion to the contrary, also "gender based."

In opposition to the motion to dismiss, counsel for the petitioners argues that the Commissioner has the clear authority to review the "Board's arbitrary and capricious decision in applying its own policies and procedures." He points out that the Commissioner properly conducts such "first instance" review of Board action. Discrimination based on sex is prohibited by N.J.S.A. 18A:6-6, a "school law," which makes such discrimination unlawful in matters "pertaining to the employment of teachers in any school . . . of this state." This Petition is filed pursuant to the general authorization for such appeals under N.J.A.C. 18A:6-9 and N.J.A.C. 6A:7-1.10. The failure of the Board to amend the findings of the Affirmative Action Officer to recognize that the "groping incident" did not occur during "restraint training," as the officer found, and to characterize this incident as "gender based," created a controversy under the school laws and in regard to the proper application of the Sexual Harassment policy, a policy arising out of a school law. As such, jurisdiction is established.

In regard to the separate filings with the Commissioner, EEOC and PERC, counsel contends that the applicable provision of the Administrative Code, N.J.A.C. 6A:3-1.4(c) indicates that the existence of other actions involving the same or similar issues of law and fact

> shall indicate the existence of such action or complaint within the petition of appeal . . . Failure to so certify may be deemed to be sufficient cause for dismissal of the petition when, in the judgment of the Commissioner and/or ALJ, such failure results in the duplication of administrative procedures for the resolution of a controversy or dispute.

Counsel offers that the several filings in different "alternative venues" were made to ensure that the "claims for relief and remedies sought in each matter can in fact be awarded in a particular venue." While not denying that the Petition failed to identify these "alternative" proceedings, counsel asserts that petitioners are not seeking to have the Commissioner duplicate actions in other administrative proceedings. However, counsel then acknowledges that it might be necessary to consider the issues of consolidation and predominant interest, presumably at least in regard to the current petition and the pending PERC matter, as the EEOC matter lies with federal jurisdiction.

As for the claim that the Petition is moot, counsel points to the superintendent's letter, noting that while it acknowledges the discomfort that Colancecco no doubt experienced, in regard to the "groping," the determination was that it was not gender based and therefore did not violate the sexual harassment policy. Clearly, this position is in direct opposition to Ms. Colancecco's understanding to the timing and nature of the "groping" and thus, whether it somehow avoids the characterization of gender-based sexual harassment or instead falls within that definition. And the various concerns about the Board's alleged failures to make available policies, procedures and to allow representation of Colancecco and other union member witnesses during the investigation are certainly not moot concerns.

In its response brief, the Board reasserts its earlier position. It offers that the Board does not dispute that Ms. Colancecco was indeed a victim of gender-based sexual harassment, and that to the extent she is appealing based upon an alleged violation of the Board's Sexual Harassment Policy, the Board did not deny that Eckmeyer's conduct violated that policy in relation to her, only that a portion of her overall claim was not established as gender-based misconduct.

Discussion

Initially, it is clear that Ms. Colancecco claimed that Mr. Eckmeyer had engaged in conduct that exposed her to inappropriate materials, conversations and communications that were of a sexual nature. The Affirmative Action Officer investigated and concluded that she had indeed been harassed and that the Sexual Harassment Policy-4352 had been violated. That Policy defines "sexual harassment" as "all unwelcome sexual advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender." By its very wording, as the portion here underlined makes abundantly clear, this Policy defines any conduct found to have violated the Policy as necessarily gender based. The actions violating the Policy must be such as would not have occurred "but for" the victim's gender. Thus, while the decisions of the Affirmative Action Officer, Superintendent and Board all found that one element of the claimed harassment was not proven to be gender based, the overall conclusion was that Eckmeyer engaged in

gender-based harassment of Colancecco. In light of the terms of the Policy, there is simply no other way to understand the findings.

As the Board properly noted, Ms. Colancecco, the alleged and, in fact determined, victim of the gender-based sexual harassment, had the right to appeal the decisions of the Affirmative Action Officer and the Superintendent to the Board. In general, decisions made by boards of education regarding violation of school laws are appealable to the Commissioner of Education. Interestingly, the Board's Policy on Sexual Harassment, 5352, explains that an employee may appeal the Board's action or inaction on a claim of a violation of the Policy to "the New Jersey Division on Civil Rights or to the United States Equal Employment Opportunity Commission." There is no mention of any appeal to the Commissioner.

The Board argues that there really is no dispute here for the Commissioner to consider. In summary, Colancecco claimed to have been sexually harassed, the Affirmative Action Officer, Superintendent, and, most importantly, the Board, all agreed that she was. That harassment was by definition, "gender based." That she disputes a portion of the findings does not detract from the fact that all agree that Eckmeyer violated the Policy, and that he sexually harassed her. Thus, what is there for the Commissioner to consider? If the Commissioner were to determine that the "groping" incident was actually gender based, that determination would not change the fact that the Board has already agreed with the complainant that she was sexually harassed and that by definition, that harassment was gender based. From the standpoint of education law, and the role of the Commissioner, it is entirely unclear what the legal significance of such a determination would be. While Ms. Colancecco may desire a finding of gender-based misconduct regarding the "groping" incident for other legal purposes, I fail to see that the Commissioner has anything to review here. And interestingly, the petitioners' requests for relief does not suggest that a finding such as they seek regarding the "groping" incident should result in any additional response by the Board vis-a-vis Eckmeyer. He was suspended while the investigation was conducted, and he resigned his position with the Board without ever resuming his work.

Reading the Petition with the liberality afforded in considering a motion to dismiss, it may be that an appeal of a Board's decision regarding an alleged violation of the Board's Sexual Harassment Policy does lie with the Commissioner. However, it is not the case that the Commissioner need consider appeals of a portion of a Board's findings where the Board's overall decision has agreed with the complainant that she suffered sexual harassment in violation of the Policy and the Board has acted to sanction the perpetrator in a manner and to an extent that is not contended to be legally insufficient. A review of this nature would involve both the Commissioner and the OAL in proceedings that would be of no practical value in regard to education law and would involve a drain on judicial and administrative resources better used for controversies that involve actual disputes over outcomes that are, in the administrative context, meaningful. As such, I **CONCLUDE** that Ms. Colancecco's claim of sexual harassment by Eckmeyer has been proven and accepted by the Board, and that there is no actual controversy for the Commissioner to resolve. While it may be that portions of the complaint regarding representational rights, and the provision of policies are properly considered by PERC in regard to the parallel Petition filed with it, given that the Commissioner has nothing to resolve regarding the claim that sexual harassment occurred, there is no need to consider consolidation and predominant interest. The Petition filed with the Commissioner is **DISMISSED** for failure to state a claim for which any meaningful relief can be granted and for mootness. The petitioners may choose to continue to seek relief from PERC and the federal EEOC.

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

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

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

March 14, 2019
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 3-14-19

Date Mailed to Parties: 3-14-19

mph

109-19

New Jersey Commissioner of Education

Final Decision

Ali Kesim,

Petitioner,

v.

Board of Education of the Borough of New Providence, Union County,

Respondent.

Synopsis

The petitioner challenged the Board's decision to terminate his employment as a custodian in the school district following a physical altercation with another employee; petitioner had also been involved in other repeated incidents of conduct that resulted in discipline. The petitioner asserted that the Board's action violated the tenure laws, *N.J.S.A.* 18A:17-3. The Board contended that petitioner's employment was subject to a Custodial Collective Bargaining Agreement (CBA), and that there is no grant of tenure in the CBA of this district. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material facts in dispute, and the matter is ripe for summary decision; the issue for determination was whether the Board violated the Tenure Act, *N.J.S.A.* 18A:17-3, and the district's CBA when it terminated petitioner's employment; petitioner was hired by the Board as a custodian in October 1998; in each year of his employment, petitioner received and signed an Employment Contract containing a clause which allows for the termination of the contract by either party with 30 days' notice in writing; all custodians and bus drivers in the district, as tenure ineligible employees, received an employment contract with a fixed term each year; the relevant CBA expired on June 30, 2018, and does not use the word "tenure" in any provision; petitioner received written notice on or about February 8, 2018 that the Board was terminating his employment effective January 24, 2018 because of a physical altercation with another employee on January 18, 2018, as well as prior repeated incidents which resulted in discipline; the notice informed petitioner that he was terminated pursuant to the notice provision in his contract, and that he would be placed on paid leave through his termination date of February 22, 2018; although the relevant CBA stated that "permanent status" was given to all custodians after the beginning of their fourth consecutive year of employment, the CBA also gives the Board the right to relieve employees of their duties for just cause through the notice provision in the annual contract. The ALJ concluded that petitioner was properly terminated on contractual notice for just cause. Accordingly, summary decision was granted in favor of the Board, and petitioner's cross-motion was denied.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

April 23, 2019

OAL Dkt. No. EDU 8311-18
Agency Dkt. No. 122-5/18

New Jersey Commissioner of Education

Final Decision

Ali Kesim,

Petitioner,

v.

Board of Education of the Borough of New Providence, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Ali Kesim, and the New Providence Board of Education's (Board) reply thereto. In this matter, the petitioner is challenging the Board's decision to terminate his employment as a custodian in the school district.[1] The Administrative Law Judge (ALJ) granted summary decision in favor of the Board and recommended that the petition of appeal be dismissed. In so doing, the ALJ found that the petitioner did not have tenure as a custodian under *N.J.S.A.* 18A:17-3 because he was appointed for a fixed term for each year of his employment with the District. Additionally, the Board did not violate the Collection Bargaining Agreement (CBA) when it terminated petitioner's employment because the CBA did not provide custodians in the District with tenure.

In his exceptions, the petitioner maintains that the Initial Decision should be rejected because the ALJ failed to apply the plain language of *N.J.S.A.* 18A:17-3 and

[1] The Board acted to terminate the petitioner's employment based on a physical altercation with another employee, as well as other repeated incidents that have resulted in discipline.

misinterpreted the holding in *Wright v. Board of Educ. of E. Orange*, 99 *N.J.* 112 (1985). The petitioner argues that he held tenure when he was unilaterally terminated because the CBA that was in effect at the time states, "[w]hen an employee commences his/her fourth year of consecutive employment in the district, that employee shall have permanent status under the agreement." Thus, the CBA effectively accords permanent status to all custodians who are employed by the Board for a period of over three years and these employees are no longer subject to the non-renewal procedures of *N.J.S.A.* 18A:27-4.1. The petitioner further contends that simply because the agreement in *Wright*, *supra*, contained the word "tenure" does not mean that every agreement in every school district throughout the state has to have the word "tenure" in order for custodians to earn it. Accordingly, the Board should be ordered to immediately reinstate the petitioner at a salary level appropriate for the 2018-2019 school year. Finally, if summary decision is not entered in favor of the petitioner based on the relevant case law and plain reading of the CBA, this matter should be remanded to the OAL for a hearing as to all material facts in dispute, including the intent of the parties to the CBA.

In reply, the Board maintains that in the Initial Decision the ALJ properly found that *N.J.S.A.* 18A:17-3 grants tenure to custodial employees only if such employees are not appointed to fixed terms. When custodial employment is governed by a CBA, the CBA may grant tenure to custodial employees. Despite the petitioner's allegations, the ALJ did not establish a bright line rule requiring all CBAs to contain the word "tenure." Instead, the ALJ reviewed the terms of the CBA in this case and determined that, unlike in *Wright*, *supra,* an agreement that contains a clear, express provision granting custodian tenure does not exist in the current CBA. Therefore, the ALJ considered extrinsic evidence including the Board's practice of issuing non-tenured employees Employment Contracts, similar to the contract that was signed annually by the petitioner while tenured employees were issued Salary Statements. Further, the ALJ properly

credited petitioner's execution of a fixed term employment contract containing a thirty (30) day notice provision for termination in each of his nearly twenty (20) years of employment as evidence of petitioner's non tenured status. Therefore, the Initial Decision should be adopted as the final decision in this matter.

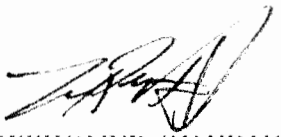
Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not have tenure as a custodian under *N.J.S.A.* 18A:17-3, and the Board did not violate the CBA when it terminated petitioner's employment. The Commissioner is also in accord with the ALJ's determination that there are no material facts in dispute prohibiting the dissolution of this matter by summary decision.

Pursuant to *N.J.S.A.* 18A:17-3, boards of education have the discretion to deny tenure to custodial staff or to confer that status upon them. In order to exercise the discretion to deny tenure to custodial staff, a board of education must appoint the custodians for a fixed term. Each year of his employment with the Board, the petitioner entered into a fixed employment contract that was effective July 1 through June 30. Therefore, the petitioner did not acquire tenure under *N.J.S.A.* 18A:17-3. The Commissioner is also not persuaded by the petitioner's assertion that he acquired tenure based on the language in the CBA, which stated "[w]hen an employee commences his/her fourth year of consecutive employment in the district, that employee shall have permanent status under the agreement." As explained by the ALJ, the word "tenure" is not used anywhere in the CBA as opposed to the circumstances in *Wright, supra,* where the agreement between the board of education and the custodians' union contained a clear, express provision that stated: "[a]ll members of the bargaining unit shall receive tenure after three years of employment." *Id.* at 184. Based on the evidence in the record related to the nature of the petitioner's employment contracts, coupled with the language of the CBA, the ALJ properly found that the CBA did not

grant petitioner tenure. As a result, the manner in which the Board terminated the petitioner's employment was not barred by *N.J.S.A.* 18A:17-3, nor did it violate the CBA.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 4/23/19

Date of Mailing: 4/23/19

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1). Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08311-18
AGENCY DKT. NO. 122-5/18

ALI O. KESIM,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,
Respondent.

Nicholas Poberezhsky, Esq., for petitioner Ali O. Kesim (Caruso Smith Picini, attorneys)

Anthony P. Sciarrillo, Esq., for respondent New Providence Board of Education (Sciarrillo Cornell, attorneys)

Record Closed: February 1, 2019 Decided: March 15, 2019

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about May 21, 2018, petitioner Ali O. Kesim (petitioner) filed an action with the Commissioner of the Department of Education against respondent New Providence Board of Education (respondent or Board) challenging his termination on or about February 25, 2018, from his position as a custodian employed by the Board for

approximately twenty (20) years as violative of the tenure laws. N.J.S.A. 18A:17-3. The Board filed its Answer to the Petition for Relief on or about June 4, 2018.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on June 11, 2018, for plenary 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. I convened a telephonic case management conference with the parties on July 2, 2018, to discuss the potential issues in the case, scheduling, and other case management concerns. It became apparent that the matter was amenable to dispositive motion practice and a briefing schedule was agreed upon, as well as plenary hearing dates should those be needed. After some adjustments to the schedule, the Board filed a Motion for Summary Decision on or about November 9, 2018. On or about January 21, 2019, petitioner filed a Cross-Motion for Summary Decision. Responses and replies were thereafter submitted. Those motion submissions having been received, the matter is now ripe for decision.

ISSUE PRESENTED ON THE MOTION

Whether respondent Board violated the Tenure Act, N.J.S.A. 18A:17-3, and the New Providence Education Association – Custodians Unit (Association) Collection Bargaining Agreement when it terminated his employment.

UNDISPUTED MATERIAL FACTS

1. Petitioner was hired as a custodian by the Board on October 5, 1998. See Certification of Dr. David Miceli, ¶ 4 (Miceli Certification). During his employment, petitioner later served as a "custodian/bus driver." See Miceli Certification, ¶ 5.

2. At the end of each school year, the Board is required to inform all employees, tenured or non-tenured, of their status of employment for the following year. See Miceli Certification, ¶ 7. Such notice includes information regarding salary for the following school year. See Miceli Certification, ¶ 8.

3. To distinguish tenured employees from non-tenured employees or employees not eligible to earn tenure ("tenure ineligible employees"), tenured employees receive a "Salary Statement" while non-tenured and tenure ineligible employees receive an "Employment Contract." See Miceli Certification, ¶ 9. Both documents set forth the employee's name and salary, and require the employee to sign the document and return it to the Superintendent's office. See Miceli Certification, ¶ 10.

4. Unlike a Salary Statement, the Employment Contract contains a termination clause which provides:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party's giving to the other 30 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above.
>
> See Miceli Certification, ¶ 11.

5. The Employment Contract contains a fixed term, specifying a start and end date. See Miceli Certification, ¶ 12. All custodians and bus drivers, as tenure ineligible employees, receive an "Employment Contract" each year. See Miceli Certification, ¶ 13.

6. District custodians are represented by the New Providence Education Association – Custodians Unit ("Association"). See Miceli Certification, ¶ 21. During his employment with the Board, Petitioner was a member of the Association. See Miceli Certification, ¶ 22. The Board and Association are parties to the Custodial Collective Bargaining Agreement (CCBA). See Miceli Certification, ¶ 23.

7. The relevant CCBA expired on June 30, 2018. The CCBA does not use the word "tenure" in any provision. See Miceli Certification, ¶ 25.

8. In each year of his employment, petitioner received and signed an Employment Contract, containing a thirty-day notice provision. See Miceli Certification,

¶ 14. In advance of the 2017-2018 school year, petitioner received an Employment Contract dated June 29, 2017, for the period of July 1, 2017 through June 30, 2018. See Miceli Certification, ¶ 15. On or about July 21, 2017, petitioner reviewed and signed that Employment Contract. See Miceli Certification, ¶ 16.

9. On or about February 8, 2018, the Board provided written notice to petitioner that the Board took action to terminate his employment effective January 24, 2018. See Miceli Certification, ¶ 18. The reason stated was a physical altercation with another employee on January 18, 2018, as well as prior "repeated incidents that have resulted in discipline." See Miceli Certification, Exhibit 5. The notice also informed petitioner that he was terminated pursuant to the notice provision in his Employment Contract, and that he would be placed on a paid leave of absence through his termination date of February 22, 2018. See Miceli Certification, ¶ 19.

10. From 1998 until June 30, 2018, the CCBA stated that "permanent status" was given to all custodians after the employee began his or her fourth consecutive year of employment. Prior thereto, "[a]ll new employees shall be hired with fixed term contracts." See Certification of Maryanne Rodriguez, ¶¶ 6-8.

11. Specifically, Article V Employee's Rights, Section D.3 of the relevant CCBA sets forth:

> When an employee commences his/her fourth year of consecutive employment in the district, that employee shall have permanent status under the terms of this Agreement and shall not be disciplined, discharged, or not reappointed without just cause. Grievances regarding the above shall be subject to binding arbitration under the terms of this Agreement.
>
> [Miceli Certification, Exhibit 6.]

12. Article VI Board's Rights, Section C.3 of the relevant CCBA sets forth:

> The Board reserves to itself sole jurisdiction and authority over matters of policy and retains the right through the

> Administration, in accordance with applicable laws and regulations:
>
> * * *
>
> 3. To relieve employees from duties for just cause.
>
> [Id.]

LEGAL DISCUSSION

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-37]

As a result of the undisputed material facts set forth above, I **CONCLUDE** that the issue of whether petitioner was tenured and thereby protected from termination in the manner in which it was undertaken by the Board can be decided as a matter of law. The assertions by petitioner in the Certification of Marilyn Rodriguez as to what the negotiators "understood" or "meant" by the long-standing phrases used in the CCBA of "fixed term" and "permanent," which pre-dated her involvement in said negotiations, is not sufficient to raise a genuine issue of material fact for this case.

The Tenure Act provides in relevant part:

> Every public school janitor of a school district shall, *unless he is appointed for a fixed term*, 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 as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense ....

[N.J.S.A. 18A:17-3 (emphasis added).]

Separately, a board may confer tenure on a custodial employee "by virtue of the express terms of the collective bargaining agreement." Camden Bd. of Educ. v. Alexander, 352 N.J. Super. 422, 447 (App. Div. 2002), *rev'd on other grounds by* Camden Bd. of Educ. v. Alexander, 181 N.J. 187 (2004), (citing Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112 (1985)).

In Wright, the board provided notice to the custodian that his employment would be terminated. 99 N.J. at 183. The CBA between the custodial union and the board stated: "[a]ll members of the bargaining unit shall receive tenure after three years of employment." Id. at 184. The custodian challenged his termination, arguing that the board permissibly bypassed N.J.S.A. 18A:17-3 when it negotiated a tenure provision. Id. The Supreme Court determined that although the custodian was appointed to a fixed term, the CBA explicitly granted the custodian tenure. 181 N.J. at 184-85. Therefore, the custodian's termination was improper. Id.

I **CONCLUDE** that the instant matter is distinguishable from Wright. Throughout his employment with the Board, petitioner was employed for one-year, fixed terms from July 1 through June 30. More specifically, for the 2017-2018 school year, petitioner reviewed and signed an Employment Contract for the period of July 1, 2017 through June 30, 2018. In Wright, the Supreme Court noted that the CBA between the board and the custodians' union contained a clear, express provision that stated: "[a]ll members of the bargaining unit shall receive tenure after three years of employment." Id. at 184. In the instant matter, no similar express provision exists. As correctly stated by respondent, the word "tenure" is not used anywhere in the CCBA. Therefore, the CCBA did not grant petitioner tenure.

By way of contrast, the undersigned is aware that some Collective Bargaining Agreements for custodians in other districts specifically state: "Effective July 1, 1998, employees who achieve three (3) consecutive years of employment shall be appointed for an unfixed term and shall acquire tenure in accordance with N.J.S.A. 18A:17-3." See, e.g., Pagan v. Elizabeth Bd. of Educ., OAL Dkt. EDU-6936-17, Initial Decision (January 2, 2018).

There is no dispute that petitioner was no longer a probationary employee who could be terminated at will but he was nevertheless employed for a fixed term. There is no grant of tenure in the CCBA in this district. In each year of his employment, petitioner was provided with an Employment Contract, which he was required to review, sign, and return to the Superintendent's office. I concur with respondent that each Employment Contract was for a fixed term and contained the following provision:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party's giving to the other 30 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above.

On February 8, 2018, the Board provided written notice to Petitioner of its intent to terminate his employment because of a physical altercation with another employee on January 18, 2018, as well as prior "repeated incidents that have resulted in

discipline." See Miceli Certification, Exhibit 5. That correspondence explicitly stated that his termination was made in accordance with the notice provision of his Employment Contract. Therefore, Petitioner was placed on a paid administrative leave effective January 24, 2018. That paid administrative leave continued for thirty (30) days, in accordance with his Employment Contract. Petitioner was then terminated effective February 22, 2018.

In sum, this Board did not negotiate tenure rights for custodians but rather was granted sole authority to terminate petitioner for just cause subject to the notice provisions of the annual employment contract. I **CONCLUDE** that petitioner could be terminated on contractual notice for just cause in the sole authority and jurisdiction of the Board.

ORDER

It is **ORDERED** that the motion of respondent New Providence Board of Education for an Order Granting Summary decision is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of petitioner Ali O. Kesim for an Order Granting Summary Decision is hereby **DENIED**.

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

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

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

Gail M Cookson

March 15, 2019
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: MARCH 15, 2019

Date Mailed to Parties: MARCH 18, 2019

id

OAL Dkt. No. 14157-18
Agency Dkt. No. 214-8/18

New Jersey Commissioner of Education

Final Decision

S.K., on behalf of minor children, N.A. and R.A.,

Petitioner,

v.

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

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/19
Date of Mailing: 4/23/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14157-18

AGENCY DKT. NO. 214-8/18

S.K. ON BEHALF OF N.A. AND R.A.,

Petitioner,

v.

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

George Scott Alevras, Esq., for petitioner (Musto & Alevras, attorneys)

Elizabeth Farley Murphy, Esq., for respondent (Busch Law Group, LLC, attorneys)

Record Closed: March 22, 2019 Decided: March 25, 2019

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 28, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

March 25, 2019
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 3-26-19

Date Mailed to Parties: 3-26-19

MAB/cb

ELIZABETH FARLEY MURPHY, ESQ.
THE BUSCH LAW GROUP, LLC
450 Main Street
Metuchen, NJ 08840
(732) 243-9588
emurphy@buschlawgroup.com
Attorneys for Respondent, Woodbridge Township
Board of Education

S.K. o/b/o minor children N.A. and R.A., Petitioner, v. Woodbridge Township Board of Education (Middlesex County), Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 14157-2018S AGENCY REFERENCE NO. 214-8/18 **SETTLEMENT AGREEMENT**

WHEREAS, Respondent, Woodbridge Township Board of Education ("Board"), is a local educational authority responsible for ensuring that students who attend school in the Woodbridge Township School District ("District") are entitled to do so pursuant to N.J.S.A. 18A:38-1 et seq.; and

WHEREAS, Petitioner S.K. is the mother of N.A. and R.A.; and

WHEREAS, M.A. is the children's father and, although not a Petitioner herein, has agreed to be bound by this Agreement; and

WHEREAS, Respondent conducted a residency investigation of Petitioner's children and determined that the children were not domiciled in the District; and

WHEREAS, Petitioner requested and was provided a residency hearing before the Board; and

WHEREAS, Respondent provided Petitioner with the opportunity to provide additional information in support of her claim of residency subsequent to the Board

hearing and Petitioner failed to do so; and

WHEREAS, Respondent notified Petitioner that the children would be removed from the school rolls; and

WHEREAS, Petitioner filed a petition of appeal before the Commissioner of Education which was transferred to the Office of Administrative Law for a hearing; and

WHEREAS, the parties, each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. The parties agree that Petitioner and M.A. will reimburse the Board in the amount of $3,000.00 for tuition costs for the 2017-2018 school year. Payment shall be made in the amount of $150.00 per month for 20 months which shall consist of two payments: $75.00 per month from Petitioner and $75.00 per month from M.A. By signing this agreement, M.A. agrees to be bound by its terms, including, but not limited to, being subject to an enforcement action. Payment shall be due on the first day of each month.

2. Petitioner, on her own behalf and on behalf of her children, and the Board mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims, whether known or unknown, arising out of events that have occurred prior to the date on which this Agreement is signed.

3. The parties agree to refrain from filing any proceeding, action or complaint regarding any claims by or rights of Petitioner or her children from the beginning of time through the date of this Agreement. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement. Further, the Board

reserves its right to conduct a residency investigation and proceed in accordance with the law in the future should it appear that the children no longer reside in the District.

4. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission on the part of the Board of liability, responsibility, or wrongdoing, that any rights of Petitioner or her children were violated at any time, or that either party has failed to act in accordance with any laws, statutes, regulations and/or codes.

5. The drafting and negotiation of this Agreement have been participated in by each of the parties and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties acknowledge that they enter into this Agreement voluntarily and free of coercion.

6. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties which makes specific reference to this Agreement.

7. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a complete legal release of any and all claims that were or could have been raised by Petitioner against the Board regarding her children from the beginning of time until execution and/or entry hereof.

8. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioner and M.A. are not bound by this Agreement until it has been ratified by the Board.

9. This Agreement contains the entire agreement between the parties hereto

and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement.

10. This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed and delivered by and among the parties and M.A.

11. Petitioner and M.A. understand and agree that they will not be considered to be a prevailing party under any statute, common law, or otherwise as a result of this Agreement and they will bear their own attorney's fees and costs.

WITNESS:

DATED: 2-5-19

S Kranzke
SHARON KRANZKE

Woodbridge Township Board of Education

By: _____

DATED: 3-21-19

_____
DATED

STATE OF NEW JERSEY,
COUNTY OF : SS.:

I CERTIFY that on the 5th day of February, 2019, Sharon Kranzke personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

_____
Notary Public

GEORGE SCOTT ALEVRAS
ATTORNEY AT LAW
STATE OF NEW JERSEY
ATTORNEY ID #040692005

MARC ACOSTA

2/11/19
DATED

STATE OF NEW JERSEY,
COUNTY OF : SS.:

I CERTIFY that on the 11 day of February, 2019, Marc Acosta personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his act and deed.

Notary Public

AUGUST A. CARLTON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 6/13/2022

The **Superintendent** presented the following recommendations:

8. That the Board of Education approve the previously submitted Settlement Agreement in the matter entitled S.K. o/b/o minor children N.A. and R.A. v. Woodbridge Township Board of Education, Agency Reference No.:214-8/18, and authorize the Board President, the Business Administrator/Board Secretary and the Board attorney to take all necessary and appropriate steps to implement the aforesaid Settlement Agreement.

* *

I, Brian Wolferman, Business Administrator and Secretary of the Board of Education, Township of Woodbridge, hereby certify that the foregoing is a true and exact copy of the Resolution approved at the Board of Education meeting held March 14, 2019.

Brian Wolferman
Business Administrator/Board Secretary

/r

March 15, 2019

112-19

OAL Dkt. No. EDU 04086-19
(EDU 17892-17 On Remand)
Agency Dkt. No. 247-10/17

New Jersey Commissioner of Education

Final Decision

Lauren Greenfield,

Petitioner,

v.

Board of Education of the Township of Irvington, Essex County,

Respondent.

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

Under the terms of the Agreement, petitioner was to complete training on workmen's compensation policies and procedures no later than December 31, 2018, the administrative details of which are set out in paragraphs one (1) through three (3) of the Agreement. The date for completion of the training, and presumably the administrative steps that were to follow, have preceded the consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/23/19
Date of Mailing: 4/23/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION APPROVING SETTLEMENT

LAUREN GREENFIELD,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 04086-19
AGENCY DKT. NO. 207-10/17

ON REMAND
OAL DKT. NO. EDU 17892-17

Randi Doner April, Esq., for petitioner (Oxfeld Cohen, attorneys)

Yadira Cristal Duran, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: March 20, 2019 Decided: March 27, 2019

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was remanded to the Office of Administrative Law on March 21, 2019 for revision of the settlement agreement to include the signature of Board attorney pursuant to N.J.A.C. 6A:3-1.13. The Settlement Agreement indicating the terms of settlement has been amended and is attached hereto.

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

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

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

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

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

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

March 27, 2019

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 4/01/2019

Mailed to Parties:
sej

RECEIVED
2019 MAR 27 A 11:00
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

HUNT, HAMLIN & RIDLEY
Counselors at Law
Military Park Building
60 Park Place, 16th Floor
Newark, New Jersey 07102
(973) 242-4471 (Tel)
(973) 242-8295 (Fax)
Attorneys for Respondent

LAUREN GREENFIELD,	) BEFORE THE COMMISSION OF
	) EDUCATION OF THE
Petitioner,	) STATE OF NEW JERSEY
	)
	) AGENCY DKT. NO.: 247-10/17
	)
	)
v.	) SETTLEMENT AGREEMENT
	)
	)
IRVINGTON BOARD OF EDUCATION	)
	)
Respondent.	)

This Settlement Agreement ("Agreement") is entered into by the Irvington Board of Education ("Respondent") on the one hand, and Lauren Greenfield ("Petitioner"), on the other hand, (collectively, "Parties") with regard to the above-captioned matter, Agency Docket No.: 247-10/17. The Parties, having agreed to resolve this matter without a hearing, herein agree as follows:

1. Petitioner, a tenured employee of Respondent, will complete training on workmen's compensation policies and procedures no later than December 31, 2018. Training shall be completed during Petitioner's preparation period. Respondent shall provide date and time of training to Petitioner by November 16, 2018.
2. Upon completing training, Petitioner shall sign a Training Acknowledgment Form acknowledging understanding of Respondent's workmen's compensation policies and procedures.

3. Once training is complete Respondent agrees to restore five (5) days to Petitioner's sick bank. Although being restored, Petitioner understands that the five (5) days are not approved workmen's compensation days.
4. Respondent expressly denies any wrongdoing in connection with or relating to Petitioner's employment relationship with Respondent. Nothing contained in this Agreement shall constitute or be treated as an admission that Respondent violated any federal, state or local law, statute, rule or regulation or any common law right sounding in tort, contract or otherwise.
5. Each Party to this Agreement shall cooperate fully in the execution of any and all other documents and the completion of any additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.
6. This Agreement contains the entire Agreement between the Parties, and supersedes all prior negotiations and/or agreements proposed or otherwise, written or oral, concerning the subject matter herein. The terms of this Agreement are fully understood and voluntarily accepted by the Parties, and other than the consideration set forth herein, no promises or representations of any kind have been made by either Party. Furthermore, no modification of this Agreement shall be binding unless in writing and signed by each of the Parties.
7. The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

THE UNDERSIGNED HAVE READ AND AGREE WITH THE ABOVE TERMS:

PETITIONER

Lauren Greenfield

11/12/18
Date

RESPONDENT

Irvington Board of Education

10/30/18
Date

Yadira Cristal Duran, Esq.
Attorney for the Board

3/20/19
Date

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of April Lowery

Paulsboro School District,

"Petitioner,"

- and -

April Lowery,

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 246-9/18

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the Petitioner:
Stephen J. Edelstein, Esq.
Lawrence S. Schwartz, Esq.
Weiner Law Group

For the Respondent:
Barbara E. Riefberg. Esq.
Shimberg & Friel

On October 19, 2018, I was assigned as the arbitrator for the above referenced matter. Hearing dates were scheduled, but the parties chose to engage in settlement discussions in lieu of proceeding on the evidentiary record.[1] Settlement conferences took place on November 6, 2018, November 26, 2018, December 17, 2018, April 2, 2019 and April 17, 2019. The discussions finally produced a settlement.

On April 29, 2019, the parties formally executed and adopted the settlement resolving the tenure charges that the Paulsboro Board of Education filed with the State of New Jersey Department of Education on September 26, 2018. The terms of settlement are included in the settlement agreement attached hereto. On April 30, 2019, I conducted a final conference with the parties' Counsel and the Respondent to discuss the terms of settlement.

N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement.

The parties' settlement agreement expressly details the basis for resolution. I have thoroughly reviewed and considered the parties' reasons for settlement set forth therein. Having considered the stated reasons in conjunction with the

[1] This matter was held in abeyance for a period of time at the Respondent's request due to family/personal medical issues. The District consented to the Respondent's request which was granted by the Director of the Office of Controversies and Disputes.

issues raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Response to Tenure Charges filed by the Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: May 2, 2019
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 2nd day of May, 2019, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-21

WEINER LAW GROUP LLP
629 Parsippany Road
P.O. Box 438
Parsippany, New Jersey 07054-0438
Phone: (973) 403-1100 Fax: (973) 403-0010
Attorneys for the
Paulsboro Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST APRIL LOWERY,	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
	AGENCY DKT. NO.: 246-9/18
	BEFORE ROBERT C. GIFFORD, ESQ. ARBITRATOR
BY THE PAULSBORO BOARD OF EDUCATION, GLOUCESTER COUNTY, NEW JERSEY.	TENURE HEARING
	SEPARATION FROM EMPLOYMENT AGREEMENT AND RELEASE

This Separation from Employment Agreement and Release ("Agreement") is effective as of the 1st day of May, 2019 (the "Effective Date"), by and between the Paulsboro Board of Education ("Board") and April Lowery ("Ms. Lowery" or "Employee").

WITNESSETH:

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, the Board has its administrative offices located at 662 N Delaware Street, Paulsboro, New Jersey 08066; and

WHEREAS, Ms. Lowery, a tenured teacher, employed by the Board, has her current address located at 214 Loring Court, Sewell, New Jersey 08080; and

WHEREAS, on or about August 27, 2018, Dr. Laurie Bandlow, Superintendent of Schools, filed Sworn Tenure Charges against Ms. Lowery, together with a Sworn Statement of Evidence in support of the charges, with the Paulsboro Board of Education; and

WHEREAS, on or about September 24, 2018, the Paulsboro Board of Education passed a resolution certifying the Sworn Tenure Charges against Ms. Lowery to the Commissioner of Education; and

WHEREAS, the parties, wishing to resolve the tenure charges presently pending against Ms. Lowery (including all claims for excessive absenteeism and misconduct as set forth herein) without the need for further litigation, hereby stipulate to settle the same, subject to the terms and conditions as set forth herein; and Ms. Lowery intends to, and by executing this Agreement, hereby does irrevocably resign effective June 30, 2019; and

WHEREAS, Ms. Lowery has submitted an irrevocable letter of resignation; and

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

1. IRREVOCABLE RESIGNATION

Ms. Lowery shall be returned to the active payroll effective May 1, 2019 through June 30, 2019, although she will remain on sick leave with pay and medical benefits. Ms. Lowery has tendered her irrevocable resignation effective June 30, 2019, from all employment with the Board, subject only to the Board's fulfillment of its obligations as set forth herein. See Attachment A.

Ms. Lowery agrees that she will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ her.

If Ms. Lowery decides to apply for a disability retirement, the Board agrees to cooperate with regard to that application. The Board further acknowledges that, while it has alleged that Ms. Lowery had excessive absences, it had not and does not allege that she otherwise misused her sick time.

2. TENURE CHARGES TO BE MOOT/NO FURTHER BOARD ACTION

The Board agrees that upon execution of the within Agreement by the parties and Ms. Lowery's fulfillment of the obligations as set forth herein, that:

(a) the subject tenure charges shall be moot and shall be deemed to be withdrawn, and that no further action shall be initiated by the Board regarding the underlying charges (including all claims for excessive absenteeism).

(b) the Board shall not and would not pursue misconduct charges against Ms. Lowery due to the nature of the IAIU Report, the fact that the student did not exhibit any manifestations of harm, the conclusion of the IAIU report that the allegations of

neglect/risk of harm were not established, the inconvenience to students and their families to testify, and disruption to Paulsboro School District operations.

The Board fully reserves all rights in the event this Agreement is breached by Ms. Lowery, as well as with respect to any third party claims that may be made against the Board as a result of any acts and/or omissions by Ms. Lowery during her employment with the Board.

3. RELEASE

In exchange for the above consideration, Ms. Lowery, her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all 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, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Consolidated Omnibus Budget Reconciliation Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq. Ms. Lowery represents that as of the date of this Agreement, she has not filed and does not intend to file a Workers' Compensation claim.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board.

4. NO ADMISSIONS

This Agreement is entered into solely for the purpose of resolving certain issues related to Ms. Lowery's employment, and that neither the execution, delivery, nor performance of this Agreement, nor Ms. Lowery's resignation, shall constitute or be construed at any time or for any

purpose to be an admission of liability or wrongdoing by any of the parties; and the parties further agree that neither this Agreement nor Ms. Lowery's irrevocable resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of said Agreement.

5. COMPENSATION/BENEFITS

As set forth in paragraph 1 above, Ms. Lowery shall be returned to the active payroll effective May 1, 2019 through June 30, 2019, although she will remain on sick leave, with pay and medical benefits. However, Ms. Lowery shall be reimbursed by the Board for her out-of-pocket COBRA payments, which she made during the time she was suspended without pay. Ms. Lowery shall also receive back pay from November 15, 2018 through April 30, 2019, subject to normal deductions.

Other than said pay and medical benefits, Ms. Lowery shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind from the Board, including, but not limited to, payment for all other emoluments of employment that otherwise may have been due to her as a result of any collective bargaining agreement, contract or Board Policy.

Ms. Lowery shall be entitled to any benefits to which she may be lawfully entitled to under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Ms. Lowery shall have the same COBRA rights as any other former employee of the Board, and shall be solely responsible for any and all costs associated with said COBRA coverage.

During the period of her leave, the Board, Jennifer Johnson, School Business Administrator/Board Secretary and/or designees, shall provide Ms. Lowery with any and all correspondence relating to her pay and/or medical benefits that Ms. Lowery would normally receive and/or have access to if she was an active employee with normal access to same correspondence and information.

Any monies due to Ms. Lowery pursuant to this Agreement will be paid by direct deposit.

6. INQUIRIES/RECOMMENDATION

The Board agrees, through its Administration, to respond to post-employment inquiries regarding Ms. Lowery by providing basic work history such as confirming the dates of Ms. Lowery's employment within the Paulsboro School District, the amount of Ms. Lowery's salary in the final year of her employment, the positions that Ms. Lowery held within the Paulsboro School District, and the date of Ms. Lowery's resignation. However, nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies such as, without limitation, the State Division of Pensions and Benefits, Teachers' Pension and Annuity

Fund ("TPAF"); the State Department of Education; and the State Board of Examiners and its agents, for example.

Furthermore, in light of P.L. 2018, c.5 § 2, which has commonly been referred to as the "Pass the Trash" law, this shall confirm that the action and/or inaction for which Ms. Lowery was alleged to have done and/or failed to do does not meet the parameters of the "Pass the Trash" law, and the Board shall respond to any inquiries made pursuant to said law in the negative.

The Board shall provide Ms. Lowery with a "neutral" letter of recommendation, if one is requested.

7. NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, or to provide information requested by various State Agencies and/or their agents.

8. REQUIREMENTS PURSUANT TO N.J.A.C. 6A:3-5.6

A. Both parties have freely consented to the within Agreement, as evidenced by their respective signatures below.

B. Both parties have had the benefit of independent legal counsel and have been fully apprised of their rights and obligations, and have indicated their full understanding and acceptance of same, by their respective signatures below.

C. The within settlement will serve the public interest by avoiding the cost of further litigation guaranteeing the desired result.

D. Ms. Lowery has been advised by her attorney that the Commissioner of Education may refer the within matter to the State Board of Examiners for possible suspension or revocation of her certification(s).

E. The parties agree that nothing in the within Agreement shall restrict access to information or records deemed public by law or result in misrepresentation of the reason for Ms. Lowery's separation from service. The Paulsboro Board of Education and its agents shall cooperate fully and honestly in responding to requests for information from government agencies and in response to requests from the public for information that it is legally required to provide.

9. **NO RETALIATION**

Neither party shall take retaliatory action of any kind against the other and/or their agents.

10. **SURRENDER OF BOARD PROPERTY**

A. Ms. Lowery shall surrender all school keys and property in her possession to the Superintendent of Schools or her designee.

B. The Superintendent of Schools shall arrange an appointment for Ms. Lowery to retrieve her personal property, if any, all lesson plans that have been prepared by Ms. Lowery during her employment with the Board, and to retrieve a copy of the 2018-2019 yearbook, which Ms. Lowery has already purchased.

C. Ms. Lowery shall be permitted to obtain copies of emails within her employment email account subject to the terms agreed upon by the parties herein. Specifically, to effectuate, Ms. Lowery shall provide, through her counsel, a list of search terms and dates for which the custodian(s) of such employment email account shall use to collect corresponding emails from Ms. Lowery's employment email account. Same custodian(s) shall produce the results to Ms. Lowery's counsel. Ms. Lowery understands that she shall not be entitled to receive any confidential student, and/or personnel information as it may relate to other employees.

11. **BOARD APPROVAL**

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

12. **ASSENT TO TERMS**

A. Ms. Lowery hereby acknowledges that she entered into this Agreement with a full understanding of her rights, and that she does so without duress and of her own free will and volition, and that she has consulted with independent legal counsel prior to executing same.

B. Ms. Lowery further acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to the Weiner Law Group LLP, 629 Parsippany Road, P.O. Box 438, Parsippany, New Jersey 07054-0438. It is understood that if this Agreement is revoked, it will not be effective or enforceable, and Ms. Lowery will not be entitled to the consideration described herein.

Furthermore, it is understood that if this Agreement is revoked and/or not approved by the Commissioner of Education, the subject/underlying tenure charges shall be reinstated and the Board will not be obligated to re-serve Ms. Lowery and/or her attorney with a copy of same but

may consider and certify, if it so chooses, said tenure charges at its next Board of Education meeting following said revocation.

13. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

14. PUBLIC INTEREST

This proposed settlement will serve the public interest because, as a result of Ms. Lowery having tendered her irrevocable letter of resignation, the Board will not have to engage in litigation related to her employment.

15. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that neither the other party nor any agent or attorney of the other party has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

16. SEVERABILITY

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 this Agreement shall remain in full force and effect, except that the provisions of Paragraph 1 hereinabove shall be deemed to be material and of the essence of this Agreement. Should the provisions set forth in Paragraph 1 be compromised, then the entire Agreement shall be deemed to be null and void and the Board shall be free to proceed with appropriate disciplinary action, up to and including the further prosecution of Tenure Charges.

17. COUNTERPARTS

This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

18. 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:

APRIL LOWERY

Dated: April 29, 2019

Witness:

Dated: April 29, 2019

For the Paulsboro Board of Education:

JOSEPH L. LISA
Board President

Dated: April 29, 2019

Witness:

JENNIFER JOHNSON
School Business Admin./Board Secretary

Dated: April 29, 2019

Attachment A

Irrevocable Letter of Resignation

Paulsboro Board of Education
c/o Jennifer Johnson, School Business Administrator/Board Secretary
662 N Delaware Street
Paulsboro, New Jersey 07045

Re: Irrevocable Letter of Resignation

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Employment Separation Agreement and Release ("Agreement"), and approval of same by the Paulsboro Board of Education ("Board"), I hereby tender my irrevocable letter of resignation effective June 30, 2019 from all employment with the Board.

Very truly yours,

April Lowery

APRIL LOWERY

115-19

New Jersey Commissioner of Education

Decision

Antoine Gayles,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

Synopsis

Petitioner – who is currently on involuntary paid administrative leave – sought reinstatement to his position as Superintendent of Schools in the respondent Board's school district. Petitioner initially filed a motion for emergent relief which was denied by the Commissioner on March 18, 2019. The Commissioner's decision denying emergent relief directed that the matter "shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure."

The ALJ found, *inter alia*, that: a telephone conference between the parties was convened following the Commissioner's March 18th denial of the motion for emergent relief for the purpose of determining whether further proceedings are necessary to bring this matter to closure; counsel for both parties agreed at that time that the motion for emergent relief was concluded and that the matter was therefore moot. The ALJ concluded in his Initial Decision that the denial of the request for emergent relief rendered the entire matter moot, and recommended dismissal of the petition with prejudice.

Upon review, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner noted, *inter alia*, that the petitioner still appears to have a dispute with the Board as to his entitlement to the position of Superintendent of Schools, and – though relief was not granted in an emergent manner – the claims alleged in the petition should be addressed at a hearing on the merits. Accordingly, the matter cannot be dismissed as moot.

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

May 2, 2019

OAL Dkt. No. EDU 02910-19
Agency Dkt. No. 45-2/19

New Jersey Commissioner of Education

Decision

Antoine Gayles,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.[1]

In this matter, petitioner seeks reinstatement to his position as Superintendent of Schools in the respondent's District. Petitioner filed a motion for emergent relief, which the Commissioner denied on March 18, 2019. The matter continued at the OAL, and the Administrative Law Judge (ALJ) entered an Initial Decision dismissing the matter as moot.

Petitioner's exceptions do not address the ALJ's finding that this matter is moot, and instead seek to overturn the denial of emergent relief. Such arguments will not be considered, as the Commissioner has already issued a decision denying petitioner's application for emergent relief. The Commissioner notes that the petitioner still appears to have a dispute with the Board as to his entitlement to the position of Superintendent of Schools. Although relief

[1] Petitioner filed a response to the Board's reply. Such a filing is not contemplated by *N.J.A.C.* 1:1-18.4, so it will not be considered by the Commissioner.

was not granted in an emergent manner, the claims alleged in the petition should be addressed at a hearing on the merits. As such, this matter cannot be dismissed as moot.

Accordingly, the Initial Decision of the OAL is rejected, and this matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/02/19
Date of Mailing: 5/02/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02910-19
AGY REF NO. 45-2/19

ANTOINE GAYLES,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,

Respondent.

William F. Koy, Esq., for Petitioner

Allan C. Roth, Esq., for Respondent (Ruderman & Roth, LLC, attorneys)

Record Closed: March 6, 2019 Decided: March 22, 2019

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a motion for Emergent Relief with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on February 28, 2019, to be heard on an emergent basis.

Petitioner seeks reinstatement to his position as Superintendent of Schools in the Respondent school district. Petitioner is currently on involuntary paid administrative leave.

The District filed a motion for declaratory ruling with the Commissioner of DOE on March 1, 2019, pursuant to N.J.A.C. 6A:3-2.1. By letter to the undersigned dated March 5, 2019, counsel for the District requested that declaratory ruling motion be consolidated with the within matter. That request cannot be considered at the present time as the Commissioner has not transferred the matter to the OAL.

The motion for emergent relief was heard on March 6, 2019. By Order dated March 6, 2019, the undersigned denied the motion for emergent relief. The Commissioner of Education issued a Final Decision, adopting the Order entered by the undersigned and stated in said Final Decision: "This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure."

Accordingly, a telephone conference was convened on March 20, 2019 to discuss what further proceedings, if any, might be necessary. Counsel for Petitioner and Respondent agreed that the motion for emergent relief was concluded and that the matter is now moot.

LEGAL ANALYSIS AND CONCLUSION

In Betancourt v. Trinitas Hosp.,[i] 415 N.J. Super. 301, 08, the New Jersey Supreme Court defines mootness as follows:

"We first set forth the principles that inform a consideration of claims of mootness. Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm. Jackson v. Dep't of Corr. 335 N.J. Super. 227, 231, 227, 762 A.2d 255 (App.Div.

[i] The litigants in this matter are not related to the undersigned.

2000), certif. denied, 167 N.J. 630, 772 A.2d 932 (2001). "A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation." DeVesa v. Dorsey, 134 N.J. 420, 428, 634 A.2d 493 (1993) (Pollock, J., concurring) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301,303, 344 A.2d. 769 (1975)). To restate, "'an issue is "moot" when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" (citations omitted).

As the denial of the request for relief has rendered the matter moot there is no further proceedings necessary to bring this matter to closure.

Based upon the foregoing, I **CONCLUDE** that the instant matter is moot and should be **DISMISSED** with prejudice.

ORDER

It is hereby **ORDERED** that the above captioned matter is **DISMISSED** with prejudice.

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

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

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

March 22, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: March 22, 2019

Date Mailed to Parties: March 22, 2019

117-19E

OAL Dkt. No. EDU 10265-15
Agency Dkt. No. 144-6/15

New Jersey Commissioner of Education

Order on Emergent Relief

G.S. and C.S., on behalf of minor child, D.S.,

Petitioners,

v.

Board of Education of the Township of Holland, Hunterdon County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe* v. *DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/02/19
Date of Mailing: 5/06/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 10265-15
AGENCY DKT. NO. 144-6/15

G.S. AND C.S., ON BEHALF OF
MINOR CHILD, D.S.,
Petitioner,
v.
TOWNSHIP OF HOLLAND,
HUNTERDON COUNTY
Respondent.

Philip E. Stern, Esq., for petitioners (DiFrancesco, Bateman, Kunzman, Davis, Lehrer and Flaum, P.C., attorneys)

Stefani C. Schwartz, Esq., for respondent (Weiner Law Group, LLP, attorneys)

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

In this matter petitioners, G.S. and C.S., on behalf of minor child, D.S., challenge the transportation decision of respondent Holland Township Board of Education (Holland) regarding the bus stop assigned to their daughter. By way of this motion for emergent relief petitioners seek an order for requiring respondents to provide a bus stop at petitioners' home, effective immediately, pending the completion of construction on nearby County Route 519.

The underlying petition in this matter was transmitted to the Office of Administrative Law (OAL) on July 14, 2015, for hearing as a contested case by the Office of Controversies and Disputes of the New Jersey Department of Education. Testimony was taken on fourteen (14) days and related hearings on legal and evidentiary issues were held on several other days. During most of the litigation petitioners appeared pro se. Post hearing submissions on the case in chief, as well as exhibits, are scheduled to be filed within the next month followed by a closing of the record. This emergent matter was filed with the OAL on April 16, 2019 and oral argument, held on April 18, 2019.

Factual Discussion

G.S. and C.S., along with their adopted granddaughter D.S., reside on Shire Road in the District within a mandatory busing zone. Their home has a turnaround drive in the front of the property. D.S. is currently attending fourth grade at Holland Township School in the respondent's K-8 district. Over twenty years ago petitioners filed a similar petition on behalf of their minor children at that time, seeking a bus stop at their home. In that matter Administrative Law Judge (ALJ) Metzger ruled on behalf of petitioners and made findings regarding safety and the road conditions at issue, a decision upheld by the then State Board of Education after a reversal by the Commissioner of Education. (See Exhibit C-1). In this matter respondents do not challenge ALJ Metzger's findings regarding road conditions[1] but take the position that the District only has the responsibility to provide safe conditions at the assigned bus stop and bears no responsibility for safety considerations from the child's home to the bus stop.

In a factual change from the prior litigation the District now contracts its bus service to the regional high school district to which it sends its students, Delaware Valley Regional (Delaware Valley). Testimony in the case in chief here showed that respondent works with Delaware Valley to determine the routes for its students. Unlike the prior matter, the size of a bus required to navigate Shire Road was not in dispute, as testimony from Delaware Valley showed that it was capable of providing whatever

[1] The parties were advised that where relevant ALJ Metzger's factual findings regarding the roads at issue would be cited in this matter as the parties agreed that there were no material changes to those roads and their condition.

size bus a given route required. Currently respondent has provided a bus stop for D.S. at the intersection of Shire Road and Anderson Road. Her home is approximately a one-half mile from the bus stop, along a stretch of road with no sidewalks or shoulder. The bus stop also serves a number of other children from the area who are provided mandatory bus service. As referenced in ALJ Metzger's opinion, as well as in numerous days of testimony, Shire Road presents significant safety issues for a child walking along it.

On March 6, 2019, construction began near petitioners' home on County Route 519, closing it until completion of the project in October 2019. Route 519 is the major north south route through rural Holland Township. Petitioners allege that as a result of this construction, a high volume of traffic has been diverted to Shire Road and D.S. faces increased danger if she is required to walk to and from the bus stop. As set forth in exhibits submitted by the parties, Shire Road is not an approved detour route for the construction, however, the speed limit has been reduced during construction. Although local police are not ticketing motorists for using Shire Road and other local roads as "pass throughs" during construction, they are enforcing the reduced speed limits. Petitioner G.S., through his certification, submits that the increased traffic on Shire Road, including large trucks, has caused Shire Road to be an even more dangerous road for D.S. to navigate, requiring the issuance of emergent relief.

Legal Discussion

The standard for emergent relief is set forth in Crowe v. De Goia, 90 N.J. 126, 132-134 (1982) and codified in N.J.A.C. 1:1-12.6. Emergent relief may be granted if the requesting party demonstrates:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;

> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [Crowe, 90 N.J. 126 at 132-134.]

Petitioners, as the moving party, bear the burden of proving each of the elements for emergent relief "clearly and convincingly". Waste Management of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

I. Irreparable Harm

Harm is considered irreparable if it cannot be redressed adequately by monetary damages. Crowe, 90 N.J. 126 at 132-33. The inadequacy of monetary damages depends on the "nature of the injury or the right affected." Ibid. In certain circumstances, severe personal inconvenience can constitute irreparable harm. Ibid. However, a possibility of a remote future injury or a future invasion of rights will not satisfy the irreparable harm standard. Continental Group, Inc. v. Amoco Chemicals, 614 F.2d 351, 359 (3d Cir. 1980).

In this emergent matter petitioners have not shown that D.S. will suffer irreparable harm if the requested relief is not granted. Petitioners' main argument is that D.S. will face increased danger due to the recent construction if the school continues to force her to walk to and from the bus stop. Specifically, they state that Holland Township acknowledged the increase in danger because officials have reduced the speed limit on Shire Road. In turn, respondent argues that the school district is not "requiring D.S. to *walk* on Shire Road to get to and from her assigned bus stop . . .[t]here are various ways for D.S. to get to and from her bus stop." Although the construction on County Route 519 has changed traffic conditions on Shire Road, petitioners have not shown that D.S. will suffer irreparable harm as they have not shown that D.S. currently walks

the half mile along Shire Road to get to her assigned bus stop. Petitioners' brief consistently implies that D.S. walks to and from the bus stop, but it is never stated that D.S. actually walks to the bus stop. See generally Petitioners' Emergent Motion. Furthermore, speculating that D.S. might face "possible physical harm while walking to and from her assigned bus stop" does not constitute an immediate injury that satisfies the irreparable harm standard. Thus, petitioners have failed to establish irreparable harm.

II. Right to Underlying Claim Must be Settled

Addressing the next prong in the Crowe standard, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133. A New Jersey school district is responsible for ensuring "the safe and efficient transportation of students to and from school and school-related activities." N.J.A.C. 6A:27-1.2; see also N.J.S.A. 18A:39-1. School districts have broad discretion with respect to selection of bus routes and placement of bus stops, and the Commissioner will not interfere with a district's decision unless it is arbitrary, capricious or unreasonable. Nielson v. Bd. of Educ. of the Morris Hills Regional Sch. Dist., EDU 3936-98, Initial Decision (April 4, 2000), http://njlaw.rutgers.edu/collections/oal/html/initial/edu3936-98_1.html.

Although unsafe conditions, such as the absence of safe walkways, is the responsibility of the municipality, a school district may not "turn a blind eye to such situations when establishing school bus stops." R.D. and V.D. o/b/o C.D. v. Bernards Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 481; see also T.F.S. o/b/o J.R.S. v. Bd. of Educ. of South Brunswick Twp., EDU 10118-05, Initial Decision (June 29, 2006), http://njlaw.rutgers.edu/collections/oal/html/initial/edu10118-05_1.html (holding that school districts have a duty to provide its walking students with a safe walk route); Nichols v. Wayne Twp. Bd. of Educ., 93 N.J.A.R.2d (EDU) 701 (Comm'r Sept. 3, 1993), adopted 94 N.J.A.R.2d 277 (St. Bd. Feb. 2, 1994), aff'd 95 N.J.A.R.2d (EDU) 157, No. A-3526-93T5 (N.J. App. Div. March 3, 1995), certif. den. 142 N.J 449 (1995) (the Appellate Division agreed that it was unsafe for a child to be required to walk on the

wrong side of the road or to ignore crosswalks.). Student safety is one factor to be considered in assessing whether the Board acted reasonably in selecting a bus stop location, and whether a stop is safe depends upon the surrounding facts of each case. Nielson (citing Wayne Twp. Bd. of Educ. v. Kraft, 139 N.J. 597, 602-604 (1995); see also Shrewsbury v. Holland Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 795 (Comm'r June 21, 1996), rev'd 97 N.J.A.R.2d (EDU) 416 (St. Bd. April 2, 1997) (the State Board of Education held that a school board's refusal to extend minibus service to a child's home was arbitrary and capricious under the circumstances because the winding road with no shoulder or sidewalks was dangerous for a child to walk between home and the bus stop, and petitioners had offered to alleviate any financial or safety burden to the district by constructing a turnaround on their property at their own expense.).

As set forth above, case law supports the proposition that a school district is responsible for the safety of its students at both a bus stop and the route taken to get to the stop, and the district must take that into account when establishing bus stop locations.

III. Likelihood of Prevailing on the Merits of the Underlying Claim

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, 90 N.J. at 133. This typically "involves a prediction of the probable outcome of the case based on each party's initial proofs, usually limited to documents." Brown v. City of Paterson, 424 N.J. Super. 176, 182-83 (App.Div.2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App.Div.2006)).

As stated above, student safety is one factor to be considered in assessing whether a Board of Education acted reasonably in selecting a bus stop location, and whether a stop is safe depends upon the surrounding facts of each individual case. Nielson v. Bd. of Educ. of the Morris Hills Regional Sch. Dist., EDU 3936-98, Initial Decision (April 4, 2000), http://njlaw.rutgers.edu/collections/oal/html/initial/edu3936-98_1.html.

Petitioners previously prevailed in similar litigation challenging the same bus stop and seeking the same relief. As noted earlier, in Shrewsbury v. Holland Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 795 (Comm'r June 21, 1996), rev'd 97 N.J.A.R.2d (EDU) 416 (St. Bd. April 2, 1997), the same petitioners argued that Shire Road was dangerous for their two children to navigate to get to the school assigned bus stop located at the intersection of Shire Road and Anderson Road. Petitioners requested the bus stop at their home on Shire Road and even volunteered to construct a turnaround on their property, at their own expense for the minibus. The same respondent argued that it was hazardous for a bus to travel down Shire Road because of the hills and rejected petitioners' offer to construct a turnaround. ALJ Metzger concluded that respondent's decision not to extend service to petitioners' home was arbitrary and capricious because "[it] is undisputed that it is dangerous for children to walk along Shire Road, particularly in the area approaching the crest of the hill . . ."

The likelihood of success on the merits of the present case turns on the petitioners' ability to show that the Board acted arbitrarily, capriciously, or unreasonably. In the underlying case, both parties concede that conditions on Shire Road are the same as described in ALJ Metzger's prior decision. Petitioners have again offered their turnaround if necessary to eliminate the safety hazard of having their granddaughter walk along the road.

Respondent argues that although the conditions on Shire Road have not changed, other factors like the size of the bus currently in use and the identity of the service provider alter the analysis. However, there is nothing in the record to support a finding that a full size bus cannot travel down Shire Road or that it would be overly burdensome to utilize a minibus. In fact, witnesses for respondent testified that a minibus could be assigned to this stop. It should also be noted that while respondent disavows any responsibility for safety issues for children on mandatory busing routes except for the provision of a safe bus stop, it factors safety considerations into the construction of routes for its courtesy busing program. As such, petitioners have established a likelihood of success on the merits of the underlying claim.

IV. Relative Hardship to the Parties

As to the fourth and final Crowe criterion, petitioners argue that the balance of the equities turns in their favor because relocating the bus stop to a safe location for D.S. would not create a financial burden to the Board. Petitioners also state that the increased traffic on Shire Road poses a serious safety threat to D.S. who must walk the "narrow and winding road," with no shoulder or sidewalk, in order to get to the stop. In response respondent argues that the Board would sustain more harm than the petitioners as the bus on the current route is too large to travel to petitioners' home and granting emergent relief would impact other existing bus routes and stops. The Board further argues that granting petitioners' relief would "essentially compel the Board to provide door-to-door service to every parent or guardian who complains they are adversely impacted by the County Route 519 construction project." Since there has been no showing that D.S. currently walks the one-half mile to the assigned bus stop, the hardship of the parties essentially amounts to respondent's inconvenience of sending a bus down Shire Road and petitioners' inconvenience of driving D.S. to the bus stop. As there are merits on both sides, the parties' situations are in equipoise. It is noted however that given changing traffic conditions a review of affected bus routes in conjunction with local polices would be advisable.

CONCLUSION

While petitioners may ultimately succeed on the merits of the underlying case, they are not entitled to emergent relief as they have not met their burden on each of the four Crowe criteria.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioners' request for emergency relief for a bus stop at their home during the construction on County Route 519 is **DENIED.**

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

Patricia M. Kerins

April 26, 2019
DATE

PATRICIA M. KERINS, ALJ

PMK/mel

New Jersey Commissioner of Education

Final Decision

Amanda Hersh Luterzo,

Petitioner,

v.

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

Respondent.

Synopsis

The petitioner – a tenured teacher employed in the respondent Board's school district prior to a Reduction in Force (RIF) – appealed the determination of the Board not to offer her employment for the 2016-17 school year, alleging that her tenure rights were violated. Petitioner holds a standard New Jersey Instructional Certificate with an endorsement as a Teacher of Business: Finance/ Economics/Law; in addition to teaching high school business, marketing, and business law courses, petitioner had taught Grade 6 Computer Technology during the 2013-14 and 2015-16 school years, and Grade 7 Computer Technology in the 2014-15 school year. In June 2016, petitioner was "bumped" from her high school business teaching position for the 2016-17 school year by a more senior tenured teacher, whose position had been abolished in the RIF; petitioner was terminated as of June 30, 2016, and placed on a preferred eligibility list for reemployment. The controversy herein relates to the assignment of Grades 6 and 8 Computer Technology classes for the 2016-17 school year – to which petitioner claims entitlement – to a non-tenured art teacher, rather than to petitioner. The Board contended that its actions were consistent with applicable law and regulation. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner acquired tenure under her standard instructional certificate, and the protections afforded thereby encompass not only those classes she is authorized to teach within the scope of her Teacher of Business endorsement, but also those that she is authorized to teach within the scope of her standard instructional certificate pursuant to *N.J.A.C.* 6A:9B-5.17, including the middle school Computer Technology courses she taught prior to the RIF; as such, the Board violated petitioner's tenure rights by failing to employ her to teach those classes during the 2016-17 school year and instead assigning them to a non-tenured art and graphic design teacher. Accordingly, the ALJ granted petitioner's motion for summary decision, denied the Board's cross motion for summary decision, and ordered the Board to compensate petitioner for any salary and benefits lost, and to credit her for any seniority credit lost during the 2016-17 school year.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter; summary judgment was granted in favor of the petitioner, and the Board was ordered to compensate petitioner for salary and benefits lost, and credit her for seniority she would have accrued during the 2016-17 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.

May 13, 2019

121-19

OAL Dkt. No. EDU 10002-16
Agency Dkt. No. 162-6/16

New Jersey Commissioner of Education

Final Decision

Amanda Hersh Luterzo,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and the petitioner's reply thereto.

In this matter, petitioner alleges that the Board violated her tenure rights when it did not offer her employment for the 2016-17 school year. Petitioner – who began teaching in the District in 2012 and earned tenure in September 2015 – has a standard New Jersey Instructional Certificate with an endorsement as a Teacher of Business: Finance/Economics/Law. In addition to teaching high school business, marketing, and business law courses, she taught Grade 6 Computer Technology in the 2013-14 and 2015-16 school years and Grade 7 Computer Technology in the 2014-15 school year. In June 2016, the Board abolished the position of School Testing Coordinator and the person vacating that position replaced petitioner as the high school business teacher for the 2016-17 school year. Petitioner was terminated effective June 30, 2016 and placed on a preferred eligibility list. For the 2016-17 school year, a non-

tenured art teacher was assigned to teach Computer Technology 6 and 8 in addition to the art classes that she taught.

Petitioner filed an appeal with the Department of Education, alleging that her tenure rights extended to the computer technology classes and that the Board violated her rights by employing a non-tenured teacher to teach those classes. The Administrative Law Judge granted summary decision to petitioner, concluding that petitioner's standard instructional certificate extends to Computer Technology 6 and 8, and therefore the Board violated her tenure rights by failing to employ her to teach those classes during the 2016-17 school year. The ALJ further concluded that the Board should compensate petitioner for any salary and benefits lost, and credit her for any seniority credit lost for the 2016-17 school year.

The Board takes exception to the ALJ's finding that petitioner is afforded tenure protections not only to the classes she is authorized to teach under her Business: Finance/Economics/Law endorsement, but also to those classes she is authorized to teach under the scope of her standard instructional certificate. The Board argues that there is no legal support for the ALJ's expansive view of tenure protections as the cases cited in the Initial Decision only hold that a tenured staff member has tenure protections over any position within the scope of his or her endorsements. As such, the Board contends that tenure only adheres to positions under a teacher's endorsements and not to general positions. The Board explains that otherwise, districts would have to "create a seniority list of every instructional certificated employee and would effectively limit the superintendent's managerial prerogative to determine schedules and assign those teachers he considers more proficient in the use of educational technologies, computers, and other digital tools to teach these courses." (Board's Exceptions at 14) The Board argues that, pursuant to *Kathi Savarse v. Board of Education of the Borough of Bernardsville*, 1990

S.L.D. 1541, tenure and seniority rights do not attach to courses that do not require a particular endorsement; as no particular endorsement is required to teach middle school computer technology, the superintendent may choose any teacher to teach those courses. Further, the Board contends that it should not be required to create a four-tenth position for a subject that does not require an endorsement, because if an endorsement is not required, then petitioner has no entitlement to teach those courses. As such, the Board finds the ALJ's conclusion that petitioner's instructional certificate authorizes her to teach computer classes to be erroneous.

Additionally, the Board contends that – following amendments to the regulations in December 2015 – *N.J.A.C.* 6A:9B-5.17(b) no longer permits the chief school administrator to assign petitioner to the computer classes because keyboarding and word processing are not considered "educational technology." Instead, these classes now require an endorsement pursuant to *N.J.A.C.* 6A:9B-9.4. As petitioner failed to maintain the appropriate business endorsement under *N.J.A.C.* 6A:9B-9.4, which would have authorized her to provide keyboarding and word processing instruction, she is no longer qualified to teach these computer courses. The Board also takes exception to the ALJ's interpretation that *N.J.A.C.* 6A:9B-9.4 only requires endorsements for grade 9-12 CTE programs, arguing that *N.J.A.C.* 6A:9B-9.4 requires that teachers in K-12 hold one of the business endorsements to teach courses in keyboarding or word processing. The Board argues that the ALJ is also using an erroneous standard in applying the CTE definition in determining that an endorsement is not required to teach middle school computer technology. The ALJ found that the middle school computer technology courses do not meet the CTE definition as they do not reflect "rigorous content", "occupation specific skills", or "relevant technical knowledge and skills needed to prepare for further education and careers in current or emerging professions." (Initial Decision at 21)

However, *N.J.A.C.* 6A:9B-9.4(a) is not limited to approved CTE programs. Instead, the seven business endorsements listed in *N.J.A.C.* 6A:9B-9.4(a) require teachers to be authorized in the subject matters – including keyboarding and word processing – when teaching the subjects in grades K-12. As petitioner is not qualified to teach the computer courses, the Board requests that the Commissioner deny petitioner's claim of entitlement for the two middle school computer technology classes in the 2016-17 school year.

In reply, petitioner agrees with the ALJ that tenure rights may extend beyond the scope of a teacher's endorsement and include all courses within a tenured teacher's instructional certificate when a specific endorsement is not mandated to teach the class. Petitioner cites *Jane Fox v. Board of Education of the Morris School District*, 93 *N.J.R.* 2d (EDU) 139 (January 11, 1993). In that case, the Commissioner held that a tenured teacher was entitled to teach three class periods of academic support over a non-tenured teacher, "insofar as no particular endorsement was required" for the assignment. *Id.* at 143. Accordingly, petitioner maintains that her tenure rights entitle her to teach computer technology over a non-tenured teacher, even though no specific instructional endorsement is required to teach it.

Petitioner argues that nothing in *N.J.A.C.* 6A:9B-9.4 bars the teaching of general computer skills by those without specific computer-related endorsements. Petitioner explains that the endorsements in *N.J.A.C.* 6A:9B-9.4 qualify teachers to teach highly technical subjects; while those technical endorsements may also include rudimentary subjects, it does not preclude teachers with no specific computer endorsement from also teaching those basic subjects, as *N.J.A.C.* 6A:9B-5.17 indicates that an endorsement is not required to deliver instruction in educational technology, computers, and other digital tools. Petitioner points out that the purpose of *N.J.A.C.* 6A:9B-5.17 is to enable more teachers to provide educational technology instruction,

as computer literacy is "crucial to modern learning in all disciplines," and there are not enough teachers with computer-specific endorsements to meet the need. If the Board's interpretation were correct, *N.J.A.C.* 6A:9B-5.17 would be pointless because every basic computer class – like Computer Technology 6 and 8 – would require a teacher with a Business Keyboarding and Data Entry endorsement. Petitioner further contends that the Board's argument is disingenuous as it assigned the computer classes to an Art and Design Teacher who did not have a computer-specific endorsement. (Petitioner's Reply Exceptions at 7).

Petitioner distinguishes the cases cited by the Board by emphasizing that, unlike those cases where regulations required additional qualifications to teach certain classes, there is no such regulation requiring a computer-specific endorsement to teach middle school computer technology. Petitioner contends that the computer classes at issue are basic computer subjects that virtually every middle school student must take – not business courses or technical in nature. The course descriptions make clear that the courses provide an elementary foundation in computers, which is the purpose behind *N.J.A.C.* 6A:9B-5.17. Petitioner further argues that, contrary to the Board's argument, this case is not about the need for a seniority list. Petitioner explains that this matter involves the rights of a tenured person to be retained over a non-tenured person, so the issue of seniority does not arise. (*Ibid.* at 11-12) As such, petitioner urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ – for the reasons thoroughly explained in the Initial Decision – that the Board violated petitioner's tenure rights by employing a non-tenured teacher, rather than petitioner, to teach Computer Technology 6 and 8 in the 2016-17 school year. The Commissioner further concurs with the ALJ that, pursuant to *N.J.A.C.* 6A:9B-5.17, no endorsement is required to teach the middle school computer courses as

they cover general, basic computer skills. As such, petitioner's tenure allows her to claim the sixth and eighth grade computer classes over a non-tenured teacher because they fall within the scope of her standard instructional certificate and she taught the courses prior to the reduction in force (RIF).

The Commissioner does not find the Board's exceptions to be persuasive. The Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, "should be liberally construed to achieve its beneficent ends." *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982). While seniority comes into play when reductions occur among *tenured* staff members, "[a] tenured teacher, however, is entitled to retention as against a non-tenured teacher under the tenure law. To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number of years of service." *Capodilupo v. Board of Education of the Township of West Orange*, 218 *N.J. Super.* 510, 515 (App. Div. 1987). In *Fox, supra*, the Commissioner found that a tenured teacher was entitled to teach three periods of academic support – which only required a valid teaching certificate – over a non-tenured teacher, noting that "Fox, a tenured teacher, was entitled to the position over nontenured Porcelli insofar as no particular endorsement was required for the three periods he was assigned as a teacher on special assignment." 93 *N.J.R.* 2d (EDU) at 143. Here, petitioner was a tenured teacher who taught middle school computer classes and was replaced by a non-tenured teacher. Given the liberal construal of the Tenure Act cited in *Spiewak, supra,* petitioner is entitled to teach these computer courses – which she taught prior to the RIF – as they fall within the scope of her instructional certificate, even though a specific endorsement is not required to teach the classes. Further, contrary to the Board's argument, this matter does not involve the creation of a seniority list;

seniority does not arise in this case, as the issue of entitlement here is not between two tenured teachers, but rather between a tenured teacher and a non-tenured teacher.

The Commissioner further disagrees with the Board's argument that *N.J.A.C.* 6A:9B-5.17 and *N.J.A.C.* 6A:9B-9.4 require a Business: Keyboarding and Data Entry endorsement in order to teach middle school computer technology. When read together, the regulations imply that an endorsement is required to teach computer courses in CTE programs, which are more complex and technical than basic middle school computer technology classes covering introductory Microsoft Office and keyboarding. If a computer-specific endorsement were required to teach middle school computer technology, then *N.J.A.C.* 6A:9B-5.17 – which allows teachers to teach "educational technology, computers, and other digital tools" without an endorsement – would be rendered meaningless. The fact that the Board replaced petitioner with an art and graphic design teacher to teach the computer classes further undercuts its argument that a computer-specific endorsement is required.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is ordered to compensate petitioner for any salary and benefits lost for the 2016-17 school year, and credit petitioner any seniority credit lost for that time period.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/19
Date of Mailing: 5/14/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10002-16
AGENCY DKT. NO. 162-6/16

AMANDA HERSH LUTERZO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CRESSKILL, BERGEN COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri and Pincus, attorneys)

Carolyn R. Chaudry, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Alfred F. Maurice, Esq., for intervenor Amy Grossman (Springstead & Maurice, attorneys)

Record Closed: December 13, 2018 Decided: February 13, 2019

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner Amanda Hersh Luterzo, a teacher, appeals the determination of respondent, the Board of Education of the Borough of Cresskill, Bergen County (Board), that it would not be offering her employment for the 2016–2017 school year, alleging violation of her tenure and seniority rights, and alleging that failure to adopt a resolution terminating petitioner's employment by name renders the termination null and void.

PROCEDURAL HISTORY

On or about June 15, 2016, Luterzo filed a Verified Petition with the Commissioner of Education. On or about July 1, 2016, the Board filed an Answer and Affirmative Defenses. On July 7, 2016, the Bureau of Controversies and Disputes (Bureau) of the Department of Education (Department) transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on July 8, 2016. By letter dated February 1, 2017, the Board notified three employees of their right to file motions to intervene by February 28, 2017. On February 6, 2017, and on February 12, 2017, notices of appearance and letter requests to intervene were filed on behalf of Megan Berlamino and Amy Grossman, respectively. Berlamino and Grossman were granted leave to intervene.

On November 22, 2017, with the intention of filing cross-motions for summary decision, the parties submitted a joint Stipulation of Facts. On January 25, 2018, petitioner and respondent filed cross-motions for summary decision accompanied by briefs. On February 8, 2018, respondent filed a brief in opposition to petitioner's motion. On February 13, 2018, intervenor Grossman filed a brief in support of respondent's motion. Intervenor Berlamino did not file a brief, and petitioner's brief reflects that "[a]s a result of the completion of discovery, Petitioner abandoned all claims to the work performed by Intervenor Berlamino and she is no longer participating as an Intervenor in this matter." On February 14, 2018, petitioner filed a brief in further support of her motion and in opposition to respondent's motion. Oral argument was held on December 12, 2018.

FACTUAL DISCUSSION AND FINDINGS

Respondent's school district consists of three schools, Bryan School (grades K–5), Merritt Memorial School (grades pre-K–5) and Cresskill Middle/High School (grades 6–12). Petitioner was hired by Board Resolution of May 21, 2012 (J-1) and was continuously employed by respondent as a teacher from September 2012 through June 30, 2016, as follows:

a) 2012–2013, full-time teacher assigned to teach high school Marketing, Introduction to Business, and Business Law;

b) 2013–2014, full-time teacher assigned to teach high school Marketing, Introduction to Business, Business Law, and Grade 6 Computer Technology (Computer Tech. 6);

c) 2014–2015, full-time teacher assigned to teach high school Marketing, Introduction to Business, Business Law, and Grade 7 Computer Technology (Computer Tech. 7); and

d) 2015–2016, full-time teacher assigned to teach high school Marketing, Introduction to Business, Business Law, and Computer Tech. 6.

Petitioner was issued a New Jersey provisional certificate as a Teacher of Business in September 2012, and a standard New Jersey Instructional Certificate endorsed as a Teacher of Business: Finance/Economics/Law in August 2013, after completion of her mentorship. (J-2.)

By virtue of the date of her hiring resolution (J-1), certification (J-2), and term of service in respondent's employ, petitioner achieved tenure as a teacher in respondent's school district as of the first day of school in September 2015.

On March 21, 2016, petitioner was verbally advised that her position would be eliminated for economic reasons, effective June 30, 2016, and that she would not be employed by the Board thereafter.

By resolution of June 27, 2016 (J-3), the respondent abolished the position of School Testing Coordinator and assigned the person vacating that position to be a high-school business teacher, replacing petitioner for the 2016–2017 school year on the basis of the former testing coordinator's superior seniority as a secondary teacher of business. That resolution also authorized the termination of petitioner's employment in the district and her placement on a preferred eligibility list.

For the 2016–2017 school year, the respondent employed the following teacher, among others: Amy Grossman.

Amy Grossman was hired as a teacher by respondent effective September 1, 2014, and continues to be employed to the present. Grossman was a full-time, ten-month teacher from September 1, 2014, through January 31, 2016. Grossman was reduced to an eight-tenths, part-time teacher from February 1, 2016, through June 30, 2016. Grossman returned to full-time status from September 1, 2016, through June 30, 2017. Grossman is not tenured.

Grossman held a provisional certificate as a Teacher of Art (J-4) from February 2013 and received a standard certificate as a Teacher of Art (J-5) in January 2015. Grossman held a provisional certificate as a Teacher of Graphic Design (J-6) from March 2014 and received a standard certificate as a Teacher of Graphic Design (J-7) in January 2015.

During the 2016–2017 school year, Grossman was assigned to teach Web Design/Animation, Mosaics/Ceramics, Design Studio, Computer Tech. 6, and Computer Tech. 8.

During the 2015–2016 school year, petitioner earned gross wages of $54,645 from full-time employment with respondent. If petitioner had been employed full time by

respondent for the 2016–2017 school year, she would have earned a gross salary of $55,935. If petitioner had been employed for the 2016–2017 school year, petitioner would have had twenty days of sick leave and four days of personal leave available for use in 2016–2017.

Petitioner gave birth on September 16, 2016. The school year for teachers began on September 1, 2016. She would have returned to work from her child-rearing leave as of January 2, 2017, if she had been re-employed for the 2016–2017 school year. If petitioner had been employed in the four-tenths position being claimed in this matter, after allowing for paid and unpaid leaves for child birth and child-rearing, she would have earned $16,448 in salary for the 2016–2017 school year.

The Computer Tech. 6 Course Description is as follows:

> This course will develop proper communication and keyboarding skills when using technology. Computers are one of the ways in which people communicate globally. There are many careers which require proper keyboarding skills. MS Word is a universal tool used in personal, professional and educational settings. MS Word applications, commands and features can be used to generate quality documents involving complex formatting. There are tools in MS Word to assist in creating professional documents.
>
> [J-6.]

The Computer Tech 6. Syllabus is as follows:

> **Course Description:**
> Computer Technology 6 class is designed to assist students in becoming better Digital Citizens. Each unit throughout this 8-week cycle includes projects/assignments designed for the sixth grade developmental & proficiency levels. Students will be required to practice a minimum of 30 minutes of keyboarding weekly to develop and assess proper keyboarding habits. Class topics covered will include keyboarding and technology basics, introductory word processing skills and internet ethics/safety. Students will also use communication and collaboration tools within class such

as Edmodo.com and Typing.com. Students will create various products using the Microsoft Office Word application.

1. **Keyboarding Drills (1–2x weekly)**
   - Weekly drills on www.typing.com
   - Weekly progress on weekly increase of speed/accuracy is assessed
   - Educational keyboarding games weekly for additional practice

2. **Unit 1: KEYBOARDNG (1.5 weeks)**
   a. The keyboard and the home row
      - Teacher presentation
      - Individual student activities
   b. Proper keyboarding positioning and techniques
      - Teacher presentation
      - Individual student activities
   c. History of keyboarding
      - Teacher presentation
      - Individual student activities
   d. Keyboarding in Everyday Life
      - Class discussion
      - Group Projects
   e. End of Unit Assessment

3. **Unit 2: Technology basics (2 days)**
   a. Various skills taught: Navigating through the computer, saving files, saving and inserting images properly, different file formats, citing your sources
      - Teacher-led activities
      - Student activity

4. **Unit 3: Introduction to Word Application (4–5 weeks)**
   a. Various skills taught: vocabulary, header, footer, document size, document orientation, columns, margins, formatting (fonts, point size, colors), formatting effects, line spacing, watermarks, page color, tabs, tables, text wrap, hyperlinks, columns, clip art, shapes, drawing, photo editing, drop caps, word art, spelling/grammar, symbols
      i. Teacher-led activities
      ii. Individual student activities
      iii. Alphabet Hieroglyphics Project
      iv. Digital Acrostic Poem Project
      v. Seasonal/Holiday Drawing Project
      vi. All About Me Poster Project
      vii. End of Unit digital assessments

5. **Unit 4: Internet Ethics and Safety (2–3 days)**

a. Teacher presentation including example real-life video scenarios
b. Group discussions on: *Online safety, digital etiquette, cyber bullying, appropriate use, protecting your online reputation, social networking, plagiarism, copyright and fair use, how to conduct effective searches, how to evaluate sites for accuracy*
c. Group Project

6. **Final Projects (1 week)**
   a. These projects should showcase students' application skills to be used to create real-world projects.
      i. Mandatory project (1): Creating your own Restaurant Menu in Word
      ii. Choice Projects (choose 3 out of 4) Cartoon, timeline, 1-month calendar, seating chart

[J-7.]

The Computer Tech. 8 Course Description is as follows:

Enhancing keyboarding skills is a benefit for life, this course will improve your typing skills by committing to daily typing practice. Correct keyboarding techniques increase the ability to complete tasks efficiently and effectively.
The following programs will be taught:

WORD (Microsoft Office [S]uite)
This is a software program that enables you to perform word processing functions. Word has desktop publishing capabilities and is the most widely used word processing program on the market.

EXCEL (Microsoft Office Suite)
Excel is a spreadsheet application. It features calculation, graphing tools, pivot tables, and a macro programming language called Visual Basic for Applications. It has been a very widely applied spreadsheet for these platforms, since 1993. It is the industry standard for spreadsheets.

POWERPOINT (Microsoft Office Suite)
Power[P]oint is a slide show presentation program. It was officially launched in 1990. PowerPoint is well known for helping develop the slide based presentation format, and is currently one of the most commonly-used presentation programs available.

[J-8.]

The Computer Tech 8. Syllabus is as follows:

Course Description:
Computer Technology 8 class is designed to assist students in becoming better Digital Citizens. Each unit throughout this 8-week cycle includes projects/assignments designed for the eighth grade developmental & proficiency levels. Students will be required to practice a minimum of 30 minutes of keyboarding weekly to develop and assess proper keyboarding habits. Class topics covered will include an advanced level of word processing, spreadsheets, and presentation skills. Students will also use communication and collaboration tools within class such as Edmodo.com and Typing.com. Students will create various products using Microsoft Office, Word, Excel, Power[P]oint applications as well as Google Drive documents, spreadsheets, presentations, drawings, forms, etc. . .

1. **Keyboarding Drills (1–2x weekly)**
   a. Weekly drills
   b. Weekly progress on speed/accuracy is assessed via www.typing.com
   c. Educational keyboarding games weekly for additional practice

2. **Unit 1: Review of Word Applications (1.5 weeks)**
   a. Various skills taught: header, footer, document size, document orientation, columns, margins, formatting (fonts, point size, colors), formatting effects, line spacing, watermarks, page color, tabs, tables, text wrap, hyperlinks, columns, clip art, shapes, drawing, photo editing, drop caps, word art, spelling/grammar, symbols
   b. Teacher-led activities
   c. Individual student activities
   d. PROJECT: Zodiac Sign Flyer
   e. End of Unit digital assessment

3. **Unit 2: Review of Excel Application (1.5 weeks)**
   a. Skills taught: *inputting data, adjusting cells, formatting, creating spreadsheets, formulas, charts, pictograms*
   b. Teacher-led activities
   c. Individual Student Activities
   d. PROJECT: 12 Days of Middle School Group Activity
   e. End of Unit digital assessment

4. **Unit 3: Power[P]oint (1.5 weeks)**
   a. Skills taught: *Basics, Themes, Transitions, Animations*
   b. Teacher-led activities
   c. Individual Student Activities
   d. PROJECT: Technology Era Presentations
   e. End of Unit digital assessment

5. **Google Drive (2 weeks)**
   a. Basics: *Introduction to GOOGLE DRIVE, editing/collaborating, sharing, etc. . .*
   b. Google docs activity
   c. Google Slides activity
   d. Google Sheets activity
   e. Google Drawing activity
   f. Google Forms activity
   g. Google Survey activity
   h. PROJECT: Student CHOICE Google (Subject proposed to teacher)

6. **Final Projects (1.5 weeks)**
   a. These projects should showcase students' application skills to be used to create real-world projects.
      i. 1 mandatory project
      ii. Choice Projects (choose 2 out of 3)

[J-9.]

Petitioner stipulated that her claims herein are limited to the 2016–2017 school year.[1]

LEGAL ANALYSIS AND CONCLUSIONS

Tenure and Endorsements

Tenure of educational personnel is authorized by the Tenure Act, N.J.S.A. 18A:28-1 to -18. An employee of a board of education is entitled to tenure if the employee (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. N.J.S.A. 18A:28-5; Spiewak v. Bd. of Educ., 90 N.J. 63, 74 (1982). Teaching staff members shall be under tenure

[1] See December 12, 2018, letter from Louis P. Bucceri, Esq.

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 Title 18A. N.J.S.A. 18A:28-5; Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962).

Tenure is acquired in one of the positions specifically enumerated in N.J.S.A. 18A:28-5 only if the individual has served for the requisite statutorily required period of time in that position. See Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 368 (1997). Those positions include, inter alia, "teacher, principal, other than administrative 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." N.J.S.A. 18A:28-5; Nelson, 148 N.J. at 368–69. However, tenure in any of the administrative or supervisory positions so enumerated accrues only by employment in that administrative or supervisory position and does not extend to any other administrative or supervisory position. N.J.S.A. 18A:28-5(c). That however, does not 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. Ibid.

Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education must hold a valid and appropriate certificate. N.J.A.C. 6A:9B-5.1(a). "Certificate" means a legal document issued by the Board of Examiners that permits an individual to serve as a teaching staff member. N.J.A.C. 6A:9-2.1. The certificate holder shall obtain any license, certificate, or authorization required by State or federal law, a licensing board, or N.J.A.C. 6A:9B-4.1 and -4.2 for the individual to serve in a position. N.J.A.C. 6A:9B-5.1(b). The employing school district must remove from the position any teaching staff member who fails to maintain the mandated license, certificate, or authorization. N.J.A.C. 6A:9B-5.1(c).

The Board of Examiners issues three categories of educational certificates: Instructional, Administrative, and Educational Services. N.J.A.C. 6A:9B-5.3. "Instructional certificate" means the certificate category that permits an individual to serve

as a teacher in a classroom setting. N.J.A.C. 6A:9-2.1. Except as indicated in N.J.A.C. 6A:9B-8.8, candidates for a standard instructional certificate first shall obtain a certificate of eligibility with advanced standing (CEAS) or a certificate of eligibility (CE), and then shall obtain a provisional certificate. N.J.A.C. 6A:9B-8.1(a). "Standard certificate" means a permanent certificate issued to a person who has met all certificate requirements. N.J.A.C. 6A:9-2.1. A provisional teacher who meets all other standard-certificate requirements pursuant to N.J.A.C. 6A:9B-8.7 will earn a standard certificate upon receipt of at least two summative evaluation ratings of effective or highly effective earned within three consecutive years of teaching. N.J.A.C. 6A:9B-8.6(b).

In addition to the foregoing, "the State Board has also designated 'special endorsements' under each type of certificate, which identify the educational subjects or assignments that share common traits." Nelson, 148 N.J. at 363. "Endorsement" means an authorization allowing a certificate holder to teach one or more specific subject area(s) or to serve in one or more specific teaching staff role(s). N.J.A.C. 6A:9-2.1. Each certificate must be issued with at least one endorsement, which shall be considered part of the certificate. N.J.A.C. 6A:9-2.1, "Certificate." Specifically, N.J.A.C. 6A:9B-9.1(a) requires that

> [t]o fulfill the endorsement requirements necessary for instructional certification pursuant to N.J.A.C. 6A:9B-8, the candidate shall:
>
> 1. Complete one or more of the following coursework requirements for the subject area in which the candidate is seeking the endorsement:
>
> i. Complete an undergraduate major in the subject area as documented by an official transcript from a regionally accredited four-year college or university;
>
> ii. Hold a graduate degree in the subject area; or
>
> iii. Complete at least 30 credits in a coherent sequence of courses appropriate to the subject area as documented by an official transcript from a regionally accredited college or

> university, of which 12 semester-hour credits must be at the advanced level of study, including junior-, senior-, or graduate-level study as documented by the official transcript of a four-year, regionally accredited college or university;
>
> 2. Pass the appropriate State test(s) of subject matter knowledge. . . .
>
> [. . .]; and
>
> 3. When applicable, complete additional requirements or exceptions pursuant to N.J.A.C. 6A:9B-11.
>
> (b) Except if certified in an experience-based career and technical education endorsement pursuant to N.J.A.C. 6A:9[B]-11.3 or military science pursuant to N.J.A.C. 6A:9[B]-11.8, holders of a CE, CEAS, or standard instructional certificate in one endorsement may obtain the corresponding CE, CEAS, or standard instructional certificate in a different endorsement upon completion of the academic and test requirements listed in (a) above and any additional requirement(s) or exception(s) in N.J.A.C. 6A:9B-10 or 11.

Career and Technical Education (CTE) Endorsements

"Career and technical education" (CTE) means organized educational activities that: offer a sequence of courses that provide individuals with the coherent and rigorous content aligned with challenging academic standards and relevant technical knowledge and skills needed to prepare for further education and careers in current or emerging professions; provides technical skill proficiency, an industry-recognized credential, a certificate, or an associate degree; may include prerequisite courses (other than a remedial course) that meet the requirements of this definition; and include competency-based applied learning that contributes to the academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupation-specific skills, and knowledge of all aspects of an industry. N.J.A.C. 6A:19-1.2; N.J.A.C. 6A:9-2.1. N.J.A.C. 6A:9B-11.3(a) provides that candidates for the instructional certificate in a CTE endorsement shall complete:

1. CEAS requirements pursuant to N.J.A.C. 6A:9B-8.2;

2. CE requirements pursuant to N.J.A.C. 6A:9B-8.3, except:

i. Candidates do not need to complete the basic skills requirement pursuant to N.J.A.C. 6A:9B-8.3(a)5 prior to obtaining a CE; and

ii. Candidates shall complete either the experience-based or degree-based requirements pursuant to (b) below;

3. Provisional requirements pursuant to N.J.A.C. 6A:9B-8.4; and

4. Requirements for the renewal of the provisional certificate, pursuant to N.J.A.C. 6A:9B-8.5, and standard certificate requirements, pursuant to N.J.A.C. 6A:9B-8.7. Candidates who have not yet completed the Department-approved basic skills assessment or achieved a minimum score on an alternate assessment listed in N.J.A.C. 6A:9B-8.3(a)5 shall complete the basic skills assessment prior to becoming eligible for a standard certificate.

According to N.J.A.C. 6A:9B-9.4(a), "21st century life and careers, and [CTE] endorsements and authorizations," the following teaching endorsements "authorize the holder to teach kindergarten through grade 12, including approved [CTE] programs in grades nine through 12 in all public schools":

1. Business education/business-related technologies: The endorsements authorize the holder to teach business education and business-related technologies in all public schools.

i. Comprehensive business: This endorsement authorizes the holder to teach accounting, banking and insurance, business computer applications, business law, business communications, business mathematics, economics and finance, entrepreneurship, international business, keyboarding, business management, business organization, marketing, office administration/office systems technology, and exploration in business-related careers.

ii. Business: accounting: This endorsement authorizes the holder to teach accounting, bookkeeping, finance and investment, business mathematics, and exploration of related careers.

iii. Business: finance/economics/law: This endorsement authorizes the holder to teach finance and investment, economics, law, banking and insurance, business mathematics, business communications, business management, business organization, and exploration of related careers.

iv. Business: keyboarding and data entry: This endorsement authorizes the holder to teach keyboarding, computer data entry, word processing, and exploration of related careers.

v. Business: computer applications and business-related information technology: This endorsement authorizes the holder to teach business-related software applications, safety and security policies pertaining to computer use, emerging hardware and operating systems, file management, legal issues related to computer use, and exploration of related business occupations.

vi. Business: office administration/office systems technology: This endorsement authorizes the holder to teach office organization, word processing, speed writing, business communication, office and administrative support practices and procedures, keyboarding, data entry, and exploration of related business occupations.

vii. Marketing education: This endorsement authorizes the holder to teach marketing occupations including sales, advertising and retailing, global marketing, entrepreneurship, and exploration of related business occupations.

The legislative history of N.J.A.C. 6A:9B-9.4 reflects that it was recodified from N.J.A.C. 6A:9-9.2(a)(9). Initially, N.J.A.C. 6A:9-9.2(a)(9), "Career education and consumer, family and life skills," did not separately list or define the business education/business-related technologies endorsements. It was not until May 15, 2006, that the regulation was amended to add the seven enumerated endorsements.

Specific CTE endorsements are based on a candidate's Department-approved employment or self-employment experience, bachelor's degree, and/or associate degree. N.J.A.C. 6A:9B-9.4(c). Endorsements are organized under career clusters and listed on the Department's website. Ibid. Petitioner's CTE endorsement, "Business: finance/economics/law," is listed on the Department's website under "Business Management and Administration."[2] To meet the endorsement requirements in N.J.A.C. 6A:9B-9.1(a)(1)(iii), as part of the minimum thirty credits in the content area, a candidate for the finance, economics, and law endorsement must complete at a two- or four-year regionally accredited college or university:

1. At least six semester-hour credits in economics;
2. At least three semester-hour credits in finance; and
3. At least three semester-hour credits in business law.

[N.J.A.C. 6A:9B-10.13(a).]

N.J.A.C. 6A:19-1.1 to -7.6 governs the CTE programs and standards. The purpose of the State system of CTE is to (1) support developmental career education designed to provide students opportunities to enhance career awareness, exploration, preparation, and decision-making skills necessary for success in the workplace; (2) provide secondary and postsecondary students with CTE programs and programs of study in Department-recognized Career Clusters that fulfill New Jersey Student Learning Standards; (3) support a comprehensive K–12 career education and counseling system; and (4) support the workforce development system by helping to ensure quality postsecondary educational opportunities for adult students. N.J.A.C. 6A:19-1.1(a). Chapter 19 establishes the general provisions governing CTE, and specifies the standards and procedures regarding CTE in the areas of (1) provision of career and technical education; (2) development, approval, and delivery of career and technical education programs and programs of study; (3) provision of structured learning experiences; (4) implementation of the CTE accountability system; (5) development and implementation of safety and health standards; and (6) contracting of services of career and technical training providers. N.J.A.C. 6A:19-1.1(b).

[2] Available at https://nj.gov/education/license/cte/endorsements.htm (last visited January 30, 2019).

A district board of education may not apply the term "career and technical" to any of its schools, programs, or programs of study unless those schools, programs, or programs of study are approved by the Department and meet the general requirements included in the approved State Plan for CTE. N.J.A.C. 6A:19-2.1(c). A district board of education may establish CTE programs and programs of study approved pursuant to N.J.A.C. 6A:19-3.1 as part of a separate career and technical high school or as part of a comprehensive high-school curriculum. N.J.A.C. 6A:19-2.1(e). A district board of education operating a CTE program or program of study must comply with all requirements pursuant to N.J.A.C. 6A:19-6, Safety and Health Standards, in the administration and operation of the programs. N.J.A.C. 6A:19-2.1(i). N.J.A.C. 6A:19-3.1(a) sets forth, at length, the program requirements for a district board of education intending to offer a CTE program or program of study.

Distinction Between Technology Education and Educational Technology

A "technology education" endorsement authorizes the holder to teach technology education in all public schools with the exception of approved CTE programs. N.J.A.C. 6A:9B-9.3(a)(8)(i). Technology education includes content aligned with the NJSLS and the "Standards for Technological Literacy: Content for the Study of Technology" published by the International Technology and Engineering Educators Association (ITEEA), Copyright 2007, incorporated by reference, available at https://www.iteea.org/File.aspx?id=67767&v=b26b7852. Ibid. Examples of the topics that can be taught under the "technology education" endorsement include: technological literacy; the nature of technology; technology and society; the engineering and technological design process; abilities for a technological world; and understanding the designed world, including selecting and using medical technologies, agricultural and related biotechnologies, energy and power technologies; information and communication technologies; transportation technologies, manufacturing technologies, and/or construction technologies. N.J.A.C. 6A:9B-9.3(a)(8)(i)(1). A technology education endorsement is not required to teach educational technology and/or computer and information skills pursuant to N.J.A.C. 6A:9B-5.18.[3] N.J.A.C. 6A:9B-9.3(a)(8)(ii). The

[3] It appears the correct citation should be N.J.A.C. 6A:9B-5.17, as 5.18 is reserved.

legislative history for N.J.A.C. 6A:9B-9.3 reflects that it was previously codified at N.J.A.C. 6A:9-9.2(a)(8). In 2005 and 2006, the regulation reflected a "technology education" paragraph, but was later amended, effective January 5, 2009, to add the "computer and information literacy" paragraph reflecting that there was no separate endorsement for educational technology and tools or for computer and information literacy, except where career and technical endorsements occur. N.J.A.C. 6A:9-9.2(a)(8)(i).

With respect to instruction in "educational technology," computers, and other digital tools, the legislative history of N.J.A.C. 6A:9B-5.17 reflects that subparagraph (b) was added, effective December 7, 2015, to almost identical language previously codified at N.J.A.C. 6A:9-5.20 (effective January 5, 2009), and later codified at N.J.A.C. 6A:9-5.19 (effective July 1, 2013). The Rule Proposal Summary reflects that the Department was proposing amendments "primarily in four areas that are consistent with both the State Board Strategic Plan and the Department's mission statement," including amendments at N.J.A.C. 6A:9-5.20 and elsewhere to address "a more comprehensive authorization for teaching computer literacy, and clarification of the distinction between educational technology and technology education." 40 N.J.R. 4856(a) (September 2, 2008). More specifically,

> N.J.A.C. 6A:9-5.20, Computer literacy, is proposed for repeal and replacement with a new section emphasizing the integration of education technology across the curriculum, per Core Curriculum Content Standard 8.2. The new rule also reflects changes in the Department's understanding of the educational technology responsibilities of teachers, and distinguishes educational technology from technology education.
>
> [Ibid.]

Presently, N.J.A.C. 6A:9B-5.17, "Instruction in educational technology, computers, and other digital tools," provides as follows:

> (a) Every teacher shall demonstrate knowledge and understanding of computers and other educational technology resources and tools as defined by the Professional Standards for Teachers.

> (b) An endorsement shall not be required to deliver instruction in educational technology, computers, and other digital tools, except where career and technical endorsements are required for the related career clusters, career education, and consumer, family, and life skills pursuant to N.J.A.C. 6A:9B-9.4.
>
> (c) Every teacher shall integrate into the classroom appropriate educational technology resources and digital tools related to the content area being taught.
>
> (d) The chief school administrator or his or her designee may assign an individual to provide instruction in the use of educational technologies, computers, and other digital tools if the individual:
>
> 1. Demonstrates proficiency in the uses of educational technologies, computers, and other digital tools, and understands their common applications in an educational setting;
>
> 2. Demonstrates knowledge and understanding of the integration in the curriculum of such technologies and digital tools;
>
> 3. Demonstrates understanding of the legal and ethical issues surrounding the use of educational technologies and digital tools in preschool through grade 12 schools; and
>
> 4. Holds a CE, CEAS, or standard certificate in an instructional field.

Analysis

In Dennery v. Passaic County Regional High School District #1 Board of Education, 131 N.J. 626, 634 (1993), the Supreme Court opined that a tenured staff member may not be subject to a reduction in force if a nontenured person has been retained in a position within the scope of the tenured staff member's certificate:

> To acquire a particular certificate and endorsement, an educator is also required to fulfill certain academic requirements. N.J.A.C. 6:11-5.1 to 5.2. Those most often include the completion of coursework or the acquisition of a

> relevant higher degree. On the satisfactory completion of all requirements, the Division of Teacher Preparation and Certification will certify the educator. N.J.A.C. 6:11-3.19.
>
> An educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate. Ellicott v. Board of Educ., 251 N.J. Super. 342, 349, 598 A.2d 237 (App. Div. 1991). Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. Id. at 350, 598 A.2d 237; Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 534 A.2d 93 (App. Div. 1987) (holding that tenured teacher with instructional certificate and endorsement in art also entitled to tenured post requiring secondary art endorsement), certif. denied, 110 N.J. 512, 541 A.2d 1371 (1988); Capodilupo v. West Orange Township Bd. of Ed., 218 N.J. Super. 510, 528 A.2d 73 (App. Div.) (holding that teacher with both elementary and secondary physical education endorsements was tenured under both endorsements), certif. denied, 109 N.J. 514, 537 A.2d 1300 (1987); Grosso v. Board of Educ., 1990 S.L.D. 1750.

In Bednar, the court opined that seniority does not purport to create employment rights for nontenured employees, and that Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a nontenured teacher in a position within the certificate of a dismissed tenured teacher. Bednar, 221 N.J. Super. at 242 (citing Capodilupo, 218 N.J. Super. 510). The court continued that N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a reduction in force, among whom seniority is determinative, but the statute does not authorize regulatory dilution of tenure rights by affording a nontenured teacher "seniority." Id. at 243.

In Capodilupo, the Appellate Division opined that the "State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a [reduction in force] as against a non-tenured applicant with the same certification." Capodilupo, 218 N.J. Super. at 515. Similarly, in Grosso v. Board of Education, 1990 S.L.D. 1750 (State Board of Education), appeal dismissed, Nos. A-4359-89T5 and A-4360-89T5 (App. Div. 1990), the Commissioner of Education agreed that the petitioner had achieved tenure as a "teacher" by virtue of his service teaching business education for the requisite period of time under

N.J.S.A. 10A:28-6, and that the scope of his tenure protection extended to all of the endorsements on his instructional certification. The Commissioner concluded that since the petitioner was authorized and qualified to serve as an elementary teacher by virtue of his elementary education certification, under N.J.A.C. 6:11-6.2(a)(6), he had entitlement as a result of his tenure status to employment as an elementary teacher as against nontenured individuals, regardless of whether he had previously served under that endorsement.

The standards for determining seniority are set forth in N.J.A.C. 6A:32-5.1. Seniority, pursuant to N.J.S.A. 18A:28-13 et seq., is determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district, in specific categories. N.J.A.C. 6A:32-5.1(b). The categories are enumerated in N.J.A.C. 6A:32-5.1(l) and include secondary, elementary and "[a]dditional categories of specific educational service endorsements issued by the State Board of Examiners and listed in N.J.A.C. 6A:9B." N.J.A.C. 6A:32-5.1(l)(17)–(19).

Petitioner holds a standard instruction certification with a Business: Finance/Economics/Law endorsement. She was employed as full-time teacher assigned to teach high school Marketing, Introduction to Business, and Business Law for the 2012–2013 through 2015–2016 school years. By virtue of the date of her hiring resolution (J-1), certification (J-2), and term of service in respondent's employ, petitioner achieved tenure as a teacher in respondent's district as of the first day of school in September 2015 pursuant to N.J.S.A. 18A:28-5(a)(2) with seniority rights pursuant to N.J.A.C. 6A:32-5.1, et seq. Petitioner does not dispute that she did not have sufficient seniority to claim the Marketing, Introduction to Business, and Business Law classes, which were assigned to another tenured teacher. However, petitioner argues that her tenure rights extend to the computer technology courses that were assigned to a non-tenured teacher and required her employment in a part-time position for the 2016–2017 school year; that her "tenure rights extend beyond the Business Education classes . . . to include all subjects which can be taught within the scope of her instructional certificate and are being taught by non-tenured teachers"; that she is properly certified to teach the computer technology courses; and that respondent does not have an educational prerogative to ignore tenure laws. Conversely, the Board argues that it properly conducted a reduction in force and that

petitioner "is not entitled to restoration to a .040 Full-Time Equivalent (FTE) position solely because she taught miscellaneous computer classes for a few years"; that petitioner did not, and does not, have the appropriate endorsement to teach Computer Tech. 6 or Computer Tech. 8 in the 2016–2017 school year; that even if petitioner could teach the computer technology courses, her tenure and seniority rights do not extend to Computer Tech. 6 or Computer Tech. 8; and that even if petitioner's tenure rights extend to Computer Tech. 6 or Computer Tech. 8, the Board properly exercised its discretion to "efficiently operate its school program by assigning those classes to [Grossman] in order to retain one full-time teacher of graphic design."

N.J.A.C. 6A:9B-5.17 allows every teacher to deliver instruction in educational technology, computers, and other digital tools, "except where career and technical endorsements are required." N.J.A.C. 6A:9B-5.17(b). In part, this regulation was proposed as "a more comprehensive authorization for teaching computer literacy," 40 N.J.R. 4856(a) (September 2, 2008), and section (c) confirms that computers and educational technology are to be incorporated by "every teacher" into the classroom, as appropriate. However, section (d), which allows the chief school administrator or designee to "assign an individual" to provide instruction in the use of educational technologies, computers, and other digital tools if that individual demonstrates the requisite proficiency, knowledge, and understanding of educational technology and computers, makes it evident that such individual is not "every teacher." Additionally, there was no evidence that the District's computer technology courses meet the CTE definition. The course descriptions and syllabi do not reflect "rigorous content," "occupation specific skills," or "relevant technical knowledge and skills needed to prepare for further education and careers in current or emerging professions." N.J.A.C. 6A:19-1.2, "Career and technical education." Inasmuch as Microsoft Office Suite has become ubiquitous in school, home, and work environments, the Computer Tech. 6, Computer Tech. 7, and Computer Tech. 8 courses appear to be general-computer-skills classes.

The District's argument that an endorsement is required to teach the computer technology classes is unavailing. N.J.A.C. 6A:9B-9.4(a) states that "the teaching endorsements . . . authorize the holder to teach "kindergarten through grade 12, including approved [CTE] programs in grades nine through 12." Emphasis added. Further,

N.J.A.C. 6A:9B-9.4(b) states: "[CTE] endorsements authorize the holder to teach approved [CTE] programs in grades nine through 12 in all public schools in accordance with N.J.A.C. 6A:9B-11.3." Emphasis added. The teaching endorsements referred to are the various business education/business-related technologies endorsements, family and consumer sciences, and agriculture, food, and natural resources. The Department of Education website makes clear that the "approved CTE programs" are, at a minimum, for secondary students, and its CTE program approval process is for secondary programs.[4] The District presented no evidence to establish that any of the computer technology classes in question complied with or were approved in accordance with N.J.A.C. 6A:19-3.1. Petitioner was not teaching secondary computer technology classes. Rather, the classes were grades six, seven, and eight, and the business education/business-related technologies endorsements identified at N.J.A.C. 6A:9B-9.4(a)(1) require the appropriate endorsement to teach an approved CTE computer technology class in grades nine through twelve only.

There is no dispute that Hersh-Luterzo acquired tenure as to her standard instructional certificate, and the protections afforded thereby encompass not only those classes she is authorized to teach within the scope of her Business: Finance/Economics/Law endorsement, but also those classes she is authorized to teach within the scope of her standard instructional certificate. Although the District argues that it properly exercised its discretion to "efficiently operate its school program" by assigning the computer technology courses to a non-tenured, full-time graphic design teacher, the cases relied upon are distinguishable from this case and insufficient to trump petitioner's tenure rights.

In sum, I **CONCLUDE** as follows:

The District's Computer Tech. 6, Computer Tech. 7, and Computer Tech. 8 courses are not approved CTE courses. No endorsement is required to teach the District's Computer Tech. 6, Computer Tech. 7, and Computer Tech. 8 courses. Petitioner's standard instructional certificate tenure extends to the Computer Tech. 6,

[4] Available at https://www.nj.gov/education/cte/ (last visited January 30, 2019).

Computer Tech. 7, and Computer Tech. 8 courses under N.J.A.C. 6A:9B-5.17. Petitioner's tenure allows her to claim the sixth, seventh, and eighth-grade computer technology classes of a non-tenured teacher.

Termination

The Verified Petition, filed on June 15, 2016, alleged that the failure to adopt a resolution terminating petitioner's employment "by name" rendered the termination null and void. However, petitioner's brief states that "[t]he second count of the petition was later mooted by the Board's adoption of a resolution terminating petitioner on June 27, 2016." Accordingly, the second count of the Verified Petition is not considered herein.

Summary Decision

Applications for summary decision after a matter has been transmitted to the Office of Administrative Law shall be filed with the administrative law judge (ALJ) in accordance with applicable rules of the OAL. N.J.A.C. 6A:3-1.12(b). A contested case before the Office of Administrative Law "can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 63 (1988).

N.J.A.C. 1:1-12.5(b) provides, in pertinent part:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. 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.

The parties cross-moved for summary decision. Inasmuch as there is no genuine issue as to any material fact challenged, I **CONCLUDE** that this matter is appropriate for summary decision. Based upon the totality of the facts and circumstances, I **CONCLUDE** that the Board's failure to employ petitioner for the 2016–2017 school year to teach Computer Tech. 6 and Computer Tech. 8 courses violated petitioner's tenure rights. I further **CONCLUDE** that the Board should compensate petitioner for any salary and benefits lost and credit petitioner any seniority credit lost for the 2016–2017 school year.

ORDER

I **ORDER** that petitioner's motion for summary decision be and hereby is **GRANTED** and respondent's cross-motion for summary decision be and hereby is **DENIED**. I further **ORDER** that the Board compensate petitioner for any salary and benefits lost and credit petitioner any seniority credit lost for the 2016–2017 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

February 13, 2019
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: February 13, 2019

Date Mailed to Parties: 2/14/2019

EXHIBITS

Joint:

J-1 Board Resolution (May 21, 2012)

J-2 Standard Certificate and Endorsement

J-3 Board Resolution (June 27, 2016)

J-4 Provisional Certificate (Amy Grossman)

J-5 Standard Certificate (Amy Grossman)

J-6 Computer Tech. 6 Course Description

J-7 Computer Tech. 6 Syllabus

J-8 Computer Tech. 8 Course Description

J-9 Computer Tech. 8 Syllabus

122-19LM

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

LAMONT O. REPOLLET, ED.D.
Commissioner

May 13, 2019

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Re: *William Acevedo v. Board of Education of the Township of Hazlet, Monmouth County,*
Agency Dkt. No. 16-1/19

Dear Parties:

I have reviewed the petition of appeal, as well as the materials filed in connection with the Board's motion to dismiss the petition in the above-referenced matter. Upon review of the submissions, I have determined to dismiss this matter as moot.

Petitioner contends that pre-participation physicals should be required for members of the District's high school dance team because the dance team qualifies as an athletic activity. The Board advised that although it classifies the dance team as a co-curricular activity, it nevertheless began requiring pre-participation physicals. As the requested relief has already been granted, this matter is moot.

Accordingly, the Board's motion to dismiss the petition is GRANTED, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/JKH/BCM

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

123-19E

OAL Dkt. No. EDU 52628-19
Agency Dkt. No. 82-4/19

New Jersey Commissioner of Education

Order on Emergent Relief

T.C., on behalf of minor child, P.S.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/19
Date of Mailing: 5/14/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 05628-19
AGENCY DKT. NO. 82-4/19

T.C. ON BEHALF OF P.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

T.C., petitioner, pro se

Martin Barger, Esq., for respondent (Barger & Gaines, attorneys)

Record Closed: April 30, 2019 Decided: May 1, 2019

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner, T.C., filed a petition seeking emergent relief on behalf of her son, P.S., who is a student at Monmouth Regional High School (MRHS). P.S. was placed on an out-of-school suspension on March 22, 2019, following an incident where the MRHS Board (Board) alleged he verbally threatened a teacher during class. Following

an expulsion hearing before the Board on April 2, 2019, P.S. was expelled from MRHS. He is currently on home instruction pending placement at Class Academy beginning in the fall of 2019. The petitioner seeks an order immediately returning P.S. to MRHS for the remainder of the school year to complete his classes. The school year ends on June 17, 2019.

PROCEDURAL HISTORY

On April 26, 2019, the New Jersey Department of Education received the petition of appeal and motion for emergent relief. The matter was transmitted to the Office of Administrative Law, where it was filed on April 26, 2019. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument on the motion for emergent relief was held on April 30, 2019, and the record was closed.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS**:

1. P.S. is a student at MRHS where he is currently in the eleventh grade.
2. In April 2018, P.S. was the subject of an expulsion hearing by the Board. (R-3.) That hearing addressed allegations that P.S. struck another student and engaged in cyberbullying activities. (Id.) P.S. denies these charges. The Board sustained the charges; however, the Board allowed P.S. to return to school on April 18, 2018, with conditions of probation. (R-4.) Among the probationary terms imposed was the requirement that "repeat of a similar incident or failure to follow any school rules or terms of this probation may result in reconvening of a Board of Education expulsion hearing." (Id.)
3. Following his probation, it is alleged that P.S. committed other violations of school rules (R-1 at 6-7), however, MRHS did not seek expulsion hearings on these violations.

4. On March 21, 2019, P.S. was involved in an incident with a teacher at MRHS in his child development class. (R-5.) The teacher reported that P.S. came to class wanting to speak with her in the hallway, he then stated to her "I'm not going to drag you out by the chair so get out in the hallway." (Id.) The teacher reported that P.S. "continued saying this in front of my class until I called to have him removed." (Id.)

    a. Following this incident, P.S. was placed on out-of-school suspension pending an expulsion hearing. MRHS provided home-instruction services to P.S. to continue his educational program.

5. The March 21, 2019, incident was the subject of an expulsion hearing before the Board on April 2, 2019. (R-2.) P.S.'s mother was notified of the hearing (Id. at 2), and P.S. and his mother attended and spoke at the hearing. (See R-1.)

6. P.S. denies the allegations addressed in the April 2, 2019, expulsion hearing; however, the Board unanimously voted to expel P.S. from MRHS due to the alleged conduct.

7. The Board recommended transferring P.S. to the CLASS Academy, an alternative high school within the Monmouth Regional School District (District). P.S. can begin classes at the CLASS Academy beginning in the fall 2019, semester.

    a. Although P.S. is currently in the eleventh grade, he currently has only twenty-five credits completed. He needs 120 credits to graduate high school. The CLASS Academy offers a credit recovery program which would allow P.S. to complete the required credits he needs to graduate high school on time. MRHS does not have a credit recovery program to allow P.S. to complete the 120 credits he needs to graduate within the next year.

    b. P.S. and his mother have indicated that they are willing to try CLASS Academy starting in the fall; however, they want P.S. to finish the current school year at MRHS and have him immediately returned to MRHS to finish his classes.

8. P.S. is currently receiving home instruction. This instruction consists of online classes as well as in-person teaching for two of his subjects. MRHS has offered to provide additional in-home one-on-one instruction for the remainder of the school year to augment what is currently being provided, however, P.S. wants to return to MRHS immediately to complete the semester. MRHS has also offered to place P.S. at another alternative high school placement operated by the Monmouth Ocean Educational Services Commission (MOESC) for the remainder of the school year, however, P.S. and his mother are not interested in placement anywhere but MRHS for the remainder of the current school year.

LEGAL DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the 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 has the burden of establishing all of the above requirements in order to warrant relief in her favor and must prove each of these Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J.Agen LEXIS 814, 7 (October 25, 2017).

Beginning with the first requirement, it is well-settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132-33. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F.Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires "a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; (an injunction) may not be used simply to eliminate the possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Id. (citations omitted) (emphasis added). The petitioner has not shown that there is an immediate harm which requires immediate redress through injunctive relief. The petitioner has been out of school since March 22, 2019, and is currently on a program of home instruction being provided by the District. The petitioner asserts that emergent relief is justified on the grounds she wants her son returned to MRHS immediately, because he needs face-to-face instruction and a class environment because "there is no supervision at home where he is all day." (P-1.)

In some cases, a break in services being provided to a student has been found to satisfy the irreparable harm standard under Crowe. See, e.g., River Edge Bd. of Education v. E.F. o/b/o V.F., 2009 N.J.Agen. LEXIS 313, OAL Dkt. No. EDS 05680-09, Final Decision (June 1, 2009); Franklin Twp. Bd. of Education v. N.K. on Behalf of M.M., OAL Dkt. No. EDS 07818-16, Final Decision (June 6, 2016). The petitioner asserts that the home instruction being provided by MRHS is not adequate to maintain P.S.'s educational objectives. The petitioner, however, has refused offers by MRHS to augment P.S.'s current home instruction with additional one-on-one teaching services or have P.S. placed back in a classroom environment at an alternative high school operated by MOESC for the remainder of the school year. The Board's actions, under

these circumstances, are not the cause of any break in educational services for P.S. that can satisfy the irreparable harm requirement under Crowe. Therefore, I **CONCLUDE** that the petitioner has failed to meet their burden of establishing a clear showing that P.S. will suffer immediate irreparable injury unless the requested relief is granted.

Secondly, the petitioners must also demonstrate that the legal right underlying their claim is settled and they must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. The crux of the petitioner's action is seeking to overturn the disciplinary decision of the Board leading to P.S.' expulsion from MRHS. It is well settled that actions within a school board's authority, including establishing policies for student discipline, are entitled to a presumption of validity and will not be overturned in the absence of an affirmative showing that the decision was arbitrary, capricious, or unreasonable. Thomas v. Morris Twp. Board of Education, 89 N.J.Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). The arbitrary, capricious and unreasonable standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, EDU 1839-98, Initial Decision, (January 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974)).]

The petitioner's legal right to challenge the Board's decision is well-established; therefore, I **CONCLUDE** that the petitioner has met her burden to show a well-settled

legal right underpins her claim. While her right to appeal is well-established, the applicable "arbitrary and capricious" legal standard makes her probability of success on the merits dubious at this time. The petitioner is challenging the Board's actions on the basis that the Board failed to give her son a fair hearing because "there were no African-American teachers, or parents, on the board" and her son cannot be judged by "persons not of their own peers" because she believes it is unfair for "5 white men and 5 white women [to] judge an African American family without one Professional Black man." (P-1 at 6 (April 12, 2019 email from petitioner to Board).) She also claims that the District discriminated against P.S. by "selecting a hearing panel that was not representative by his own peers" (P-1 at 1) despite the Board's membership consisting of duly elected officials from each of the three towns that make up Monmouth Regional School District. The petitioner's assertions, without factual support to demonstrate actual discrimination in the Board's actions, do not sustain her claim that her son was unfairly judged or that his due process rights were violated by the Board's actions. On this record, I **CONCLUDE** that the petitioner has failed to meet her burden to demonstrate a reasonable probability of success on the merits.

Finally, in balancing the relative equities of the parties' respective positions, the petitioner feels that her son is at home while other children are going to school "and he is going to have mental anguish over that." (P-1 at 6 (April 12, 2019, email to school board).) On the other hand, the Board has a substantial and valid interest in ensuring the safe and orderly operation of the activities of its schools. The balance weighs in favor of the Board over the student because such a ruling to the contrary would amount to an "undermining of authority" that could "have a far reaching effect on the school district in its dealings with its student." L.B. o/b/o S.C. v. Hamilton Township Board of Education, EDS 08561-17, Final Decision, (June 22, 2017) http://lawlibrary.rutgers.edu/oal/search.html. In balancing of the respective equities, I **CONCLUDE** that the petitioner has failed to meet her burden to demonstrate that P.S. will suffer greater harm than the Board if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to meet all of the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter.

ORDER

Accordingly, **I ORDER** that the petitioner's application for emergent relief be and hereby is **DENIED**.

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

May 1, 2019
DATE

DAVID M. FRITCH, ALJ

/dw/mph

APPENDIX

WITNESSES

For petitioner:

P.S.

For respondent:

Kathleen Mihalko, Assistant Principal, MRHS
Brian Evans, Principal, MRHS

EXHIBITS

For petitioner:

P-1 Petition of Appeal Packet

For respondent:

R-1 Transcript of MRHS Board of Education, Expulsion Hearing, April 2, 2019
R-2 MRHS Expulsion Hearing Packet, April 2, 2019
R-3 MRHS Expulsion Hearing Packet, April 17, 2018
R-4 MRHS Terms of Probation, April 18, 2018
R-5 MRHS Student Incident Report, March 21, 2019

New Jersey Commissioner of Education

Final Decision

Vincenza Olsen-Faivre and Donna Perez,

Petitioners,

v.

Board of Education of the Carlstadt – East Rutherford Regional School District, Bergen County,

Respondent.

Synopsis

Petitioners – tenured secretaries in the respondent Board's school district – challenged the Board's decision to deny their salary increases, and to rescind petitioner Vincenza's Olsen-Faivre's stipend for serving as the district's substitute coordinator, based upon an alleged act of fraud. Specifically, the Board contended that the petitioners conspired to fraudulently deceive the Board in order to receive salary increases.

The ALJ found, *inter alia*, that: petitioner Olsen-Faivre was and continues to be the confidential secretary to the district's Superintendent of Schools; petitioner Perez was formerly employed as confidential payroll clerk and bookkeeper for the district; the allegations herein arose when the Board's Business Administrator reviewed newly approved salary revisions for the 2014-2015 school year, and subsequently accused petitioners of conspiring to include Olsen-Faivre's substitute coordinator stipend in her pensionable salary without obtaining Board approval; both the petitioners and the Board presented credible, competent witness testimony at hearing; based on the totality of the evidence presented, there is no basis to find that petitioners conspired against the Board; the evidence did not support the conclusion that petitioners committed fraud by intentionally disobeying a supervisor's instruction or unilaterally altering Board documents without approval; on the contrary, the testimony showed that the Superintendent at the time of the incident supported the idea of Olsen-Faivre's stipend becoming pensionable. The ALJ concluded that petitioners are entitled to the Board-approved salary increases they were denied in violation of their tenure rights. Accordingly, the ALJ reversed the Board's decision denying said increases and rescinding Olsen-Faivre's stipend.

Upon comprehensive review, the Commissioner concurred with the ALJ that petitioners did not conspire to fraudulently deceive the Board in order to receive salary increases; further, the Board's decision to rescind their salary increases was a violation of their tenure rights. In so deciding, the Commissioner found no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. Accordingly, the Commissioner determined that petitioners are entitled to their approved salaries for the 2014-15, 2015-16 and 2016-17 school years, but found that petitioner Olsen-Faivre is not entitled to reimbursement for the stipend she claimed as substitute coordinator because she never obtained tenure in that 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.

May 13, 2019

OAL Dkt. No. EDU 9612-15
Agency Dkt. No. 108-5/15

New Jersey Commissioner of Education

Final Decision

Vincenza Olsen-Faivre and Donna Perez,

Petitioners,

v.

Board of Education of the Carlstadt – East Rutherford Regional School District, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The petitioners, tenured secretaries in the Carlstadt-East Rutherford Regional School District, are challenging the Board's decision to deny their salary increases, and to rescind petitioner Vincenza Olsen-Faivre's stipend for the substitute coordinator position, based upon an alleged act of fraud. Following three days of hearings at the OAL, the Administrative Law Judge (ALJ) found that the petitioners did not conspire to fraudulently deceive the Board in order to receive salary increases. The ALJ also found that the Board's decision to rescind their salary increases was a violation of their tenure rights. Therefore, the petitioners were entitled to their Board approved salaries for the 2014-15, 2015-16 and 2016-17 school years. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the petitioners did not conspire to fraudulently deceive the Board to

receive salary increases, and that the Board's decision to rescind their salary increases was a violation of their tenure rights.[1] Importantly, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. The ALJ found that the petitioners' testified credibly and that the evidence presented does not support the conclusions that a conspiracy was committed by the petitioners. The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her and made findings of fact based upon their testimony. It is well established that the Commissioner must defer to the credibility findings of the ALJ unless these prove to be 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).

Accordingly, the petitioners are entitled to their approved salaries for the 2014-15, 2015-16 and 2016-17 school years.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/19
Date of Mailing: 5/14/19

[1] The ALJ discussed various other potential issues in the Initial Decision, including the fact that the secretaries were given contracts for a three-year term. The facts in this case are extremely case specific and it is not necessary to posture on the length of the petitioners' contracts in order to resolve this matter. The Commissioner is, however, in accord with the ALJ's determination that *N.J.S.A.* 18A:29-4.1 does not apply to the petitioners because they are not teaching staff members, nor do they hold any certificates.

[2] Petitioner Olsen-Faivre did not obtain tenure in the substitute coordinator position, and as such she is not entitled to reimbursement for the stipend amount.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09612-15
AGENCY REF. NO. 108-5/15

VINCENZA OLSEN-FAIVRE
AND DONNA PEREZ,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CALRSTADT-EAST RUTHERFORD
REGIONAL SCHOOL DISTRICT,
BERGEN COUNTY,
Respondent.

Vincenza Olsen-Faivre and Donna Perez, appearing pro

Dennis McKeever, Esq., for Respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: February 15, 2019 Decided: February 19, 2019

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises from the denial of salary increases to Vincenza Olsen-Faivre (Olsen-Faivre or Faivre) and Donna Perez (Perez), Petitioner employees of the Board of Education of Carlstadt-East Rutherford (Respondent), and rescission of a stipend from Faivre due to an alleged act of fraud committed by Petitioners. Petitioners contend that Respondent violated the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 and the Teach-NJ Act, N.J.S.A. 18A:17-1.

On April 11, 2015, counsel to Petitioners filed a Petition of Appeal and supporting documents to the Director, Bureau of Controversies and Disputes (Bureau) of the New Jersey State Department of Education. This petition challenged the salary-increase rescission of Olsen-Faivre and Perez and loss of stipend to Olsen-Faivre.

On May 11, 2015, notarized verifications were sent by Petitioners to the Bureau. These verifications were received on May 12, 2015.

On June 30, 2015, Respondent filed a Motion to Dismiss in lieu of an Answer pursuant to N.J.A.C. 6A:3-1.5(g).

On July 2, 2015, this matter was transmitted to the Office of Administrative Law for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 13, 2015, Petitioners filed their letter brief opposing Respondent's Motion to Dismiss. On July 20, 2015, Respondent submitted its response to the Motion to Dismiss.

On October 1, 2015, this tribunal denied Respondent's Motion to Dismiss and held that Petitioners had a vested right to receive their salary increases due on December 10, 2014. This tribunal determined that rescission of the salary increases was a prohibited compensation reduction which violated Petitioners' tenure rights pursuant to N.J.A.C. 18A:17.2.

Following a telephone prehearing conference, this tribunal issued an Order requiring Respondent to file its Answer on or before October 30, 2015. The Order specified that discovery be completed by February 1, 2016.

Respondent submitted its Answer on October 27, 2015.

On July 8, 2016, Petitioners filed a Motion for Partial Summary Decision. On July 29, 2016, Respondent filed a letter brief opposing Petitioners' Motion for Partial Summary Decision.

On September 23, 2016, this tribunal denied Petitioners' Motion for Partial Summary Decision because the parties disputed several material facts. These disputes include: 1) whether Petitioners, pursuant to N.J.S.A. 18A:29-4.1, are or were considered "full-time teaching staff members"; 2) whether Petitioners' terms of service expired before the three-year time period stipulated in their contracts; and 3) whether Petitioners are entitled to a salary increase for the first year or subsequent years.

A hearing scheduled for September 26, 2016, and September 27, 2016, was adjourned.

In December 2016, Respondent retained new counsel. On or about April 3, 2017, Petitioners submitted a Notice of Substitution of Attorney confirming that Petitioners would appear pro se and that former counsel withdrew its appearance.

On April 18, 2017, Respondent requested an adjournment of the hearings scheduled in late April. An in-person pre-hearing conference was held on April 24, 2017, and hearings were held on May 4, 2017, May 12, 2017, and June 16, 2017.

Petitioners filed their post-hearing brief and exhibits on September 8, 2017. Respondent filed its reply brief on September 25, 2017.

A copy of Exhibit P-12 was provided on February 15, 2019, in order to complete the record.

FACTUAL BACKGROUND

Petitioners are or were employed by Respondent Board of Education of Carlstadt-East Rutherford as tenured administrators employed as confidential secretaries. Perez formerly served as confidential payroll clerk and bookkeeper and Olsen-Faivre served as confidential secretary to the superintendent. Olsen-Faivre is, and Perez was employed under a three-year contract approved by the Board. Petitioners were not and are not union members nor members of an employment association. Therefore, terms and conditions of their employment contracts were not negotiated subject to a collective bargaining agreement. Salaries and employment terms were negotiated on an individual basis.

During the 2013-2014 school year, Perez's contractual salary as payroll clerk and bookkeeper was $79,032 plus additional compensation for longevity. Olsen-Faivre's contractual salary as confidential secretary was $56,787 with additional compensation for longevity plus a stipend for her job duties as substitute coordinator.

Petitioners' contracts expired on June 30, 2014. Contracts for the upcoming years had not yet been fully negotiated by the commencement of the 2014-2015 school year. As such, Petitioners' continued employment in their positions was subject to the contractual terms set forth in the expired employment contract while contract negotiations continued.

The respective salaries of Petitioners remained the same at the start of the 2014-2015 school year as they were during the 2013-2014 school year. The salaries were approved for Petitioners at the Board's meeting of May 7, 2014. Olsen-Faivre's total salary was $60,912 including a base salary of $56,787, plus $1,425 for longevity, and a $2,700 stipend for her substitute coordinator position. The primary function of Olsen-Faivre's job position was to contact substitutes to ensure that the district's classrooms

would have adequate personnel coverage. Perez's total salary was $79,507 including a base salary of $79,032, plus $475 for longevity.

The contract negotiations between the Becton Educational Association (BEA) and the Board concluded with the Board meeting of December 10, 2014, and salaries and appointments for faculty and support staff were approved. At the December 10, 2014, meeting, the salaries for its confidential secretaries for the 2014-2015, 2015-2016, and 2016-2017 academic years were approved by Respondent, subject to individual employment contracts for each employee. For the 2014-2015 academic year, Olsen-Faivre's salary was set to be raised to $61,487, plus longevity, and Perez's salary was set to be raised to $81,032 plus longevity.

After this process concluded, District Business Administrator Nicholas Annitti (Annitti) reviewed the Board's payroll records and determined that Olsen-Faivre and Perez had conspired to include Olsen-Faivre's substitute coordinator stipend in her pensionable salary. Annitti determined specifically that Olsen-Faivre and Perez logged into the district's payroll system using Perez's system access as payroll clerk to include Olsen-Faivre's stipend in her base salary as a district confidential secretary. He determined that this occurred despite the fact that Olsen-Faivre's employment contract did not include the amount in her base salary and neither Respondent nor any district administrator authorized this action.

Following Annitti's determination, Respondent held a special meeting on January 21, 2015. At the meeting, Respondent voted to rescind the salary increases granted to Petitioners for the 2014-2015 school year. Additionally, Respondent directed the Superintendent of Schools to issue letters of reprimand to the Petitioners for their actions. Respondent also directed the administration to advertise the substitute coordinator position in which Olsen-Faivre had been employed and for which she received a stipend.

Letters of reprimand were issued on January 26, 2015. The District Superintendent issued a letter to Olsen-Faivre for her actions, and Annitti as District Business Administrator/Board Secretary issued a letter to Perez. They were

reprimanded for an alleged conspiracy to roll Olsen-Faivre's stipend into her base salary for pension benefits without obtaining Board approval.

Petitioners appealed Respondent's action.

TESTIMONY

Nicholas Annitti

Nicholas Annitti testified that he was the School Business Administrative Board Secretary of the Carlstadt-East Rutherford Regional Board of Education. During his nineteen years employed by Respondent, his job duties were largely financial. Annitti testified that Perez's position as secretary was not a tenured position, but her position as bookkeeper was a tenured position. Olsen-Faivre's position was a tenured position. Annitti further agreed that, as non-union members, Olsen-Faivre and Perez did not negotiate their contracts subject to a collective-bargaining agreement. Perez and Olsen-Faivre therefore negotiated directly with the Board to create their contract. Annitti outlined the work duties of the substitute coordinator as someone who arranged for substitute teachers when a regular teacher was absent. Annitti did not believe this position to be a "tenure-able" position. Olsen-Faivre held the duty of substitute coordinator as a stipend position.

Annitti further testified that, at the Board meeting in which the three-year contracts for Confidential Secretary was agreed upon, the stipend was not included as part of a pensionable salary.

Annitti outlined the typical procedure taken when a salary is coordinated and calculated by the Superintendent's Office and then sent to the Payroll Department. The Payroll Department then cross-checks the adjustment made and puts the salary adjustment onto the Board agenda. Annitti further testified that the Payroll Department does not change salaries without prior authorization from the Superintendent, and the Superintendent never changes salaries without a resolution passed by the Board of Education.

Annitti further testified that Perez was an efficient employee that knew payroll policies and had a strong knowledge of which compensation was pensionable and which was non-pensionable. Annitti continued that he only experienced a stipend being

rolled into an annual salary on one prior occasion. In that instance, a Confidential Secretary's stipend was added to her pensionable salary after she requested that the stipend be added. Following the request, the Board rescinded the Motion which paid her a stipend, withdrew the stipend, and rolled it into her salary.

The increase to Olsen-Faivre's salary was not discovered until after the contract negotiations of the confidential employees had concluded. Annitti discovered the salary increase, and immediately asked Olsen-Faivre about the increase. His recollection was that Olsen-Faivre replied that the Board had negotiated and approved the stipend to be added to her salary, and that Board member, Raymond Muszynksi had approved the action. Annitti reported that Perez also stated that the Board approved of adding the stipend to Olsen-Faivre's salary. Having no recollection of the Board negotiations and action, Annitti questioned his colleagues and brought up the salary increase for discussion at the next Board meeting. None of the other Board members recalled approving or even discussing the salary increase. Annitti stated that after the meeting, Perez was defensive and told Annitti, "You'll be hearing from my attorney."

Raymond Muszynski

Raymond Muszynski testified that he has served on the Board of the Carlstadt-East Rutherford Board of Education for ten years. Muszynski testified that he did not recall the Board discussing Olsen-Faivre's stipend rolling into her pensionable salary at the Board's May 2014 meeting. Muszynski testified that he believed he was the Chairperson of the Negotiations Committee on the date of the Board meeting in question. As the individual that handled negotiations at that time, all compensation issues were brought before him.

Renee Engelhardt

Renee Engelhardt testified that she was employed by the Carlstadt-East Rutherford Regional Board of Education as a Confidential Secretary to the Business Administrator, a position which she held for fifteen years. Engelhardt testified that she was not a member of a collective bargaining unit, and as such, that she was usually

subject to three-year contracts. When discussing her duties, Engelhardt stated that she prepares exhibits for Board meetings. When asked about the procedure regarding approval of stipend positions, Engelhardt stated, based upon her recollection, that stipend positions are approved under separate Resolutions. Her job duties included attending all Board meetings and did not recall discussion of Olsen-Faivre's stipend being rolled into her pensionable salary. Engelhardt further testified that the meeting in question was extremely tumultuous.

Engelhardt testified that during her time as an employee with the Board of Education, she received a stipend for attending Board of Education meetings. She stated that her stipend was made pensionable by the Board of Education by rolling her it into her salary. This occurred in November of 2011, when a new contract was negotiated.

Vincenza Olsen-Faivre

Olsen-Faivre testified that she is currently employed as the Superintendent's Secretary for the Carlstadt-East Rutherford Regional Board of Education. She has been employed by the Board since 1997. Olsen-Faivre testified that she worked under a three-year employment contract beginning July 1, 2014. Olsen-Faivre testified that she essentially "took on" the role of substitute coordinator in 2008. As a substitute coordinator, Olsen-Faivre worked outside the Superintendent's office with the Principal's secretary. She called substitute teachers, as a previous outside vendor had done.

Olsen-Faivre testified that she had a discussion with previous Superintendent James Jencarelli, wherein he stated that she would receive payment for coordinating substitute teachers at some point prior to 2008. Olsen-Faivre began performing these duties when the outside vendor stopped performing this function. Olsen-Faivre testified that she wrote a memo to him in which she requested payment for the role of substitute coordinator, and he presented that memo to the Board of Education. She testified that the Board agreed via a resolution to pay a stipend of $2,350 for coordinating the substitutes. She testified that she additionally gave Superintendent Gary Bowen a memo to present to the Board in April of 2014 regarding the stipend. Neither party

produced a copy of the memo. She testified that when she handed the memo to Dr. Bowen, he told her to put the stipend in her "pensionable wages" column in the salary resolution chart for the 2014-2015 school year, to be presented to the Board for discussion. Additionally, her role should be changed in her job description for the Board proposal. Olsen-Faivre testified that she does not recall seeing any Board minute meetings that discussed the stipend. She was removed from the position of substitute coordinator following the allegations that are the subject of this hearing.

Olsen-Faivre testified that the allegations that are the subject of this hearing relate to a formal reprimand she received for directing another employee to add a $2,700 stipend to her base salary, making the amount pensionable, without the knowledge of Business Administrator Annitti. She testified that the increase from $2,350 to $2,700 reflected a conversation with a Mr. Mango, Interim Superintendent, about an increase in the stipend. She testified that she did not direct any employee to commit fraud. She testified that since the Board members did not question anything that she put into the resolution, she had no reason to think that her conduct was wrong.

On cross-examination, Olsen-Faivre testified that she did not carbon copy Mr. Annitti or the Board of Education in the memo requesting that her stipend be pensionable. She testified that she has access to the personnel files that the memo was kept in. She testified that Donna Perez implemented the accounting change to make the stipend pensionable. She testified that after the meeting, she did not talk about the stipend being pensionable with any of her superiors. She did not sign a paper that included an altered job description reflecting the new position, which is sometimes the practice of the Board, after the Board meeting.

Donna Perez

Donna Perez testified that she is currently employed by the Hoboken Board of Education. She worked for the Carlstadt-East Rutherford school district for eleven years in the Payroll Department, as a bookkeeper, and in accounts payable. She testified that her supervisor was Nicholas Annitti. Further, that after the Board approved salaries, she would take the approved agenda and put them into the payroll files. If

there were changes to be made for longevity, or to a teacher's salary, she would make changes in the payroll accordingly. She also kept track of Board approval of bills. She testified that she was in Mr. Annitti's office when Olsen-Faivre asked him about including her stipend in her base salary so that it would be pensionable prior to the Board of Education meeting. She testified that she did not conspire with Olsen-Faivre to include the stipend in her pensionable salary. Perez testified that she acted in accordance with her duties when she adjusted Ms. Olsen-Faivre's salary, as the increase was approved in Board Minutes.

On cross-examination, Perez testified that she received a stipend for her role as Treasurer for Student Activities and Athletics. However, the stipend did not become pensionable because the school revoked the stipend on January 21, 2015, for disciplinary reasons related to this hearing. When asked if there was typically a signed contract presented to her before making modifications to salaries, she stated that there were plenty of instances that signed contracts were unavailable. In those instances, once the salaries were approved on the agenda, she would look at the Minutes and implement the changes. She testified that since Mr. Annitti, was supposed to review salaries before the agenda was passed on to her, she would have no reason to question the salaries in the Minutes.

Mary Vaccaro

Mary Vaccaro (Vaccaro) testified that she is the school Library Media Specialist, Technology Facilitator, the Virtual High School Site Coordinator, and a Virtual High School Teacher. She receives a pensionable stipend for her role as Technology Facilitator. As a Technology Facilitator, she helps teachers or other employees with technology issues. Vaccaro testified that in April of 2014, she assisted Olsen-Faivre with a memo. She testified she helped create this memo addressed to Dr. Bowen requesting that Olsen-Faivre's stipend be pensionable. She testified that she did not save the memo but printed it.

On cross-examination, Vaccaro testified that she has no knowledge of the Board deliberations or any other discussions regarding stipend positions. She does not know what happened to the memo once she handed it to Olsen-Faivre.

Louise Clarke

Louise Clarke (Clarke) has been the Superintendent of schools since July 1, 2014 and has her office in Becton Regional High School in the Carlstadt-East Rutherford School District. She testified that she has not had a personal conversation with Olsen-Faivre regarding her stipend. Clarke testified that she had a conversation with the prior Superintendent, Dr. Bowen, regarding the stipend. She along with Dr. Bowen and Olsen-Faivre were in Bowen's office at the time of the conversation. Bowen told Clarke that in order to put a stipend into an employee's pension or to roll it into a pension, the best way is to change the job description on a Salary Exhibit for presentation to the Board. Clarke testified that typically, when a Salary Exhibit is created, both the Superintendent and the Business Administrator review them. Once the Business Administrator signs off on the Exhibit, the agendas are sent out in packages to the Board members through his office. Clarke testified that she had a conversation with Dr. Bowen regarding Ms. Olsen-Faivre's pensionable salary, and he did not remember whether he ever discussed it with the Board.

On cross-examination, Clarke testified that according to the letter of reprimand regarding Olsen-Faivre, there was no authority given to put the stipend into the base salary. She testified that she was present at the Board of Education action session on May 7, 2014 and does not recall any discussion regarding Olsen-Faivre's substitute teacher coordinator position. She testified that subsequent to the discovery of the stipend being a part of Olsen-Faivre's salary, she did not have a conversation with Olsen-Faivre or Annitti about resolving the terms of the investigation against Olsen-Faivre. She also testified that the reprimand letter that she passed down to Olsen-Faivre was by Board directive, and she wrote the letter using information received from Mr. Annitti.

Kevin Felten

Kevin Felten testified that he is employed by the Borough of East Rutherford as a police officer, and he began serving as a Trustee to the Board of Education in January of 2016. He testified that for employee stipends, the Superintendent recommends the stipend and Board members vote. Stipends are usually approved once a year. Felten stated that a Settlement, a payment to petitioner, was presented to the Board following the accusations against Olsen-Faivre. He voted "no" to the Settlement because he was concerned about possible fraud and pension fraud. Felten testified that Mr. Zitomer, the school board attorney, went to the Prosecutor's Office concerning Olsen-Faivre's actions and the Office did not prosecute the case. He testified that to the best of his knowledge, stipends are not pensionable, and they do not receive tenure. He does not know of any stipend in the past that has been pensionable for employees. He testified that he would be surprised if that had happened in the school district.

On cross-examination, Felten testified that he was not a Board member at the time that Dr. Bowen was Superintendent. He was not included on any agenda reviews during Dr. Bowen's time as Superintendent. He testified that he was not aware that Engelhardt's stipend became pensionable.

Jeffrey C. Bliss

Jeffrey Bliss testified that he is a partner with Lurch, Vinci, and Higgins, a CPA firm that specializes in governmental and non-profit accounting. He has served as an auditor for the Carlstadt-East Rutherford Board of Education for five years. As an auditor for the district, he is responsible for auditing their financial statements, books, and records. He also reports on compliance with government accounting standards and Department of Education compliance requirements. He testified that he received a phone call from Business Administrator Annitti regarding Olsen-Faivre's case. Upon review, he told Annitti that Olsen-Faivre's stipend had been included as part of her pensionable base wage salary. He testified that in New Jersey, stipends are usually pensionable if the duties concerning the stipend are performed as part of the regular work period, and if the role is part of the employee's normal job duties. If the job is

outside the normal duties of the position, it is not pensionable. He testified that to his understanding, the Board approved the substitute coordinator position as a non-pensionable stipend, as the duties were performed outside the normal workday hours of her normal position. Bliss testified that unlike a "salary increase," a stipend does not increase year after year. Rather, it is usually for a term of a contract.

LEGAL DISCUSSION

I. Credibility

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963). There is no mechanical formula for determining the truth, to the extent it can be discerned, and many factors may be considered and weighed. These include the demeanor of the witness and the manner of testifying, the interest a witness may have in the outcome, and the reasonableness and coherence of the testimony. Dawson v. R.W. Vogel, CRT 4501-00, Initial Decision (April 25, 2002), adopted as modified, Dir., Division on Civil Rights (Aug. 28, 2002), <http://njlaw.rutgers.edu/collections/oal/>.

"Credible testimony" must proceed from the mouth of a 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 common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). The determination of credibility must be made based upon the totality of the evidence, including an assessment of the witnesses by the trial judge who has had the opportunity to see and hear the witnesses at hearing. See, e.g., In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002).

In the present matter, both the petitioners and respondent have presented credible, competent witnesses. Based on the totality of the evidence presented before this Court, there is no basis to find that petitioners conspired against the Board to make Olsen-Faivre's stipend pensionable without approval. Perez, who is responsible for changing employees' salaries once the Board approves, had worked for the Board of Education of Carlstadt-East Rutherford for eleven years without any disciplinary action before this incident. Olsen-Faivre was also highly experienced at her position, having been designated the substitute coordinator when the vendor hired by the school backed out. Notably, as of the date of the hearing Olsen-Faivre was still employed by the Board. The evidence does not support the conclusion that Olsen-Faivre committed fraud by intentionally disobeying her supervisor's instruction or unilaterally altered Board Documents without approval. On the contrary, testimony shows that Dr. Bowen, the Superintendent at the time of the incident, supported the idea of Olsen-Faivre's stipend becoming pensionable.

Mary Vaccaro testified that she helped Olsen-Faivre create a memo addressed to Dr. Bowen to present to the Board, requesting that Olsen-Faivre's pension be pensionable. This evinces Olsen-Faivre's efforts to follow proper protocol, although it may not have been the "best" way to have her concerns addressed. Notably, Kevin Felten testified that the Prosecutor's Office did not find evidence of fraud by petitioners sufficient to pursue a case against them.

Witnesses testified that the Board meeting in question was hectic because of a conflagration that occurred during the meeting. No one can recall, whether or not Olsen-Faivre's pensionable stipend was actually discussed. Perez testified that there were numerous occasions that signed contracts were unavailable when making modifications to salaries. In those instances, once the salaries were approved on the agenda, she would look at the meeting Minutes and implement the changes so employees were paid according to the changes. She testified that since Business Administrator Annitti was supposed to review salaries before the agenda was passed on to her, she would have no reason to question the salaries in the Minutes following the meeting. Ms. Perez was doing her job the same as she had for the past eleven years, and I **FIND** that there is no evidence of misconduct.

The Board cannot be permitted to hold petitioners accountable for a possible error that resulted from a failure in the checks and balances of the system; particularly where multiple people were responsible for ensuring that appropriate protocols were followed. Ms. Clarke testified that once the Business Administrator signs off on an exhibit, agendas are sent out in packages to the Board members through his office. Annitti, the Superintendent, and the Board members had ample opportunity to discover a "mistake," "error," or "fraud" in the salary proposals presented. Instead, the proposed salary changes were approved. Accordingly, I **FIND**, that the evidence presented does not support the conclusion that a conspiracy was committed by Olsen-Faivre and Perez.

II. Enforcement of the Contracts

The gravamen of respondent's argument involves petitioners' attempts to enforce their respective three-year-employment contracts approved by the Board on December 10, 2014. Respondent argues that permitting these contracts to be enforced would improperly bind future boards. Multi-year salaries of full-time "teaching staff members" of a Board of Education are governed by N.J.S.A. 18A:29-4.1:

> A board of education of any district may adopt a one, two, three, four, or five year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. The policy schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two, three, four, or five years from the effective date of the policy but shall not prohibit the payment of salaries higher than those required by the policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments, or adjustments.

Furthermore, N.J.S.A. 18A:1-1 defines a teaching staff member as:

> . . . 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.

Teachers and principals are among the several positions that require certification. N.J.S.A. 18A:1-1. The record indicates that Petitioner Perez was previously employed by the Board as the confidential payroll clerk/bookkeeper. Petitioner Olsen-Faivre is currently employed by the Board as the confidential secretary to the District's Superintendent. No evidence was presented to demonstrate that petitioners are teaching staff members or hold State-issued certificates.

Petitioners argue that past practice has been to enforce three-year contracts for non-certified staff. However, the "past practice" doctrine provides that where "contract terms are unspecific or vague, extrinsic evidence mat be used to shed light on the mutual understanding of the parties." Hall v. Bd. of Educ. of Jefferson, 125 N.J. 299, 301 (1991). The contracts in question are not vague, as they were explicitly for a three-year period.

Since petitioners are not "teaching staff members" as defined by N.J.S.A. 18A:29-4.1, common law rule governs the validity of the contracts. "The common-law rule is that a public body empowered to appoint a public officer 'may not forestall the rights and obligations of [its] successor by making an appointment' where the term of the appointee will not take effect until after the expiration of the term of the appointing [body]." Georgia v. Suruda, 154 N.J. Super. 439, 448 (Law Div. 1977). The Court's analysis of this principal was determined in Gonzalez v. Board of Education of Elizabeth School District, Union County, 325 N.J. Super. 244, 252 (App. Div. 1999). In Gonzalez, the main issue before the Court was whether appellee, a local school board, had the power to appoint a superintendent whose term would begin during the term of office of the succeeding board. Ibid. In its analysis, the Court reasoned that a board of education is a "non-continuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute." Id. at 253; see also Skladzien v. Board of Educ., 12 N.J. Misc. 602, 604-05 (Sup. Ct. 1934). Since Appellant appointee's term would not take effect

until after the expiration of the term of the Board of Education, the appointment was void. Gonzalez, 325 N.J. Super. at 252.

Notwithstanding the above cases, the doctrine of equitable estoppel is relevant to whether the Board may rescind the approved three-year employment contracts for petitioners. Equitable estoppel embodies the doctrine that "one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has detrimentally relied thereon." Anske v. Borough of Palisades Park, 139 N.J. Super. 342, 348 (App. Div. 1976) (citing NJ Suburban Water Co. v. Harrison, 122 N.J.L. 189, 194 (E. & A. 1939)). The test for equitable estoppel requires that the petitioner "show that the alleged conduct was done, or representations 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." Miller v. Miller, 97 N.J. 154, 163 (1984). Indeed, equitable estoppel is applied "only in very compelling circumstances." Timber Properties v. Chester Twp., 205 N.J. Super. 273, 278 (Law Div. 1984). Furthermore, in those instances when it is invoked, equitable estoppel is not applied against the State to the same extent that it is applied against private individuals. Garcia v. Snedeker, 199 N.J. Super. 254, 264 (App. Div. 1985) (citing Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)). The policy reason behind this is that allowing equitable estoppel against the State may be detrimental to the public interest and could interfere with the performance of essential government functions. O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987).

Parties asserting equitable estoppel against the State are, therefore, required to satisfy a higher burden. Thus, in analyzing equitable estoppel claims against the State, "New Jersey state courts [ ] require a showing of intentional misrepresentation or other intentional misconduct—or at least a negligent disregard as to the consequences (detrimental reliance) of the acts—by the government in order for a claimant to be able to assert equitable estoppel against the government." Kane v. Bd. of Tr., Teachers' Pension and Annuity Fund, 96 N.J.A.R.2d (TYP) 25, 29. A party seeking to invoke estoppel against a government entity has the burden of establishing that "an officer of the state, conscious of the State's true interest and the private [party]'s

misapprehension, stood by while the private [party] acted in detrimental reliance." Newark v. Nat'l Resource Council, 82 N.J. 530, 545 (1990). Accordingly, the focus is on *intent*.

In the present case, respondent approved three-year-employment contracts for both petitioners. The contracts included a salary increase for each of the three years. The unambiguous three-year duration of contracts for confidential employee's conflicts with N.J.S.A. 18A:29-4.1 and the principles established in Gonzalez and Skladzien. The Board's successors would be bound to a decision to increase salaries, which would "usurp and limit" their authority. Petitioners' three-year contracts went beyond the term of the Board itself that created them.

The Board argues in its brief, that the three-year contracts that it awarded to petitioners were void ab initio. As such, they acted in bad faith and their conduct might rise to the level of a blatant misrepresentation or conduct beyond the scope of its authority. In either case, respondent's action to award three-year contracts that it believed were void ab initio was an affront to all notions of fundamental fairness. Although there may not have been a clearly defined "detriment" immediately flowing from its actions, equity dictates in favor of petitioners in this case.

Accordingly, I **CONCLUDE**, that respondent should be estopped from denying petitioners' salary increases for their employment during the three-year contract period.

I further **CONCLUDE** that petitioners are entitled to the Board-approved salaries for the 2014-2015, 2015-2016, and 2016-2017 school years, or portion thereof.

CONCLUSION

Based on the totality of the circumstances and voluminous testimony, I **CONCLUDE** that petitioners did not conspire to fraudulently deceive the Board to receive salary increases. Further, since petitioners are not employees requiring certification, like teaching staff, the Board should not have entered into a three-year contract with petitioners. However, past practice appears to have been to the contrary

and respondent may have awarded three-year contracts to employees who were not statutorily entitled to contracts of such duration. I am not persuaded by respondent to now deny petitioners compensation that they had reason to believe they were under contract to receive. Respondent's bad faith should not go unrequited.

ORDER

It is hereby **ORDERED** that respondent's decision to deny salary increases for petitioners and to rescind a stipend from Olsen-Faivre due to an alleged act of fraud 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

February 19, 2019
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: February 19, 2019

Date Mailed to Parties: 2/21/2019

lr

APPENDIX

WITNESSES

For Petitioners:

Raymond Muszynski
Vincenza Olsen-Faivre
Donna Perez
Loise Clarke
Mary Vaccaro

For Respondent:

Nicholas Annitti
Rene Engelhardt
Kevin Felten
Jeffrey C. Bliss

EXHIBITS

For Petitioners:

P-1 Opening Statement – Olsen-Faivre
P-8 Job Description for Confidential Secretary
P-12 Executive Session Minutes of 1/21/15
P-19 Paycheck for pay period ending 6/15
P-20 District Policy: Discipline

For Respondent:

R-1 Job Description – Confidential Secretary in Superintendent's Office
R-2 6/1/11, Work Session Agenda
R-3 Not admitted
R-4 7/13/11, Work Action Session Minutes
R-5 Olsen-Faivre Contract for period from 7/11-6/30/14

R-6 11/9/1,1 Work Action Session Minutes

R-7 5/7/14, Work Action Session Minutes

R-10 4/4/12, Work Action Session Minutes

R-11 5/8/13, Regular Action Session Minutes

R-12 5/7/14, Work Session Minutes

R-13 2014 PERS Pension Report

R-14 12/10/14, Work Action Session Minutes

R-15 1/21/15, Special Action Minutes

R-16 Olsen-Faivre's Letter of Reprimand

R-17 Perez's Letter of Reprimand

R-18 Not admitted

R-19 6/9/10, Executive Session Minutes

125-19

OAL DKT. No. EDU 06426-18
(EDU 15251-16 On Remand)
Agency DKT. No. 247-9/16

New Jersey Commissioner of Education

Final Decision

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

Petitioners,

v.

Board of Education of the City of Bayonne, Hudson County,

Respondent.

The record of this matter, the proposed stipulation of settlement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's March 29, 2018 determination to remand the Agreement as it did not comply with the requirements of *N.J.A.C.* 6A:3-1.13. As the deficiencies noted in the Commissioner's previous decision have been addressed, the Commissioner can approve the within Agreement in its present form.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/19
Date of Mailing: 5/14/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06426-18

AGENCY DOCKET NO. 247-9/16

M.M. ON BEHALF OF J.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondents.

Julie Warshaw, Esq. appearing on behalf of petitioners (Warshaw Law Firm, LLC)

Mitchell L. Pascual, Esq., for respondent (Chasan Lyener & Lamparello, P.C.)

Record Closed: April 9, 2019 Decided: April 9, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 4, 2019, 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. This matter was initially assigned to the undersigned under OAL Docket Number EDU 15251-16. An Initial Decision approving the settlement agreement was issued on March 29, 2018. However, by Order dated May 3, 2018, the Commissioner remanded the matter to OAL due to the agreement not being signed by the Board's attorney, the agreement not having the appropriate Board resolution and

designating the Assistant Superintendent to sign the agreement on its behalf as required under N.J.A.C. 6A:3-1.13. Several telephone conferences were conducted. On April 9, 2019, the Board's attorney submitted the Settlement Agreement and Release which authorizes the Board President to execute the agreement on behalf of the Board. A copy of both Settlement Agreements and the Resolution from the June 27, 2018, meeting is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

4-9-19
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: 4-12-2019

Date Mailed to Parties: 4-12-2019

ljb

SETTLEMENT AGREEMENT AND RELEASE
OAL DKT. NO. EDU 06426-18

2019 APR -9 A 11:04

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is made and entered into this _____day of _____, 2018 in the case of M.M. o/b/o J.M. a minor child, v. Bayonne Public School District Board of Education, in an appeal dated September 23, 2016 before the Commissioner of Education of a Harassment, Intimidation, and Bullying ("HIB") finding against J.M. This settlement agreement ("Agreement") is made by and between M.M. on behalf of J.M., minor child ("Petitioner") and the Bayonne Public School District Board of Education ("District"), hereinafter sometimes referred to collectively as "the Parties."

WHEREAS, M.M., as natural guardian and parent of the minor petitioner, J.M., filed an appeal with the Commissioner of Education on or about September 23, 2016, which sought the following: (1) that the finding of HIB against J.M. from an alleged incident on the field during a game on field day on May 24, 2016 be reversed, (2) that the HIB finding and investigation be removed from his student record, (3) that J.M.'s transfer from the Henry E. Harris School to the Mary J. Donohue School was a form of retaliation and that he must be switched back, (4) that the District would contact the State and to remove the "tag" and identifying marker from J.M.'s student ID number regarding the HIB finding, (5) that J.M.'s IEP shall be modified to include counseling to address the effects of this alleged incident and the transfer to a different school, to address his needs and learning issues, and to hold an IEP meeting to discuss the results of the independent evaluation conducted by Dr. Daniel DaSilva and incorporate those findings in J.M.'s IEP, and (6) attorney's fees.

WHEREAS, J.M. at all relevant times was a classified student;

WHEREAS, the parties both desire to resolve this matter on an amicable basis without the time, costs, and uncertainty of litigation;

NOW, THEREFORE, the parties, in full consideration of the exchange of promises and covenants set forth herein, the sufficiency of which is hereby acknowledged and agree as follows:

A. Terms of Agreement:

1. The District has agreed to remove all references to the HIB Complaint(s), investigation, and findings from J.M.'s student records,

2. the District has agreed to contact the State of New Jersey and request in writing to remove all "tags" associated with HIB and an HIB finding from J.M.'s student ID number;

3. The District has agreed to hold an IEP meeting within a reasonable time after receipt, by the District, of Dr. Daniel DaSilva's independent evaluation report in order to discuss the results of the independent evaluation and incorporate those findings in J.M.'s IEP as deemed appropriate and necessary by the District; and

4. The District has agreed to pay attorney's fees in the amount of $3,000.00 within 30 days from the date that the Board of Education approves said settlement agreement.

In exchange for the above terms, Petitioner has agreed to resolve this action and dismiss her appeal with prejudice.

B. No Admission: This Agreement is for the purpose of settling the dispute between the Parties only. This Agreement does not constitute an admission by either party on any of the issues that may have been in dispute between them.

C. Settlement and Release: This Agreement is a full settlement and release of all claims which exist or may exist between the Parties relating to said alleged HIB incident through the

date this Agreement is fully executed. The Parties release and forever discharge each other (including with regard to the District its officers, agents, employees, predecessors, assigns, and attorneys) from all existing demands, actions, claims of any kind, nature, and description both in law and in equity which the Parties have or might have, whether known or unknown, against each other through the date of execution of this Agreement, except as may be necessary to enforce the terms of this Agreement. Without limiting the foregoing generalities, the Petitioner specifically acknowledges that she is waiving any rights against the District which may have accrued, or might have accrued, to her and/or to J.M. which she may or may not know about at this time up to the date of execution of this Agreement.

D. Confidentiality: Except as necessary to enforce its terms or as required by law, subpoena, or administrative/judicial order, the Parties agree that the terms of this Agreement will be kept confidential and private between them; that is, neither party will disclose any aspect of it to anyone else. In the event either party is asked about the dispute, they shall tell all others that the dispute was settled in a manner satisfactory to both parties. The Parties may, without breach of this Paragraph or of this Agreement, disclose the terms of the Agreement to their educational, legal, and financial advisors and representatives to the extent necessary for such individuals to perform their professional duties and so long as each individual/entity commits to keeping such terms confidential. In addition, Petitioner may disclose the terms of the Agreement to family members who agree to be bound by the terms of this paragraph. The Parties may, without breach of this Agreement, as they deem necessary or desirable, seek to introduce copies of this Agreement as an exhibit in administrative or judicial proceedings in furtherance of their rights and obligations under this Agreement and the laws as they relate to Petitioner or to J.M.

E. Access to Counsel and Understanding of Agreement: The Parties to this Agreement hereby acknowledge that they had the opportunity to consult with an attorney or other representative of their choice throughout these proceedings, that they have read this entire Agreement, and that they have signed this Agreement, voluntarily with full understanding of its terms and without any other inducements or promises except for those set forth herein. This Agreement shall be executed in duplicate by the Parties. Each executed Agreement shall be considered an original. Petitioner hereby certifies that she is satisfied with the legal services of Julie Warshaw, Esq. of the Warshaw Law Firm, LLC. Petitioner also certifies that she has the legal authority on behalf of herself and her son, J.M., minor child, to enter into this Agreement.

F. Entire Agreement: The Agreement constitutes and contains the entire agreement between the Parties and shall be binding and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each. There are no other understandings or agreements, verbal or otherwise, in relation thereto, between the parties except as expressly set forth herein.

G. Governing Law: This Agreement is entered into in the State of New Jersey and shall be construed and interpreted in accordance with the laws of the State of New Jersey.

H. Construction: The language of all parts of the Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties to the action. In the event that one or more sections of this Agreement are found by a judicial body to be ineffective, the remainder of the Agreement shall remain in full force and effect. This Agreement can be executed in parts and still be considered an original copy. Captions set forth herein shall be for reference purposes only.

IN WITNESS WHEREOF having carefully reviewed this entire Agreement, each party intends to be legally bound to the terms set forth herein, and have executed the foregoing Agreement on the date first above written.

M.M. as parent and natural and legal guardian
of J.M., Minor Child

Bayonne Public School District Board of
Education
(Signature)

Joseph T. Broderick, President
Bayonne Public School District Board of
Education
(Printed Name)

C-24

BOARD OF EDUCATION / OF THE CITY OF BAYONNE

2019 APR -9 A 11:04

HUDSON COUNTY, NEW JERSEY

June 27, 2018

WHEREAS, the Board of Education held a Board Level Hearing on June 29, 2016, regarding student J.M.; and

WHEREAS, by Resolution dated June 29, 2016, the Board confirmed the HIB findings of the Administration against the student J.M.;

WHEREAS, M.M., as natural guardian and parent of the minor petitioner, J.M., filed an appeal with the Commissioner of Education on or about September 23, 2016, which sought the following: (1) that the finding of HIB against J.M. from an alleged incident on the field during a game on field day on May 24, 2016 be reversed, (2) that the HIB finding and investigation be removed from his student record, (3) that J.M.'s transfer from the Henry E. Harris School to the Mary J. Donohue School was a form of retaliation and that he must be switched back, (4) that the District would contact the State and to remove the "tag" and identifying marker from J.M.'s student ID number regarding the HIB finding, (5) that J.M.'s IEP shall be modified to include counseling to address the effects of this alleged incident and the transfer to a different school, to address his needs and learning issues, and to hold an IEP meeting to discuss the results of the independent evaluation conducted by Dr. Daniel DaSilva and incorporate those findings in J.M.'s IEP, and (6) attorney's fees;

WHEREAS, the parties both desire to resolve this matter on an amicable basis without the time, costs, and uncertainty of litigation;

WHEREAS, the parties have negotiated a mutually acceptable Settlement Agreement and Release;

BE IT FURTHER RESOLVED that the Board President shall execute the Settlement Agreement and Release in the name and on behalf of this Board and that the Board Counsel approve same as to form; and

FURTHERMORE, written notice shall be provided to student J.M.'s guardian and/or representative by Board counsel.

TRUSTEE

Moved that that the foregoing resolution is adopted.

SECONDED BY TRUSTEE

ADOPTED AT BOARD MEETING HELD June 27, 2018

RECEIVED
2018 JAN 24 A 8:49
Office of

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is made and entered into this _____ day of _____ 2017, in the case of M.M. o/b/o J.M. a minor child, v. Bayonne Public School District Board of Education, in an appeal dated September 23, 2016 before the Commissioner of Education of a Harassment, Intimidation, and Bullying ("HIB") finding against J.M. This settlement agreement ("Agreement") is made by and between M.M. on behalf of J.M., minor child ("Petitioner") and the Bayonne Township Public School District Board of Education ("District"), hereinafter sometimes referred to collectively as "the Parties."

WHEREAS, M.M., as natural guardian and parent of the minor petitioner, J.M., filed an appeal with the Commissioner of Education on or about September 23, 2016, which sought the following: (1) that the finding of HIB against J.M. from an alleged incident on the field during a game on field day on May 24, 2016 be reversed, (2) that the HIB finding and investigation be removed from his student record, (3) that J.M.'s transfer from the Henry E. Harris School to the Mary J. Donohue School was a form of retaliation and that he must be switched back, (4) that the District would contact the State and to remove the "tag" and identifying marker from J.M.'s student ID number regarding the HIB finding, (5) that J.M.'s IEP shall be modified to include counseling to address the effects of this alleged incident and the transfer to a different school, to address his needs and learning issues, and to hold an IEP meeting to discuss the results of the independent evaluation conducted by Dr. Daniel DaSilva and incorporate those findings in J.M.'s IEP, and (6) attorney's fees.

WHEREAS, J.M. at all relevant times was a classified student;

WHEREAS, the parties both desire to resolve this matter on an amicable basis without the time, costs, and uncertainty of litigation;

NOW, THEREFORE, the parties, in full consideration of the exchange of promises and covenants set forth herein, the sufficiency of which is hereby acknowledged and agree as follows:

A. Terms of Agreement:

1. The District has agreed to remove all references to the HIB Complaint(s), investigation, and findings from J.M.'s student records,

2. the District has agreed to contact the State of New Jersey and request in writing to remove all "tags" associated with HIB and an HIB finding from J.M.'s student ID number;

3. The District has agreed to hold an IEP meeting within a reasonable time after receipt, by the District, of Dr. Daniel DaSilva's independent evaluation report in order to discuss the results of the independent evaluation and incorporate those findings in J.M.'s IEP as deemed appropriate and necessary by the District; and

4. The District has agreed to pay attorney's fees in the amount of $3,000.00 within 30 days from the date that the Board of Education approves said settlement agreement.

In exchange for the above terms, Petitioner has agreed to resolve this action and dismiss her appeal with prejudice.

B. No Admission: This Agreement is for the purpose of settling the dispute between the Parties only. This Agreement does not constitute an admission by either party on any of the issues that may have been in dispute between them.

C. Settlement and Release: This Agreement is a full settlement and release of all claims which exist or may exist between the Parties relating to said alleged HIB incident through the date this Agreement is fully executed. The Parties release and forever discharge each other (including with regard to the District its officers, agents, employees, predecessors, assigns, and

attorneys) from all existing demands, actions, claims of any kind, nature, and description both in law and in equity which the Parties have or might have, whether known or unknown, against each other through the date of execution of this Agreement, except as may be necessary to enforce the terms of this Agreement. Without limiting the foregoing generalities, the Petitioner specifically acknowledges that she is waiving any rights against the District which may have accrued, or might have accrued, to her and/or to J.M. which she may or may not know about at this time up to the date of execution of this Agreement.

D. Confidentiality: Except as necessary to enforce its terms or as required by law, subpoena, or administrative/judicial order, the Parties agree that the terms of this Agreement will be kept confidential and private between them; that is, neither party will disclose any aspect of it to anyone else. In the event either party is asked about the dispute, they shall tell all others that the dispute was settled in a manner satisfactory to both parties. The Parties may, without breach of this Paragraph or of this Agreement, disclose the terms of the Agreement to their educational, legal, and financial advisors and representatives to the extent necessary for such individuals to perform their professional duties and so long as each individual/entity commits to keeping such terms confidential. In addition, Petitioner may disclose the terms of the Agreement to family members who agree to be bound by the terms of this paragraph. The Parties may, without breach of this Agreement, as they deem necessary or desirable, seek to to introduce copies of this Agreement as an exhibit in administrative or judicial proceedings in furtherance of their rights and obligations under this Agreement and the laws as they relate to Petitioner or to J.M.

E. Access to Counsel and Understanding of Agreement: The Parties to this Agreement hereby acknowledge that they had the opportunity to consult with an attorney or other representative of their choice throughout these proceedings, that they have read this entire

Agreement, and that they have signed this Agreement, voluntarily with full understanding of its terms and without any other inducements or promises except for those set forth herein. This Agreement shall be executed in duplicate by the Parties. Each executed Agreement shall be considered an original. Petitioner hereby certifies that she is satisfied with the legal services of Julie Warshaw, Esq. of the Warshaw Law Firm, LLC. Petitioner also certifies that she has the legal authority on behalf of herself and her son, J.M., minor child, to enter into this Agreement.

F. Entire Agreement: The Agreement constitutes and contains the entire agreement between the Parties and shall be binding and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each. There are no other understandings or agreements, verbal or otherwise, in relation thereto, between the parties except as expressly set forth herein.

G. Governing Law: This Agreement is entered into in the State of New Jersey and shall be construed and interpreted in accordance with the laws of the State of New Jersey.

H. Construction: The language of all parts of the Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties to the action. In the event that one or more sections of this Agreement are found by a judicial body to be ineffective, the remainder of the Agreement shall remain in full force and effect. This Agreement can be executed in parts and still be considered an original copy. Captions set forth herein shall be for reference purposes only.

IN WITNESS WHEREOF having carefully reviewed this entire Agreement, each party intends to be legally bound to the terms set forth herein, and have executed the foregoing Agreement on the date first above written.

M.M. as parent and natural and legal guardian
of J.M., Minor Child

Assistant Superintendent

Representative of the Bayonne Township Public School Board of Education

126-19

OAL Dkt. No. EDU 13510-18
Agency Dkt. No. 179-7/18

New Jersey Commissioner of Education

Final Decision

A.V. and P.V., on behalf of minor child, A.V.,

Petitioners,

v.

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

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/19
Date of Mailing: 5/14/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13510-18
AGENCY DKT. NO. 179-7/18

A.V. AND P.V. ON BEHALF OF MINOR CHILD, A.V.,

Petitioners,

v.

BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

Lisa ChadwickThompson, Esq. for petitioners (Mason Thompson, LLC, attorneys)

Jodi S. Howlett, Esq. for respondent (Cleary, Giacobbe, Alfieri , Jacobs, LLC, attorneys)

Record Closed: April 9, 2019 Decided: April 9, 2019

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

This matter was transmitted to the Office of Administrative Law on September 17, 2018 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

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

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

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

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

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

April 9, 2019
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 12, 2019

Mailed to Parties: April 12, 2019

sej

JODI S. HOWLETT, Partner
jhowlett@cgajlaw.com

Reply to: Matawan Office

2019 APR -9 A 9:43

April 8, 2019

Via E-Mail (Sharon.Jeffers@oal.nj.gov) and NJLS
Honorable Ellen Bass, ALJ
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: A.V. and P.V. o/b/o A.V. v. West Morris Regional High School District Board of Education
OAL Dkt. No.: EDU 13510-18
Agency Dkt. No.: 179-7/18

Dear Judge Bass:

As the Court is aware, this firm represents Respondent West Morris Regional High School District Board of Education ("Board") in the above-referenced matter.

On behalf of the Board, the undersigned respectfully submits the enclosed settlement agreement, fully-executed by the parties. Also enclosed are the certified minutes from the Board's meeting on February 11, 2019, memorializing approval of the settlement.

The parties thank the Court for its continued attention to this matter.

Respectfully submitted,

Jodi S. Howlett
Encl.

cc: Lisa Chadwick Thompson, Esq. – counsel for Petitioners (via e-mail)

2019 APR -9 A 9:43

MASON THOMPSON, LLC
Lisa Chadwick Thompson, Esq. (Atty. ID #009191995)
50 Nelson Street
Dover, New Jersey 07801
973-366-9300
973-366-9301 (facsimile)
Attorneys for Petitioners

A.V. and P.V., on behalf of their minor child A.V Petitioners, vs. West Morris Regional School District Board of Education, Morris County Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **OAL DOCKET NO.: EDU 13510-2018 N** **AGENCY REFERENCE NO.: 1799-7/18** **SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made effective as of the last date on which it is executed by either party hereto ("Effective Date") and is by and between Petitioners A.V. and P.V., on behalf of A.V. ("Petitioners"), and the West Morris Regional School District Board of Education ("Board"). Petitioners and the Board are each singularly referred to herein as "Party", and collectively referred to herein as "Parties."

WHEREAS, the Board operates the West Morris Regional High School; and

WHEREAS, A.V. is a student at West Morris Regional High School; and

WHEREAS, Petitioners previously initiated a Petition of Appeal against the Board ("Petition"), in response to the Board's determination that there was sufficient evidence to find that A.V. committed an act of harassment, intimidation, and bullying ("HIB"); and

WHEREAS, the Parties amicably settled the disagreements and controversies between them during a settlement conference held on January 23, 2019; and

WHEREAS, the Parties enter into this Agreement for reasons including but not limited to avoiding the expense, time and inconvenience of litigation; and

NOW, THEREFORE, in consideration of the representations set forth hereinbelow, the Parties, intending to be legally bound, agree to:

1. Board shall immediately remove from Student A.V.'s cumulative file or any electronic version thereof, any and all documents, including but not limited to records, emails, letters, reports, statements and the like, related or referring to the alleged HIB.

2. Student A.V.'s cumulative file shall not include any reference to any disciplinary action in any way related to the alleged HIB violation and Student A.V. shall not be required to serve the detention previously imposed.

3. Student A.V.'s cumulative file shall not include any reference to any requirement for counseling in any way related to the alleged HIB violation.

4. Any records, reports, statements or documents prepared on behalf of the Board related to the alleged HIB violation shall be sealed and shall not be disclosed for any reason.

5. Within fifteen (15) calendar days of approval of this Agreement by the Board, the Board shall provide Petitioners with a letter acknowledging that the foregoing items have been completed.

6. The Parties agree and promise that, to the extent permitted by law, they will not disclose, in any manner whatever, any information regarding the existence or terms of this Agreement or the facts and circumstanced giving rise to the claim(s) in the Petition, to any person or organization, public or private, except that the parties may disclose said information to their attorneys, and such information may also be disclosed to member of the Board, the Superintendent, the Business Administrator, and the District/Board Attorney. The Board expressly agrees that prior to disclosure to any member of the Board, the Superintendent, and/or the Business Administrator, that this promise of non-disclosure must be fully explained and agreed upon,

7. The Parties agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving either of the Parties, except to the extend necessary to enforce the terms hereof.

8. As this Agreement resolves the dispute between the Parties, the Petitioner agrees to withdraw the Petition, with prejudice, immediately upon full execution of this Agreement. In light of the Parties' desire for the confidentially of this Agreement, this Agreement shall not be made public in any way, and a copy hereof shall not be included in A.V.'s student file and/or any electronic version thereof.

9. In consideration of the above, and all other terms of this Agreement, the Petitioners hereby waive and release the Board, its employees and agents from all possible claims that have or may have been accrued against the Board relating to anything that

has happened until now, regardless of the forum in which such claims may have been pursuable, to the extent permitted by applicable law through the date this Agreement is executed. Nothing in this release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

10. Neither Party shall be considered a "prevailing party" for any purpose, and both Parties shall be responsible for their own counsel fees costs.

11. This Agreement shall be binding upon the Parties, and their respective affiliates.

IN WITNESS WHEREOF, each of the Parties hereto, intending to be legal bound hereby, has executed this Agreement under seal on the date indicated below.

FOR PETITIONERS:

3/31/19
Philip Varughese (date)

3/31/19
Andrea Varughese (date)

FOR WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

2/11/19
Michael Ben-David (date)
Superintendent

2/11/19
(date)
Board President

A MEETING OF THE BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED

IN THE OFFICIAL MINUTE BOOK

The Board of Education of the West Morris Regional High School District, in the County of Morris, New Jersey, convened into Regular Session, on February 11, 2019 at 6:59 p.m. in the West Morris Mendham High School Library.

The following members of the Board of Education were present:

Thomas Brooks	Marina Kontos	Robert Strobel
Joseph Galayda	James Schulok	Lisa Woodring
David Kennedy	Donald Storms	

The following member of the Board of Education was absent: Gary Lakritz

Motion by Mr. Storms, second by Mr. Galayda,

9. That the Board enter into a settlement agreement regarding Student #5940.

Voting YES (8): Mr. Brooks, Mr. Galayda, Mr. Kennedy, Ms. Kontos, Mr. Schulok, Mr. Storms, Mr. Strobel, Mrs. Woodring

Motion APPROVED

I, Denise Zollner, Assistant Secretary of the Board of Education, of the West Morris Regional High School District, in the County of Morris, State of New Jersey, hereby certify that:

(1) the foregoing extract is a true copy and complete copy of a resolution relating to the subject matter referred to in the extract as adopted by the Board of Education and recorded in the official minutes of the February 11, 2019 meeting of the Board of Education of said district; and

(2) that said meeting of the Board of Education was duly noticed and held in conformity with the Open Public Meetings Act, N.J.S.A. 10:4-7 et seq.

(3) I have hereby set my hand this 22nd day of March, 2019.

Denise Zollner, Assistant Board Secretary

2019 APR -9 A 9:44

In the Matter of the Tenure Hearing of

Nikki Vogel,
School District of the
Township of Deptford
Gloucester County

Agency Docket No. 14-1/19

Ruling and Opinion on Respondent's Motion to Dismiss

Tia Schneider Denenberg, *Arbitrator*

APPEARANCES

FOR THE RESPONDENT:

Steven R. Cohen
Hop T. Wechsler
Selikoff & Cohen, P.A.

FOR THE DISTRICT:

Albert K. Marmero
Grace, Marmero & Associates, LLP

I. BACKGROUND

This matter is before the arbitrator for a decision on the motion to dismiss filed by Nikki Vogel (Respondent) on January 31, 2019, along with a letter brief in support of the motion. On February 21, the Director of the Office of Controversies and Disputes granted an extension, making the award due on June 3, 2019. On March 4, 2019, the School District of the Township of Deptford, Gloucester County (District) filed a letter brief in opposition to the motion to dismiss. On March 19, 2019, the Respondent filed a reply brief.

I. Statement of Facts

The Respondent is a tenured teacher employed by the District at the Pine Acres Early Childhood Center since December 22, 2003. On October 17, 2018, she was arrested in Atlantic County, New Jersey, after police observed her car "swerving all over the road" on the Atlantic City Expressway [Arrest Report attached to District's letter of January 9, 2019 to the Commissioner of Education, at 4]. The arrest report stated that her blood alcohol content was 0.00% and that she "was under the influence of a narcotic analgesic and CNS [central nervous system] depressant" [id. at 6]. The police charged the Respondent with violating several New Jersey statutes, including distribution or possession of prescription legend drugs, operation of a motor vehicle with a minor as passenger, and driving while intoxicated [id. at 1-6].

On the following day, the State of New Jersey Department of Education's Criminal History Review Unit (CHRU) sent a letter to the District notifying it that CHRU had forwarded to the Commissioner of Education "information concerning a pending charge against [the Respondent] for a disqualifying crime or offense" [CHRU letter dated October 18, 2018]. The letter stated the date of the arrest (October 17, 2018), the court of jurisdiction (Atlantic County Superior Court), and the court status (pending court adjudication), but did not include the arrest report. The District Superintendent received the letter on October 23, 2018.

On October 29, 2018, the Respondent sent the Superintendent an email setting forth:

> 3 charges:
>
> 1. Failure to make lawful disposition
> 2. Operating under influence of liquor or drugs
> 3. Traffic on marked lanes-unsafe lane change.
>
> My attorney is currently investigating the above charges in an attempt to downgrade or eliminate them.
>
> [Respondent's email of October 29, 2018]

On November 5, 2018, the Superintendent initiated a tenure charge against the Respondent, charging her with conduct unbecoming on the basis of her arrest [Notice of Charge of Conduct Unbecoming, dated November 5, 2018]. His statement included as evidence only the CHRU letter and the Respondent's email to him, and did not include the arrest report [id.]. The Superintendent served the tenure charge on the Respondent the same day [id.].

On November 19, 2018, the Respondent's counsel filed a Statement of Position with the District in opposition to the tenure charge.

At a meeting on December 18, 2018, "after considering the Notice of [Tenure] Charge, Statement of Evidence and Exhibits, and having reviewed the Statement of Position in Opposition to the Tenure Charge," the District "determined that probable cause exists to credit the evidence in support of the charge" [Respondent's Brief, Exhibit B at 3]. At that point, the District did not have before it a copy of the arrest report and the criminal charges had not been adjudicated. At the same meeting, the District also approved the Respondent's "voluntary transfer from Pine Acres Early Childhood Center to Deptford High School for the remainder of the 2018-2019 school year" [Respondent's Brief, Exhibit C].

On December 21, 2018, the District submitted the tenure charge to the Commissioner of Education.

By letter dated January 9, 2019, the District informed the Commissioner that on January 4, 2019, it had received additional documentation related to the Respondent's arrest [Letter of January 9, 2019 from the District to the Commissioner]. In its letter, the District enclosed "a copy of the documentation which supplements the record" and requested "that the additional documentation be considered prior to a decision by the Commissioner" [id.]. The enclosures consisted of the New Jersey State Police Arrest Report, the New Jersey State Police Drinking Driving Report, and accompanying video footage of the arrest [id.].

On January 17, 2019, the District filed a written tenure charge with the Commissioner [see Respondent's brief at 3].

On February 11, 2019, the Director of the Office of Controversies and Disputes sent correspondence acknowledging receipt of the Tenure Charge and referring the matter to arbitration.

On February 12, 2019, the criminal charges against the Respondent were adjudicated by the Township of Hamilton Regional Municipal Court, Atlantic County, New Jersey [Respondent's Reply Brief, Exhibit A (Transcript of Terms of Conditional Discharge and Dismissals)]. The Respondent was admitted into the Municipal Court's Conditional Discharge Program and required to pay fees and court costs, and all other charges against her were dismissed [id.].

II. CONTENTIONS OF THE PARTIES

The Respondent contends:

The Respondent maintains that the tenure charge is procedurally defective because it is not stated with specificity, is not based on competent evidence, and does not support a determination of probable cause. The tenure charge offers no explanation as to why the mere fact of her arrest without the disposition of any criminal charges against her, nor her timely reporting of the arrest to the Superintendent, should constitute conduct unbecoming or relate in any way to her employment as a teacher. Indeed, the nature of the charged conduct is never specified—a procedural deficiency that has proven fatal to other tenure charges.

The accompanying sworn Statement of Evidence from the Superintendent is equally deficient because it does not contain evidence of the Respondent's unbecoming conduct as a teaching staff member of which the Superintendent has the necessary personal knowledge. The District deprived the Respondent of procedural due process when it rubber-stamped the charge the Superintendent initiated, and it compounded its error when it submitted subsequently-obtained evidence—the arrest report and accompanying video footage—directly to the Commissioner to supplement the record, denying the Respondent the opportunity to respond to the evidence and supplement her Statement of Position in return. As the District had no knowledge as to the contents of the arrest report at the time it voted to certify the charge against the Respondent, the arrest report should not be considered as evidence in support of the charge.

In addition to these procedural defects warranting dismissal of the tenure charge, there is another independent basis for dismissing the charge: the Respondent's arrest without a conviction cannot constitute evidence of unbecoming conduct. The Respondent was arrested, but was not indicted, tried, or convicted. Indeed, as a result of the Municipal Court's proceeding on February 12, 2019, her arrest will not be followed by an indictment, trial, or conviction, and, as such, cannot constitute evidence of unbecoming conduct. The District certified a tenure charge based solely on the fact of the Respondent's arrest and her own statement outlining the resulting criminal charges but without any specifics regarding the underlying circumstances of the arrest and without an indictment, trial, or conviction. The exhibits referenced in the Superintendent's Statement of Evidence show only that the Respondent was arrested; they do not establish, or even attempt to establish, that the Respondent engaged in unbecoming conduct as a teaching professional. The District can offer no proof that the mere fact of the Respondent's arrest adversely relates to her employment. To the contrary, by voting to transfer her to Deptford High School for the remainder of the school year at the same meeting in which it certified the charge against the Respondent, the District did not proceed as if her employment was adversely affected by the arrest.

In short, the tenure charge must be dismissed because it is procedurally defective and because it does not prove that the Respondent engaged in conduct unbecoming.

The District contends:

The District asserts that the tenure charge is procedurally effective under N.J.A.C. 6A:3-5.1. That statute does not require that persons initiating tenure charges have first-hand knowledge, but rather that the charge and evidence be executed under oath. Here, although the Superintendent did not have first-hand knowledge about the Respondent's arrest, he did have the October 18th correspondence from the CHRU and the October 29th e-mail from the Respondent, which provided him the necessary information in order to prepare and submit the tenure charge to the District.

The Superintendent's tenure charge and statement of evidence were based on hearsay, which is permissible. The charge was stated with as much specificity as was available to the Superintendent on November 5, 2018, which was clearly enough information and evidence for the District to vote that probable cause existed. Additionally, the Respondent was able to generate a three-page Statement of Position in response to the charge of conduct unbecoming. In short, the Superintendent followed applicable regulations, issued a charge based on competent evidence, and the charge is procedurally effective.

In addition, the charge demonstrates conduct unbecoming by the Respondent. Based on the information received, the Superintendent possessed cause to issue the tenure charge for unbecoming conduct because the arrest clearly has an effect on the morale, efficiency, and public perception of the District. The fact that the criminal charges have not yet been adjudicated[1] is irrelevant; the issue is not whether the teacher is found guilty of the criminal charge, the issue is whether the teacher engaged in conduct unbecoming, which is any conduct that adversely affects the morale or efficiency of the Department of Education. Here, the Respondent, an elementary school teacher, was arrested and charged with various drug and alcohol offenses. Given the totality of the circumstances, the pending tenure charge for unbecoming conduct is warranted.

---

[1] The District's brief, dated March 4, 2019, states: "To date, to the best of our knowledge these charges have not yet been adjudicated" [District's Brief at unnumbered page 6]. The brief also states that, "[d]espite the pending criminal charges not yet being adjudicated, the Charge for Unbecoming Conduct can still be determined and is supported based upon the evidence submitted" [id.]. As noted above, the criminal charges were adjudicated by the Hamilton Municipal Regional Court on February 12, 2019 [see Respondent's reply brief of March 19, 2019, Exhibit A]. Nothing in the record in this arbitration proceeding addresses whether the District became aware of the court's adjudication of the criminal charges after it filed its brief and before the Respondent filed her reply brief.

DISCUSSION

The Respondent has the burden to demonstrate that the motion to dismiss the tenure charge should be granted. The Respondent raises two separate grounds for dismissing the tenure charge. These will be addressed in turn.

First, the Respondent asserts that the tenure charge is procedurally defective because it is not stated with specificity, is not based on competent evidence, and does not support a determination of probable cause. The District counters that the tenure charge is procedurally effective.

The relevant statute provides:

> Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education . . . accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement.
>
> [N.J.A.C. 6A:3-5.1(b)1]

The Superintendent initiated the tenure charge against the Respondent on November 5, 2018, charging her with conduct unbecoming. On that date, the only knowledge he had concerning the Respondent's arrest consisted of two documents: the CHRU letter and the Respondent's email to him. The totality of the information contained in these two documents was that the Respondent had been arrested on October 17, 2018, and that the arrest involved three charges stated in the email. The Superintendent was unaware of the arrest report at this time and had no other evidence surrounding the circumstances of the arrest. Based solely on the two documents submitted as the Statement of Evidence, the Superintendent asserted that the Respondent had engaged in conduct unbecoming.

The reliance on these two documents, without more, is insufficient to meet the procedural safeguards intended by the statute. As the Respondent cogently points out:

> The tenure charges offer no explanation as to why the mere fact of her arrest without the disposition of any criminal charges against her, nor her timely reporting of the arrest to Superintendent Dietz, should constitute conduct unbecoming or relate in any way to her employment as a teacher. Indeed, the nature of the charged conduct is never specified – a procedural deficiency that has proven fatal to other tenure charges.
>
> [Respondent's Brief at 4]

It requires too much of a stretch to conclude from a mere reference to the two documents, without any explanation at all of the relevant circumstances, that they provide probable

cause for a determination that the Respondent's actions had any connection to her employment, let alone constitute conduct unbecoming of a teacher.

In this regard, the District's contention--that the tenure charge was "stated with as much specificity as was available to the Superintendent on November 5, 2018 which was clearly enough information and evidence for the Board to decide to vote that probable cause existed"— is conclusory and unsupported [District's brief at unnumbered pages 4-5]. It is undoubtedly true that the tenure charge was stated with as much specificity as was available to the Superintendent on November 5, 2018 (which was not much at all). However, that information was not used by the Superintendent to explain how or why there was a nexus between the facts contained therein and the Respondent's employment as a teacher or how those facts established probable cause to show conduct unbecoming. Nothing required the Superintendent to act on November 5, 2018, prior to his having any knowledge of the arrest report or any other evidence concerning the circumstances of the arrest, and prior to any court adjudication of the criminal charges against the Respondent. Further, the Respondent was deprived of due process when she was not afforded the opportunity to respond to the District's submission of the arrest report, the accompanying video footage of the arrest to the Commissioner, and its request that the Commissioner consider that additional documentation in making a decision on the tenure charge.

In sum, the Respondent was deprived of significant procedural safeguards by the manner in which the tenure charge was processed.

Moreover, even if the processing of the tenure charge were found to comply with all necessary procedural safeguards, the charge nevertheless did not establish probable cause to show that the Respondent engaged in conduct unbecoming.

Under New Jersey law, a teacher may be dismissed for "unbecoming conduct" [N.J.S.A. 18A:6-10]. While that term is not defined in statute, its meaning has been elaborated by the courts. In *Bound Brook Board of Education v. Ciripompa*, 228 N.J. 4 (2017) (*Ciripompa*), the court stated that it

> has defined unbecoming conduct as conduct "which adversely affects the morale or efficiency of the [department]" or "has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *In re Young*, 202 N.J. 50, 66, 995 A.2d 826 (2010) (alterations in original) (quoting *Karins v. Atl. City*, 152 N.J. 532, 554, 706 A.2d 706 (1998)). We have also held that a finding 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'." *Karins, supra*, 152 N.J. at 555, 706 A.2d 706 (quoting *Hartmann v. Police Dep't of Ridgewood*, 258 N.J. Super. 32, 40, 609 A.2d 61 (App. Div. 1992)).
>
> * * *
>
> A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those

> concerns are harmed by allowing teachers to behave inappropriately while holding public employment.
>
> [*Ciripompa* at 14]

In the instant case, the parties disagree as to whether the mere fact of an arrest, in the absence of an indictment, trial, or conviction, can constitute evidence of conduct unbecoming. Both parties cite *Tharpe v. Newark Police Dep't*, 261 N.J. Super. 401 (App. Div. 1992) to support their positions on this issue. *In Tharpe*, the court addressed whether an arrest unsupported by a conviction disqualifies an individual from obtaining employment as a police officer. The court stated:

> It is apparent to us that the Legislature, by enacting N.J.S.A. 11A:4-10 and by authorizing the promulgation of necessary implementing regulations in N.J.S.A. 11A:2-6(d), envisioned circumstances under which an applicant for a law enforcement or fire fighter position could be disqualified on the basis that he or she had merely been arrested rather than convicted of a crime. The regulation which permits disqualification for "other sufficient reasons" is rooted in the statute and authorizes the removal of an applicant's name based upon his arrest record, at least where he or she seeks employment as a law enforcement officer or a fire fighter.
>
> It is equally clear, however, that the fact of an arrest, standing alone, may have no persuasive force in assessing an applicant's qualifications. For example, an arrest may be based on a misidentification or predicated upon a wholly incorrect apprehension of the relevant facts. In a similar vein, an arrest may relate to a comparatively trivial matter and may constitute an isolated event in an otherwise unblemished life. Clearly, the circumstances surrounding the arrest and other factors should be considered in determining whether an applicant's name ought to be removed from an eligibility list.
>
> An arrest may warrant the removal of an applicant's name particularly where the position sought involves enforcement or administration of the law, but the relevant circumstances should be carefully considered. The appropriate inquiry should be whether the circumstances surrounding the arrest "adversely relate[] to the employment sought." N.J.S.A. 11A:4-11. This is the statutory standard applicable when considering the impact of criminal convictions on public employment and it is equally amenable to the related question concerning the effect of an arrest on the applicant's qualifications. Surely, an arrest should have no greater disabling effect than does a criminal conviction. In both cases, consideration should be given to the nature and seriousness of the offense charged, the surrounding circumstances, the date of the offense and the individual's age at the time, whether the offense alleged was an isolated incident, and any evidence of rehabilitation.
>
> [See N.J.S.A. 11A:4-11; *Tharpe*, 261 N.J. Super. at 405-06]

Applying the principles of *Tharpe* to the tenure charge of conduct unbecoming a teacher, it is clear that the mere fact of an arrest, in the absence of an indictment, trial, or conviction, does not by itself answer the question of whether the arrest can constitute evidence of conduct unbecoming. As the court emphasized, the relevant circumstances of the arrest must be carefully considered, and the appropriate inquiry should be whether the circumstances surrounding the arrest adversely relate to the employment position.

Here, both the November 5, 2018 determination by the Superintendent to initiate a tenure charge and the District's December 18, 2018 determination that probable cause exists to credit the evidence in support of the charge are fatally defective because they did not consider the circumstances surrounding the arrest. The reason that the Superintendent and the District did not consider those circumstances is obvious: they were completely unaware when they made their determinations of the circumstances surrounding the arrest because they did not have the arrest report or any other evidence relating to the arrest to consider at that time. For this reason, their determinations that the arrest demonstrated conduct unbecoming by the Respondent are unsupportable and unsustainable.[2]

One additional point should be noted. On the same date that the District certified the charge against the Respondent, it also voted to transfer her from her position in the Early Childhood Center to Deptford High School for the remainder of the 2018-2019 school year. The District offered no explanation at that time, nor did it do so subsequently or in its brief, as to why it was appropriate to transfer the Respondent to another school at the same time that it claimed that she should be dismissed from her then-current position for conduct unbecoming a teacher. As the Respondent's brief aptly points out, by transferring the Respondent the District "did not proceed as if her employment were adversely affected by the arrest..." [Respondent's Brief at 7].

IV. CONCLUSION

For the reasons set forth above, the Respondent's motion to dismiss the tenure charge is granted. The dismissal is without prejudice to the District recertifying the tenure charge against the Respondent with appropriate evidence in support of such a charge. See the undersigned arbitrator's decision in *IMO Ebert and SOSD City of Newark, Essex County*, Agency Docket No. 267-9/14 (Jan. 30, 2015) (granting respondent's motion to dismiss tenure charges for district's substantial and unexplained failure to comply with statutory timeliness mandate; dismissal is without prejudice to the district's right to file charges again in a manner that fully comports with applicable statutory provisions); *IMO Wallwork and School District of Township of Orange, Essex County*, 85 SLD 952, 956, *aff'g in relevant part* 85 SLD 946 (1985) (dismissing tenure charges against respondent as being procedurally defective, but not precluding the board from recertifying the tenure charges against respondent with appropriate evidence in support of such tenure charges).

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[2] The failure by the Superintendent and the District to consider all relevant circumstances is not cured by the subsequent submission of the arrest report and accompanying video to the Commissioner, since that material was never part of the Superintendent's and the District's consideration to proceed with the tenure charge.

If the District decides to recertify the tenure charge against the Respondent with appropriate evidence in support of such a charge, it must: (1) comply with all applicable procedural requirements; (2) consider and address the Municipal Court's February 12, 2019 disposition of the criminal charges; (3) consider and address its December 18, 2018 decision to transfer the Respondent to Deptford High School for the remainder of the 2018-2019 school year; and (4) consider and address all other relevant circumstances concerning the arrest, consistent with the principles set forth in *Tharpe*.

Tia Schneider Denenberg
Arbitrator

In the Matter of the Tenure Hearing of

Nikki Vogel,
School District of the
Township of Deptford
Gloucester County

Agency Docket No. 14-1/19

Ruling on Respondent's Motion to Dismiss

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, to hear and decide the above-captioned matter, rules as follows:

The Respondent's motion to dismiss the tenure charge is granted. The dismissal is without prejudice to the District recertifying the tenure charge against the Respondent with appropriate evidence in support of such a charge.

Tia Schneider Denenberg
Arbitrator

Dated: May 13, 2019

State of New York
County of Columbia

On this 13th day of May, 2019, before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Kristy Lee Brailey
Notary Public State of New York
No. 01BR6326865
Qualified in Columbia County
Commission Expires June 29, 2019

131-19

COMMISSIONER OF EDUCATION, State of New Jersey

IN THE MATTER OF THE PROCEEDING BETWEEN:

State Operated School District, City of Newark, Essex County
"Petitioner" or "District"

And

Tenured Teacher LaRhonda Ragland
"Respondent" or "Teacher"

Petition: "Dismissal, Tenured Teacher L. Ragland, by Newark Board of Education"
Agency Docket No: 209-8/18

AWARD and OPINION

Pre-Hearing Conference [Discovery issues]	November 14, 2018
Hearings [Evidentiary] Newark, NJ	November 20, 30, December 4, 2018; January 24, 30, February 14, 15, 2019
D.O.E. Extension(s) granted:	January 17, March 01, 2019
Transcripts received:	January 28, February 06-28, 2019
Briefs, w/ materials:	March 29 - April 10, 2019
Date of Award:	May 15, 2019

Arbitrator Jay David Goldstein

APPEARANCES

For Petitioner [Newark S. D.]
Brenda Liss, Esq.,
Ashley Higginson, Esq.
Yolanda Mendez, H.R. Exec. Dir, (Acting)
Karisa DeSantis, Principal
Regina Sharp, Vice Principal
Najran Cowins, Vice Principal

For Respondent [L. Ragland, Teacher]
Stuart Ball, Esq.,
LaRhonda Ragland

INTRODUCTION

The underlying dispute over this dismissal action by the Newark School District [Petitioner] arose from alleged 'inefficient' and, 'partially inefficient' ratings received by 'Tenured Teacher' Ms. Ragland [hereafter, "Teacher" or "Respondent"] over a two school year period. As a result of the less-than-efficient ratings described herein, many attempts were made to correct the "Teacher's" alleged deficiencies through ongoing, continued efforts by supervisory and/or administrative personnel of the Dr. Everett Horton School ["Horton"] where she had been assigned.

Numerous allegations detailing the above were found in the proceedings raised by "Petitioner" and included in the "Notice of Tenure Charges" filed against "Respondent", wherein her dismissal was sought. These were extensively documented in the record hereunder.

In response to the dismissal proceedings, alleged defenses were raised by Respondent, but in limited fashion. "Respondent" initially answered the charges in an August 17, 2018 position letter wherein Ms. Ragland [By Counsel] contended she was, "*...targeted by administrators who had an agenda hostile to her.*" Later, discovery proceedings in preparation for this arbitration matter showed Respondent's 'Answers to Petitioner's Interrogatories', including the above. [All underlining herein is for emphasis only and by the author unless noted]

Those filings [et al] also make reference to a prior tenure charge and subsequent Arbitration Award involving 'Teacher' [Respondent Exhibit #2; Arbitrator T. Brown] wherein Teacher's Counsel states unequivocally that, "*Ms. Ragland will rely on the decision of the Arbitrator in the prior case and on other evaluations ...supplied by the Petitioner as well as on her own testimony.*" In answer to other Interrogatories [2nd -3rd] posed by the District, Teacher's Counsel also contended that she, "*...continued to find success as a dance teacher just as* [she had] *from 2006-2016*"**and**, "*There are so*

many students, parents and colleagues who could attest to the positive impact [she has] have had on so many students and [her] successes as a dance teacher"

Again by the Teacher's response, "*Ms. Ragland has been a dance teacher in the Newark Public schools since 2006. She has received a host of favorable evaluations and commendations from parents and students over those years.*" Further that, "*She has had excellent training in her field and has had an abundance of high level experience. She will also rely on supporting documents...supplied from her files and on her own testimony.*" [Respondent pleading]

Notwithstanding the above prehearing arguments and similar tenders by each Party at Hearing, that record is devoid of evidence offered by or on behalf of Respondent in support of her prior contentions to contradict Petitioner's evidence in support of its charges. Discussed below, there were minor contradictions on cross-examination of Petitioner witness testimony that, while technically correct, did not alter the overall veracity of any District witness. Moreover, any contradiction found did not substantially affect any evaluation overall.

In a linked procedural matter, Parties' Counsel tacitly agreed that all evidence in this proceeding would be limited to the 2016-17 (and) 2017-18 School Years, as found in the 'charges' against this Tenured Teacher. Notwithstanding this agreed to limitation , Teacher testified to, and her post Hearing Brief raised the prior history of her employment at the Newark School District. [Oct. 29, 2018 Pre-Hearing Conference, Board Brief and Teacher Brief]

Additionally, both sides made reference to that prior employment matter in their respective arguments in this case. Each acknowledged that the prior matter had been adjudicated by another arbitrator, and whose decision has been admitted into this record [R-2]. The consequence(s) of that decision, if any, will be addressed below.

Further chronological background events are summarized here, but are presented in greater detail under the Background, Facts, Party Positions, below this section.

School year 2005; *"Respondent LaRhonda Ragland ("Respondent") is a tenured teacher of dance who has been employed by the Newark Board of Education ("Board") since 2005*

She received annual summative evaluation ratings of "partially effective" in the 2016-2017 school year and "ineffective" in the 2017-2018 school year, pursuant to the Board's State-approved system of teacher performance evaluation, the Newark Public Schools Framework for Effective Teaching ("Framework")."

[Board's Brief]

2015-2016; in her closing Brief only, the Teacher alleges that the above referenced and current charges, "*... brought by Petitioner Board ... "the District" or "Petitioner") should be seen in the context of her many years as a successful teacher[1] (Tr.7,1320:10-13) particularly in School Year 2015-2016 (Exhibits R-3, R-4, R-5, R-6, R-7,and R-8) and in the context of a prior attempt to fire her for inefficiency. That prior attempt was entirely unsuccessful. (Exhibit R-2)* [Teacher's Brief]

End of School Year 2018; "*...the Superintendent of Schools was required to file a tenure charge of inefficiency against her. Accordingly, he did so at the end of the 2017-2018 school year, and the Board submitted the charge to the Commissioner of Education*" [Board Brief]

September 10, 2018; this Arbitrator appointed to the matter by the NJ State Board of Education.

October 29, 2018; pre-Hearing Conference with parties' Counsel and Arbitrator, held in person.

November 20, 30, December 4, 2018; January 24, 30, February 14, 15, 2019; Hearing(s) in the matter occur at the Newark Board of Education offices in Newark, NJ. During the seven (7) evidentiary hearings, each side had full opportunity to present its relevant evidence; including written exhibits, sworn testimony, cross-examination and rebuttal testimony. The Tenured Teacher was present during the entirety of the evidentiary Hearings, given opportunity to and did testify in her own behalf. Each Party agreed to written closings and the protocol for those submissions.

January 28, February 06-28, 2019; the transcribed record of hearing was received in several batches.

March 29–April 10, 2019; by their mutually agreed to schedule the Parties filed closing Briefs electronically with the Arbitrator on March 29th. Thereafter however, the agreed upon submission of same by US 1st Class mail, including cited materials copied to one another and the Arbitrator was only complied with by one side. Noncompliance by Respondent's counsel delayed the closing of the post Hearing process by approx. one week, but both briefs [+ cited materials] were eventually received between the above mentioned dates.

The Hearing record was eventually declared closed at the receipt of all materials on April 10, 2019. Prior, several calendar extensions were granted by the NJ, DOE due to several factors including delay in discovery, protracted hearing schedules, delay in transcript hearing records.

May 15, 2019; decision rendered, filed with the NJ Commissioner of Education.

ISSUE

While the Parties' did not stipulate *per se* to an issue, the basis for determining whether a dismissal was reasonably taken under all of the attendant circumstances must be determined. Thus in conformity with statutorily mandated principles including limitations or exclusions to them, the following question is deemed relevant and appropriate for the inquiry before this tribunal:

'Has the Board proven the tenure charges by a preponderance of the evidence sufficient to warrant termination of the Tenured Teacher?'

If a termination was deemed 'not warranted', another potentially viable question is: 'what shall be the remedy?'

Additionally, the 'Board' cited the 'Act' as controlling a statement of the issue:

"The Act limits the available defenses to four specifically enumerated potential issues, and it strictly limits the arbitrator's authority to consideration of only those four issues. N.J.S.A. 18A:6-17.2(a)."

The Board also commented on the Respondent's answer to the 'enumerated' issues, being:

"RESPONDENT ASSERTED ALL FOUR STATUTORY DEFENSES IN HER ANSWER TO THE CHARGE, BUT THE EVIDENCE PRESENTED AT THE HEARING SUPPORTED NONE OF THEM. [Board Brief]

As addressed herein and below, the Teacher's Brief did expand on those defenses.

In addition, the Board made two pre-Hearing Motions. The first was for a "Dismissal", rejected out-of- hand as not timely for consideration when made. In lieu thereof, another Motion [in effect, *In Liminae*] was given full and complete consideration by the Arbitrator and, despite opportunity afforded Respondent for rectification, none was forthcoming.

As for the limitations requested by the 'Board' were deemed persuasive and remained so due to 'Respondent's' failure to complete its statutorily mandated discovery and, to have done so in timely fashion, my ruling follows.. The limitations sought by the Petitioner's motion are granted, i.e., "*...to the facts stated in Respondent's answers to interrogatories*".

Further, "*At an on-the-record conference on October 29, 2018, the Board's counsel requested a ruling that the factual issues to be addressed at the hearing, and evidence to be presented, should be limited to the facts stated in Respondent's answers to interrogatories. See October 29, 2018 Transcript (T) at 16.* ***Respondent's counsel argued*** *that the evidence should not be so limited, and argued further that as a* ***result of procedural flaws*** ***the charge should be dismissed in its entirety*** *without regard to the four statutory defenses. (T17.) The arbitrator did not rule as to either party's position, stating, "we'll deal with it" at the hearing, and he suggested the* ***parties submit proposed findings of fact****. (Id.) The Board did so, and Respondent did not.* " [Board Brief, citing Conference and Hearing Transcripts]

In addition to the above statement [attributed to 'Respondent's Counsel', as cited by the Board Brief] the Tenured Teacher's defense to the charges was considerably limited to cross-examination of the 'Board' witness' testimony, 'Teacher's' testimony denying the veracity of the 'Board' witnesses and, the legal argument in Respondent's post-Hearing Brief.

What is more, an additional pre-hearing opportunity in the form of submitting Proposed Findings of Fact were afforded each side to argue for presentation of their respective assertions regarding either limitation (exclusion) or inclusion of, "factual issues' and, 'evidence to be

presented'. When the mandated discovery period expired thereafter, the Board had submitted its Proposed Findings of Fact, [cited i.e., reproduced below] and, Counsel for the Tenured Teacher did not summit anything in that regard.

Resultant thereto, certain limitations were placed on the evidence presented by/for the Tenured Teacher's case, as analyzed further below. These procedural limitations are directly attributed to the failure of engagement in the process by Respondent, after both sides were offered opportunity to do so. The Board completed all discovery obligations and the Tenured Teacher did not comply during the discovery process.

Thus the Teacher's failure to comply with 'discovery' and thereafter fail to engage in argument [Propose Findings of Fact] relevant to limitation of evidence thereafter also precludes the Tenured Teacher from arguing certain positions, post-Hearing. The rationale for this ruling is based upon simple fairness inherent to an orderly proceeding which must not allow for even the appearance of disparate treatment in favor of one side.

Allowing only one side to avail itself of the opportunities for the 'discovery' proceedings is to deny the other side fair opportunity to put on and/or defend its position. [Analysis, below] Thus here, Petitioner's Motion to limit Respondent's opportunity to subsequently submit 'Facts and Evidence' not previously and timely submitted according to statutorily mandated guidelines is appropriate and proper. Fuller discussion is in 'Analysis', below.

BACKGROUND, FACTS and PARTY POSITIONS

The discussion above over the "Issue" contents adequately permits each Party Position that was timely and properly presented; and therefore relevant, i.e., as to inclusion or exclusion of evidence. The proper limitation therefore is to: "... *the facts stated in Respondent's answers to interrogatories*", as stated by the Board. The limitations on evidence and facts are thus defined by

what Respondent has presented pre-hearing and, in timely fashion. The following additional background/positions are deemed appropriate for consideration where noted and are gleaned from the Parties respective positions.

Initially, the Board argues its burden of proof by citing a prior Award in this jurisdiction:

"*The burden in this case is on the School District to prove by a preponderance of the evidence that the **statutory criteria** for the tenure charges have been met. Where the School District has met this burden, the burden shifts on Respondent to "affirmatively prove that she has a defense to the Tenure charges brought against her." I/M/O Tenure Hearing of Roxanne Jastrzembski, Agency Ref. No. 216-8/18 (Ira Cure, Arbitrator, March 7, 2019) at 41.*" [Board Brief]

Also discussed hereunder, the Board likewise addresses the basis for that award by referring to the statutory defenses which an Arbitrator may consider on review:

"*TEACHNJ provides only four defenses by Respondent which the arbitrator may consider when reviewing a tenure charge of inefficiency, i.e., whether or not:*

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

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

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

(4) the district's actions were arbitrary and capricious." [Board Brief, citing TEACHNJ]

The Board evaluates the aforementioned TEACHNJ defenses by providing excerpts of testimonial examples, from documents admitted into the record and, from its submission of:

"***PROPOSED FINDINGS OF FACT***

Based on the evidence presented, the arbitrator should make the following findings of fact:

1. Respondent is a tenured teacher employed by the Board.

2. The Framework is the Board's teacher performance evaluation rubric approved by the New Jersey Commissioner of Education pursuant to N.J.S.A. 18A:6-123.

3. In the 2016-2017 and 2017-2018 school years, Respondent's teaching performance was evaluated by the Board in accordance with the Framework. Respondent received annual summative evaluation ratings of "partially effective" for the 2016-2017 school year and "ineffective" for the 2017-2018 school year. Consequently, a tenure charge of inefficiency was filed against Respondent pursuant to N.J.S.A. 18A:6-17.3.

4. Respondent's evaluations in the 2016-2017 and 2017-2018 school years adhered substantially to the evaluation process, including but not limited to providing a corrective action plan. Respondent has identified no substantial failure to adhere to the evaluation process.

5. Even if the evaluations on which the Board relies in support of the charge of inefficiency, or either of them, failed to adhere substantially to the evaluation process, that fact did not materially effect the outcome of the evaluation.

6. There was no mistake of fact in Respondent's evaluation for either the 2016-2017 or the 2017-2018 school year.

7. The charge of inefficiency was not brought due to considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law.

8. Contrary to Respondent's assertion, the charge was not brought in furtherance of the hostility to Ms. Ragland for standing up to misconduct and successfully defending herself. (Even if proven, this allegation is insufficient to support a finding that the charge of inefficiency against Respondent would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law. This allegation does not pertain to any such prohibited considerations.)

9. The Board's actions in connection with the charge of inefficiency against Respondent were not arbitrary and capricious.

The above referenced "Proposed Findings Of Fact" are, in effect, the equivalent of an opening statement typically offered at the beginning of a Hearing. In doing either one, each side

implies it will prove the proposed facts offered and by an appropriate quantum of the evidence. Respondent did not avail itself of either, an oral opening 'statement' or the opportunity to submit its own Proposed Findings Of Fact.

Moreover, there was no dispute over either Paragraph's 1. or 2. [Petitioner's, above] Indeed, Respondent offered little or no defense to several of the "Proposed Findings". Except for Respondent's general denials of Board evidence/ proof discussed in the Analysis below, there was no further mention of the Teacher's prior claims of discrimination against her by:

"...*political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law*" [Board's Brief]

Instead of proofs offered at Hearing, the summary content of Respondent Teacher's Brief consisted of broad legal argument, primarily based upon a theory that this case, "...*should be seen in the context of her many years as a successful teacher (Tr.7,1320:10-13) particularly in School Year 2015-2016 (Exhibits R-3, R-4, R-5, R-6, R-7,and R-8) and in the context of a prior attempt to fire her for inefficiency. That prior attempt was entirely unsuccessful. (Exhibit R-2). Indeed, that prior attempt resulted in an extensive decision by Arbitrator Timothy J Brown.*" [Teacher's Brief]

Respondent did cite text from that prior Arbitrator's decision:

"Arbitrator Brown concluded: I do not question the evaluators determinations as to the quality respondent's classroom performance as reflected in the three observations made respondent thousand 13 14 school year. However, when the District's failures to comply with the provisions of the District's framework are weighed in full along with the considerations I rely upon below finding arbitrary conduct by the district, I find that respondents 2013 14 evaluation "failed to adhere substantially to the [Districts] evaluation process including, but not limited to providing a corrective action plan (Exhibit R-2 at page 37)" [Teacher's Brief]

Given that the Findings in this case [below, Analysis] support the evidence of substantial compliance with the evaluation process, Respondent's premise for the citation was not made clear. The lack of clarity is twofold.

First is that another, prior arbitrator's analysis of facts and pre-decision comments are neither conclusively, nor 'per se', binding upon a subsequent decision maker's view of subjective facts offered in a later case. Despite attempts at comparison, they rarely have identical facts for which the former case is precedent setting.

Accordingly, the Teacher's position in this regard, here, remains unclear. Moreover, in that prior case, except for some similarities as to the 'forms' and formulary used under TeachNJ generally, the final decision in that prior inefficiency case was reached on a set of procedurally deficient grounds clearly distinct from the facts in this case.

Other distinctions between the two cases include that the Teacher –Respondent here was found, by clear and unrefuted evidence, to have been substantially uncooperative with the Supervisory personnel's efforts to rehabilitate her pattern of poor behavior and improper conduct. The evidence points to the resultant effect, either directly or indirectly affecting her peers, superiors, students, and parents. Her contiguous behavior in this case either bordered upon or, clearly rose to the level of insubordination. Further discussion is found in the Analysis below.

Except for the general denial(s) referenced elsewhere herein, there was no evidence presented to refute the allegations made against her. At Hearing before this tribunal, Respondent Teacher testified for only a limited [under two hours] period of time. Moreover, and contrary to information provided in an Answer to Interrogatories provided by Respondent, there were neither ancillary documents to support her view of being an excellent teacher, nor any witnesses made available to testify on her behalf.

Each side submitted post-hearing Briefs containing their significant 'Points' of view. Carrying the burden of proof the District submitted:

" I. THE TENURE CHARGE OF INEFFICIENCY IS PROCEDURALLY VALID.

II. *THE TENURE CHARGE OF INEFFICIENCY SHOULD BE UPHELD.* [on the basis of]

A. *THE ARBITRATOR'S STANDARD OF REVIEW.*
B. *THE EVIDENCE DEMONSTRATED THAT THE SCHOOL DISTRICT ADHERED SUBSTANTIALLY TO ITS EVALUATION PROCESS.*
C. *THE EVIDENCE DEMONSTRATED NO MISTAKE OF FACT IN THE EVALUATION.*
D. *THE SCHOOL DISTRICT DID NOT ACT IN A MANNER THAT WAS ARBITRARY AND CAPRICIOUS.*
E. *THE EVIDENCE DEMONSTRATED NO RETALLATORY MOTIVE FOR BRINGING THE TENURE CHARGE.*
F. RESPONDENT HAS FAILED TO MEET HER BURDEN OF PROVING ANY DEFENSE"

[Board's Brief]

Also, and while not included in the charges *per se*, the record is replete with District's claims alleging Tenured Teacher was also guilty of insubordination. There were disciplinary actions taken, ostensibly due to her ongoing and continued failure to cooperate with the efforts of administrative and supervisory personnel assigned to meet with her to assist in complying with correction of her deficiencies. [Testimony and documentary evidence; Board's Brief]

In rejoinder to the District's Brief the Teacher's defense(s) rest primarily upon a premise that there was a failure of proof required by the Board. Thus, the Teacher's 'Points' claim, in effect, that the District failed to meet its burden of proof:

I. *THE NECESSARY LEGAL PREREQUISITES FOR THE CHARGES HERE ARE ENTIRELY ABSENT FOR BOTH YEARS AND THEREFORE THE CHARGES ARE INVALID.*
[School Year 2016-2017 School Year 2017-2018]

II. *THE STATUTORY REQUIREMENT THAT AN ARBITRATOR CONSIDER THE MATERIALITY OF A DISTRICT'S FAILURES IS INAPPLICABLE HERE.*

III. *THE DISTRICT'S FAILURES TO DEVELOP PROPER ASEs ARE NOT EXCUSED BY ANY WAIVER OR EQUIVALENCY*

IV. *THE DISTRICT'S FAILURES CANNOT BE EXCUSED BY TRYING TO BLAME MS. RAGLAND:*

V. *FAILURE TO IMPLEMENT THE LEGALLY MANDATED CORRECTIVE ACTION PLAN AND IPDP INVALIDATE THE ASEs AND CHARGES FOR THE BOTH SCHOOL YEARS.*
A. THE CAP PROVIDED FOR MS. RAGLND IN THE 2017-2018 SCHOOL YEARWASINADEQUATE *B.*

THE IDPD PROVIDED FOR MS. RAGLAND IN SCHOOL YEAR 2016-2017 WAS INADEQUATE

VI. *THE DISTRICT'S BIAS AGAINST MS. RAGLAND IS REFLECTED IN ITS OVERALL FAILURE TO CONDUCT A FAIR AND LEGALLY PROPER OBSERVATION AND EVALUATION PROCESS.*

[Teacher's Brief]

Each Party concluded its views of the matter as follows.

In summary of the **Board's Position**, at the 'Conclusion' of its Brief:

"*For all the reasons set forth herein, the tenure charge of inefficiency against Respondent should be upheld, and Respondent should be dismissed from her employment by the Board.*"

[Board's Brief]

In summary of the Teacher's Position, at the 'Conclusion' of its Brief,

"*For the foregoing reasons, the charges of inefficiency against Ms. LaRhonda Ragland must be dismissed and Ms. Ragland should be restored to full employment by the District with appropriate back pay, benefits and seniority.*" [Teacher's Brief]

FINDINGS AND OPINION

All arguments, positions and evidence adduced at a pre-hearing Conference and seven (7) evidentiary hearings were taken into careful consideration. Relevant portions of the statutory sections which the Parties mutually acknowledged being bound to were cited by each side and deemed relevant without further recitation here. Those Statues impose a, "just cause" standard for dismissal, also granting a School District the right to issue reasonable rules, orders and regulations which are not conflicting. There has been no challenge to those statutory standards for discipline by either side.

Analysis; overview

The clear evidence shows Respondent-Teacher's uncooperative attitude and behaviors linked with her 'evaluation' process by the District occurred during the period in question. Further, those factors were the primary causes to impede the dynamics of that process.

Therefore, any degradation of the evaluation process as challenged by Respondent was misguided and found wanting for lack of evidence against the Petitioner-District. The blame for Teacher's failure to escape the charges of 'Inefficiency' is not deemed to be the fault of District administration, but instead directly on the Teacher.

The School District seeks to justify its 'Dismissal' action. The Teacher responds by seeking re-instatement, "*...with appropriate back pay, benefits and seniority*". The Board has justified its Dismissal action and its views of the principles involved are sound. While disputed, the District's views are substantiated by the facts.

At the core of the issue(s) was whether a justifiable dismissal occurred or, whether the penalty was too harsh or unfair pursuant to the guidelines promulgated by authorities cited by both parties. Relevant to the underlying considerations are certain indisputable facts occurring both before disciplinary proceedings had begun at the School District level and, after the matter reached the 'Tenured Teacher' dispute resolution level presided over by the NJ DOE [Office of Controversies and Disputes].

The evidence is convincing that Respondent-Teacher demonstrated a blatant lack of cooperation, inattention or indifference to the necessary protocols of her teaching position, consistently and throughout both levels of the above proceeding(s). The District's evidence was replete with documentation and credible testimony concluding that ongoing and continued efforts over an extended time period attempted to correct the Teacher's deficiencies. Borne out by

competent and credible testimony of same, they included both 'formal' and 'informal' observations by school ["Horton"] administration of this Teacher's inappropriate teaching methods, her significant lack of basic professional skills and the Teacher's inability to communicate effectively, both verbally and in-writing; to Students, parents and School Staff.

The District's evidence started with a showing that its charges were procedurally valid. As evidenced herein, Respondent provided no proof to the contrary when necessary to do so at the 'Discovery' stage of this proceeding. Thus, Respondent failed and refused to provide evidence of the procedural deficiencies she alleged but did not prove.

Although Respondent broadly contended that its claim of 'bias' was based upon an, "

"*...OVERALL FAILURE TO CONDUCT A FAIR AND LEGALLY PROPER OBSERVATION AND EVALUATION PROCESS*"; that general condemnation of the evaluation process did not 'fit' within the scope or totality of the otherwise credible facts presented by the District witnesses. Moreover, the evidence produced at Hearing by Petitioner against Respondent to substantiate its charges overwhelmingly demonstrated that the District adhered substantially to its evaluation process. While disputed by Respondent, the only showing to support her theoretical insinuation and arguments against the validity of District evaluations and observations came in the form of cross examination of District witnesses. The cross examination was insufficient to overcome Petitioner's proof.

Furthermore, it is persuasive that any alleged failures of the District proofs were only tenuous possibilities [and not probabilities]. They were drawn out by Respondent's closing Brief and either unsupported by the transcribed record or, found to be *de minimus* mistakes in calculation or interpretation of the regulations guiding the 'TeachNJ'. Nonetheless, the alleged discrepancies were determined to actually be based upon the lack of cooperation of the Respondent Teacher. It was the Teacher's responsibility and failure, absolutely, to contribute to creating her CAP, for example, that

resulted in that document not being finished and, not done timely. That evidence was not refuted, except for a post-Hearing assertion by Respondent that, "the District was responsible also". Yet the clear evidence showed that the District cannot create something like the CAP without having the Teacher's input to begin that CAP.

Teacher offered no evidence in support of, or even minimal argument to successfully explain why basic teaching-related administrative functions [i.e., process for grading of students found to be another set of deficiencies] were ignored by her. Moreover and despite the school ["Horton"] administration personnel's best efforts to correct deficiencies observed, those efforts were met with both an ostensible inability to perform these functions or, with Ms. Ragland displaying an attitude either approaching, or directly engaging in blatant insubordination toward legitimate and direct orders from her Supervisors.

Paradoxically, a mainstay of Teacher's defense is an onslaught of allegations in the form of complaints/ protests about the District and yet, ignores clear evidence of Teacher's neglect. In lieu of accepting responsibility for her actions, Teacher referred only to allegations in a prior filing:

"*Petitioner failed or refused to insure that its administrators comply with regulations...[pre or post observation conferences...and or hold them within the permitted time limit...timely complete Respondent's individual professional development plan (IPDP)...in the development of Respondent's corrective action plan (CAP)...to insure that it's administrator's engage in a collaborative process with the teacher to develop Respondent's IPDP or CAP...specifically set forth...teacher's deficiencies...establish timelines for the correction of alleged deficiencies.*"] Interrogatory #5

That 'Answer' [to an Interrogatory] was not borne out by any credible testimony to the contrary. Instead, despite Teacher's allegations in defense of the charges against her, the record contains clear and convincing evidence, based upon numerous efforts occurring throughout the period of time spanning these charges consisting of various collaborative attempts to help Teacher Ragland.

These include attempts to hold various meetings and yet, resulted in unsuccessful meetings, conferences, coaching sessions and repeated instructions by and between various administrative personnel and Ms. Ragland. These appeared as genuine efforts to re-educate and rehabilitate certain behaviors and methods engaged in by this Tenured Teacher ["Ragland"]. Yet her closing Brief only argues the District's fault in this regard.

Distressingly, the record shows numerous instances where good faith efforts were attempted to help this Teacher, but rebuffed by her. Unrefuted testimony shows she either openly declined the opportunities offered, failed to agree on suggested dates to meet and did not offer alternative initiatives typically in keeping with commonly accepted educational methods adopted and/ or practiced within a School District.

In addition to clear evidence by Petitioner's witnesses of this Teacher's refusing or ignoring these attempts to assist her, Respondent -Teacher brought forth no evidence to refute the allegations against her negative behaviors and, just as importantly, no witnesses to support her assertions of alleged negative treatment. We are therefore persuaded that despite any of the non-substantial imperfections of her 'evaluation' process, the overriding failure of cooperation by this Teacher forms the basis for her termination.

Even at the beginning point of these proceedings [i.e., appeal of the Board's decision] Respondent could have defended her position but made little effort to provide necessary documentation during discovery [up to and including a failure to offer any Proposed Findings of Fact] and again, at Hearing. Moreover, after 6 ½ days of 'Board' testimony 'Respondent' offered her testimony in approx. 2 ½ hours, offering little more than general denials to what 'Board' witnesses had testified to about her inefficiencies, lack of cooperation and insubordination.

Furthermore, no witnesses were called to testify on her behalf, even though Respondents pre-Hearing pleadings proffered that such evidence in support of her defense was ostensibly available. The prior pleadings of Respondent had claimed:

"There are so many students, parents and colleagues who could attest to the positive impact [she has] have had on so many students and [her] successes as a dance teacher"

Mistake of Fact: Beyond the above, the only conclusion based upon all available and relevant argument and evidence produced determines that the Petitioner School Board must prevail and the Respondent Teacher's position be denied. The Board's burden of proof has been met. There were no mitigating circumstances presented by Respondent Teacher to overcome the credible testimony and other evidence of her inability to perform and her behavioral issues. Thus, there was no mistake of fact demonstrated by Respondent in the evaluations of her.

Discrimination, et al.: When the burden shifted to Respondent, her prior defense(s) to the charges against this Teacher were simply lacking. Not only did Respondent present no proof of affirmative defenses claimed in prehearing pleadings [hostile work environment, anti-union animus, etc.] but she failed and/or refused to participate in mandated 'discovery'. When offered opportunity to argue against a Motion (*in liminae*) Respondent again failed/ refused to participate. Thus, no proofs of discrimination were ever presented; the complete lack of same demonstrating contempt for this process and appearing only as an aggravating circumstance.

In depth analysis of the above follows.

Burden of Proof

As in any matter involving employee disciplinary action, the burden is upon the Employer [here, Petitioner] to establish it had proper cause to take the action and, that an appropriate penalty was meted out under all attendant circumstances. The Tenured Teacher challenged that the

standard was not met, contending that the preponderance of evidence by the District was not conclusive or, that it was found wanting.

The Petitioner's case in the Matter of this Tenured Teacher contained clear evidence to support its overview of the case it presented:

Over seven hearing days ...the Board presented evidence describing the Framework generally and its application specifically to Respondent's teaching performance. The Board's Executive Director of Human Resources explained the Framework, and the four school administrators responsible for evaluating Respondent's performance described their observations and interactions with her, their fidelity to the Framework, Respondent's corrective action plan, the professional development and support provided to her, the opportunities for her to provide data in support of higher ratings and to submit rebuttals to the observations and evaluations, her failure to take advantage of those opportunities, and their calculation of the ratings of "partially effective" in 2016-2017 and "ineffective" in 2017-2018.

[Board Brief]

There was not a scintilla of evidence to demonstrate the District, or any employee, acted in an arbitrary or capricious manner toward this Teacher. Indeed the only argument by Respondent in order to show retaliatory motive, hostility and/or an arbitrary or capricious manner was the alleged improper manner of the evaluation process. Given the conclusions reached hereunder relative to the appropriateness of the evaluation process, none of the discriminatory behavior alleged by Respondent was found. There was nothing in the record to demonstrate any, 'arbitrary and capricious' behavior toward Respondent.

To the contrary and as outlined above by the Petitioner District, all its arguments were directly related to the evidence presented at hearing(s). It concluded with: "*For all the reasons set forth herein, the tenure charge of inefficiency against Respondent should be upheld, and Respondent should be dismissed from her employment by the Board.*" [Board Brief]

Thus the burden of proof was met by the District and, failed to be overcome by Teacher.

Substantial Compliance

Examples of its compliance with 'TeachNJ' were credited by and through testimony and documentary evidence of the District's administrative personnel. One such instance showed a pattern of ongoing and consistent failure(s), to accomplish timely the ordinary administrative functions performed by teachers. For example, timely grading of students or, providing any viable explanation for, i.e., why all students of a certain class received the same ['D'] grade. The Teacher's defense of this example, and other deficient instances, was that she apparently lacked the time required to accomplish the task. Other examples of both, 'Teacher's' alleged inefficient and insubordinate behaviors and her defenses to those charges follow.

The testimony and evidence presented in support of the charges was clear and convincing. There were instances, described below, where cross-examination by Respondent's Counsel revealed minor inconsistencies in statements made or in the computation(s) of points attributed to the Teacher's evaluations. These 'flaws' however were either corrected by re-direct examination or, upon closer scrutiny by this Arbitrator deemed to be irrelevant due to the insubstantial nature of their alleged 'defect'. None of the 'flaws' alleged by Respondent were found to be substantial enough to overcome the basic test for sufficiency of the TeachNJ concept that requires a School District to achieve when evaluating a Teacher's efficiency. Thus, the 'substantial compliance' factor was achieved here.

The intent of that concept by numerous authorities (and not overturned) mandates that a school district is in compliance with the Teach NJ principles when, "...the 'substantial compliance' standard" has been reached. All the evidence presented by Petitioner has met this 'substantial

compliance' test. When the burden of proof shifted to Respondent, the insubstantial level of evidence produced by the Teacher was found to be insufficient and lacking.

Except for the cross-examination process described above [minimalistic flaws in the evaluation process] there was no evidence produced to support Respondent's overly simplistic theory of her case, to the effect that the District was engaged in a vendetta against her:

"The point here is that the District was so focused on building its case against Ms. Ragland's teaching and attitude that it disregarded its responsibilities and brought a negative prejudgment to its observation and evaluation process. As noted, this same approach led to prior charges and the Arbitrator there kept his focus on the District's failures. The same result should follow here." [Respondent Brief]

The above theme by Respondent, attempting to invoke a hostile work environment appeared throughout the Teacher's brief and yet failed to overcome the substantial quantum of evidence to the contrary brought by Petitioner.

Respondent did not address any significant or incomplete standard of the evidence presented against her except for oblique reference to one arbitrator's dicta in his decision, arguing that the same result must apply here. Respondent's Brief cited from that decision and then argued that:

[Arbitrator Brown]: *'However, when the District's failures to comply with the provisions of the District's framework are weighed in full along with the considerations I rely upon below finding arbitrary conduct by the district, I find that respondents 2013 – 14 evaluation "failed to adhere substantially to the [Districts] evaluation process including, but not limited to providing a corrective action plan (Exhibit R-2 at page 37)*

[Respondent Brief] *That statement is completely and precisely applicable here. Indeed, the charges here are clearly part of an ongoing crusade to discredit and fire Ms. Ragland"*

Thus Respondent tried to attach or attribute the same rationale by Arbitrator Brown, in a prior matter with differing factual circumstances, to the present case and compare the facts therein to charges against this Teacher several years later.

The Petitioner also cited the 'Brown' decision to distinguish the similarities and yet, also to show how the same or similar facts were found in both cases. It cited:

"In I M O Tenure Hearing of Alexander Gonzalez, Agency Ref. No. 264-9/15 (Timothy Brown, Esq., Arbitrator, March 3, 2016) at 13, the arbitrator found, as here, only the teacher may upload a CAP, and therefore "the teacher subject to the CAP bears significant responsibility to assure that the CAP is completed in full and within the time periods established." Therefore, "when a teacher is claiming a school district failed to substantially comply with the evaluation process," regarding a CAP, "such a claim should be strictly scrutinized to determine whether the District exercised such attention and good faith in the process as to satisfy the ***'substantial compliance' standard*** *and/or whether the alleged [issue with] the CAP was caused by the teacher." (Id.)* [Board Brief]

The Board also cited specific examples in answer to Respondent's claims of irregularities in the evaluation process.

"Here, Respondent created her CAP document, which was then reviewed together with Ms. Cowins (J-17.) Ms. Cowins provided Respondent with significant feedback, but Respondent did not change the CAP. Instead, Respondent "unshared" the document, so that her administrators did not have access until the deadline by which CAPs needed to be finalized. (6T970.) At the mid-year, again Ms. Cowins stressed that the CAP goals needed to be revised, stating, "It is strongly suggested that student growth goals are revised to be measureable and align with grade-level standards." (6T1014.) Those suggestions were repeatedly relayed to Respondent, but she ignored them. (6T1016-22.)" [Board Brief]

The examples given were deemed credible, and satisfied the Board's burden of proof. The proofs here were clear by the District's evidence. It is insufficient for the challenging party [Respondent Teacher here] to simply deflect that evidence by a show of minimalistic flaws in computing evaluation points, which did not change Teacher's overall ratings of her efficiency.

Moreover, the more relevant aspects of *dicta* contained within the Arb. Brown decision were references to the shared responsibilities between the Teacher and School District administrators charged with the evaluation process and intended to assist the Teacher in correcting her deficiencies and reaching her goals.

The preponderance of the evidence demonstrates unequivocally that the District met its burden of proving that its actions in seeking termination of this Teacher were for just and proper cause. 'Substantial Compliance' with the Act was demonstrated

This Arbitrator also used other contributing factors to review the evidence.

Credibility

Petitioner-'Board' presented extensive testimony of four (4) eyewitnesses to Respondent's behaviors and actions described herein. Of import here is that each of them testified under a 'Motion of Sequestration', thus insulating that testimony from the taint of improper repetition.

Including other documentary accounts regarding interactions with Respondent 'Teacher', their testimony can only be described, even in broad general terms, as showing uncooperative behavior by this Teacher. Their accounts credibly described actions including 'Teachers' inattention or indifference to the necessary protocols of her teaching position, including failure to adhere to standard protocols of her teaching position and, conduct approaching, or at insubordinate levels. While Respondent Teacher attempted to minimize her culpability [vis. the Petitioner's allegations] by generally denying that the alleged behavioral actions ever occurred, the Petitioner's

witnesses clearly contradicted Respondent's general denials. Each of the four (4) witnesses' testimony had the 'ring of truth' to the allegations and, Respondent's denials did not approach that level and, were unsupported by any evidence.

Moreover, Respondent's testimony stood unsupported by a lack of veracity and further damaged by internal and external inconsistencies. One example alone was when Teacher was confronted by a failure to report her grades and in a timely fashion. She alternated between denial of that duty and finally, simply claimed that she had insufficient time to complete that important task. .

Notably, the 'Teacher' could not supply any evidence in rebuttal of 'Board' witness testimony beyond general denials, only supported by theoretical supposition. Nor did Ms. Ragland provide, even circumstantially, anything beyond a pre-hearing statement of the evidence ["*...a host of favorable evaluations commendations...parents students over those years...*] she purportedly had at her disposal.

Thus credibility was tested by a number of factors, including when the parties' jointly agreed to sequestration. The separation of the witnesses was key, given that the testimony of one could not be influenced by prior testimony of another on similar matters. The joint motion for it was enforced, even over a 'Board' objection to it on the 1st day of evidentiary Hearing and thus, sequestration occurred here for all testifying witnesses.

Accordingly the overwhelming evidence of credible testimony was found to be more than sufficient to satisfy the School Board's burden.

Sufficiency of the Evidence

Despite Teacher's testimonial defense [i. e., general denials] for the events described by District's witnesses, the evidence was overwhelmingly clear to the contrary, thus sufficient. Even using a minimal standard for the degree of evidence necessary, a 'reasonable person' could hardly dispute the veracity and thus the credibility of the District witnesses who testified. Therefore the evidence was deemed sufficient to uphold Petitioner's charges.

Further, several of the witnesses demonstrated more than a modicum of compassion for this Teacher, seemingly in a valiant effort to help Respondent achieve the level of sufficiency necessary to keep her job. Yet, even in that instance, this Teacher did not help herself.

Unsupported vs. Corroborated

There was no basis in fact for the defense's posture that the Board evidence was unsupported by the facts. Thus taking all manner of credible evidence, cited authority and argument into consideration provided a basis for finding that the conduct described in the charges against this Teacher were proven beyond doubt, plainly by a preponderance of the corroborated evidence presented.

Thus the factors analyzed above demonstrate that a preponderance of the evidence found in the charges support a finding that this Teacher was culpable of the charges, including "Inefficiency". Accordingly, the Newark School District has met its burden of proof for this Tenured Teacher's Dismissal.

There were other circumstances addressed, that bear appropriate commentary.

\Aggravating vs. Mitigating Circumstances

The Tenured Teacher's Brief contained several veiled and thus elusive references to factors in mitigation of the charges/ penalty. Although the remedy sought implies that alleged circumstances [i.e., hostile environment, et al] were present in this case. Yet the facts upon review, were not persuasively linked to the record of this Teacher.

While no set rule exists for applying mitigation to a particular set of circumstances any neutral must be mindful of the gravity of charges which could have such a deleterious effect on an employee as found here. Balancing that of course is the potential for returning an employee to a workplace environment where, if the charges are deemed credible, there is a likelihood of ongoing and continued conduct deleterious to the mission of teaching. Those aggravating factors are found here.

This neutral has in past applied mitigation standards generously where an employer was found to have meted out an overly harsh penalty. When a long term employee otherwise having served with distinction is precipitously accused of a relatively minor infraction or one involving a singular incident of wrongdoing appearing to be out-of-character, then it is persuasive to and becomes incumbent upon the neutral to correct an injustice.

The 'mitigating' factors suggested above were not found here and instead, substantial evidence of ongoing and continued resistance to change by this Teacher. Consequently, having determined that the charges filed by the Newark School District were appropriate, we cannot adopt the existence of mitigating factors suggested by the Teacher as warranting invocation of progressive discipline. Therefore, correcting a penalty of termination with a less severe penalty is not warranted here, under all the attendant circumstances.

Retaliation, res judicata and/or collateral estoppel:

Another suggested aggravating circumstance calling for mitigation was alleged, retaliation' as a primary defense. The Teacher's Brief argued that a blatant and veiled motive for the current charges against her by the Newark School District existed. Ostensibly she argued that the current charges were only a 'refiling' of prior charges unsuccessfully brought against her for allegedly the same or similar charges previously raised during a previous school year. Also that her "outspokenness" after being re-instated previously, now provides the basis of her claim for 'retaliation' in this current set of charges. [Teacher's Brief] No other 'proofs' were offered.

Moreover, Respondent's veiled attempts to connect the present and prior arbitrations had the overtones of exploring theories of *Res judicata* and collateral estoppel as factors against the termination penalty. However, for several reasons clearly evidenced in the record before us it is persuasive that there is no plausible reason to doubt the veracity of the current charges under either of those theories.

Teacher's Brief cites the prior Arbitrator Brown decision for the premise that the current charges filed against Ms. Ragland were simply a, '*re-filing*' of the prior incident, i.e., implying a, "...negative prejudgment", or, "*the District's bias against Ms. Ragland that infected the entire observation process*. While not specifically raising the defense of 'res judicata', it is clearly implied here and yet unfounded.

Regardless of the prior charges or arbitration outcome resulting in this Teacher's re-instatement to her tenured position, no one can be immune to or immunized against 'fresh' charges, especially ones involving the nature and seriousness of those found herein. Moreover, we deem these charges to be unconnected, having occurred in/a separate school environment and after having given this Teacher a fresh start within a new environment. A primary requisite of *Res judicata* is the

requirement for an absolute showing that the person is being jeopardized, twice, for the same offense and, under the exact, same circumstances.

Here, there has been no showing of such duplication, but for the theoretical position taken in the post-hearing Brief. Moreover and further to the contrary of either *res judicata* or collateral estoppel, it was clearly demonstrated by the District that it had an absolute and statutorily mandated legal duty and thus, no choice but to act upon the parent/student complaints due to the nature and timetable of events shown here.

The District had no choice but to act upon the current evaluations, parent/student complaints of inappropriate conduct and/or behavior when brought to its attention. The fact pattern here, despite any ironic similarities to the incidents that this same teacher was accused of in prior litigated matters, involves a fresh set of incidents. Thus, current charges do not fall under the protections afforded by the preclusion theories of *Res judicata* and collateral estoppel.

Thus, other than veiled, vague but unsubstantiated testimony by the Teacher and theoretical suggestions implied in her brief but also unsubstantiated that by virtue of the Teacher's re-instatement and subsequent complaints about her assigned tasks, there is no finding here that she was the victim of retaliation, due to her prior reinstatement. This Teacher, like any other, had the right to file a 'grievance' or complaint over her concerns with her assignments at any time after her re-instatement, but did not take advantage of that right.

The current circumstances involve factually unconnected incidents occurring in prior school years. Accordingly, no evidence of retaliation has been found here and neither *res judicata* nor collateral estoppel can apply.

In **summation** after careful consideration of all evidence and argument in support thereof, it can only be concluded that this Tenured Teacher was properly charged with "inefficiency". Moreover, other conduct-related rules observed by the School District were violated as well.

This Teacher's conduct and behavior when approached to help correct her deficiencies were addressed herein and can only be described as insubordination, by her failing and/or refusing to cooperate with the authority over her granted to the School District. Moreover, her actions and deliberate inaction to avoid helping herself to improve, formed the basis for the disciplinary action taken against her.

The corrective measures adopted and attempted hereunder by the District to assist this Teacher were lawful and proper. To have accomplished these goals would also have benefited the well-being of students, faculty and others who came under this Teacher's far reaching affect.

The preponderance of evidence demonstrates that an evaluation process was in place for teachers in this New Jersey public school system. While a complex and complicated process, the evidence demonstrates the managing authorities of this School ('Horton') administered it in a substantially complete way and did so in a full and fair manner with complete regard for this Teacher's personal rights in efforts to assist her. The process as applied here was more than sufficient to warrant a finding that the charges against this Teacher were proper and that the penalty of termination was just. The Teacher's claims to the contrary were found to be baseless allegations only and, lacking in proof.

Although pre-Hearing allegations by her claimed, 'hostility, anti-union animus' and other forms of discrimination, the Teacher's evidence at Hearing did not follow through to establish proof of any retaliation or other discrimination. While documents containing these allegations by Teacher were a part of the record and, opportunity to hear testimony from others might have supported them,

no witnesses were called by the Teacher. No such testimony was heard and thus, the assertions remain as merely ostensible and unproven.

Moreover, the preponderance of evidence against her was substantial. The Teacher's testimony was found wanting, both in its failure to complete the gaps between basic allegations made, the proofs necessary to justify them and also to explain inconsistencies between her views and that of District witnesses against her. Accordingly, the Teacher's credibility suffered.

The evidence is clear as detailed hereunder that all appropriate elements required for a just and proper cause dismissal were present in this case. Thus the burden of proof was met by Petitioner, Newark School District. While the concept of progressive discipline is not a factor here, it is both ironic and noteworthy that a similar tenured teacher action involving this Teacher had been taken before.

Teacher's Counsel attempted to rely upon misquoted assumptions from that prior arbitration, thereafter extensively cited in Respondent's post-Hearing brief in this case. As discussed above here, the rationale by a prior arbitrator to find in the Teacher's favor previously, was not relevant now in this case. The only relevance here is that Teacher Ragland did have the benefit of foreknowledge or cautionary advice to understand what would be expected of her when she was (in effect) placed back to work. Yet she failed to heed that information and to be guided accordingly.

Taking all manner of evidence, argument and positions of the Parties into consideration, the decision in this matter follows.

DECISION

The evidence is clear that all appropriate elements for a just and proper dismissal of Respondent were present in this case. The burden of proof was met by a preponderance of the evidence produced through Petitioner, Newark School District.

Overwhelming and credible testimony from four (4) administrative / supervisory personnel of 'Teacher' was elicited by the District and found to be realistic, accurate and trustworthy, meeting the 'substantial compliance' factors of the Act. Moreover, when given opportunity to refute that evidence, no adequate defenses were raised by the Tenured Teacher to circumvent or contradict, in any substantial manner the District's findings, its rationale for discipline, the charges, or a penalty of dismissal.

The Tenured Teacher's only defense was a general denial of the basic assertions and charges. Further, her initial contentions that she had been a victim of hostility and discrimination lacked any evidence or proof of occurrence.

Taking all manner of evidence and argument by both parties into consideration and deliberation, it is the considered opinion of the undersigned neutral that Petitioner Newark School District had the absolute right to have charged Tenured Teacher LaRhonda Ragland with the offenses stated hereunder and to have sought and caused her dismissal thereafter.

In view of the above, the penalty of dismissal for this Tenured Teacher is upheld. No other remedies apply.

Jay D. Goldstein,

Jay D. Goldstein, Arbitrator

Dated: May 15, 2019, Jenkintown, PA

132-19L

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

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Governor

SHEILA Y. OLIVER
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LAMONT O. REPOLLET, ED.D.
Commissioner

May 22, 2019

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Re: *Mary Murphy-Maciak v. Board of Education of the Town of Hackettstown, Warren County; Robert Grauso, Athletic Director; and David Mango, Superintendent, Agency Dkt. No. 310-12/18*

Dear Parties:

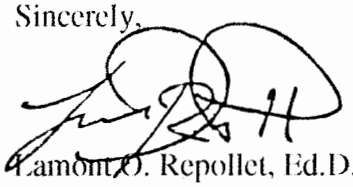
I have reviewed the petition of appeal, as well as the materials filed in connection with the respondents' motion to dismiss the petition in the above-referenced matter. Upon review of the submissions, I have determined that the Commissioner does not have jurisdiction over the claims alleged in the petition.

The petitioner contends that respondent Grauso committed an act of harassment, intimidation, and bullying (HIB) when he berated her during a meeting in January 2018 regarding her son's transfer to another school, and she seeks an investigation into his actions. The purpose of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, is "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." *N.J.S.A.* 18A:37-13.1(f). It is clear that the Act only applies when HIB is committed against a student – not against a parent. The petitioner's allegations do not arise out of New Jersey school law, as she is not a student; therefore, the Commissioner is without jurisdiction over the matter, pursuant to *N.J.S.A.* 18A:6-9.

Accordingly, the Board's motion to dismiss the petition is GRANTED, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Sincerely,



Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/JKH/BCM

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

133-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of
East Brunswick, Middlesex County,

Petitioner,

v.

Board of Education of the City of Trenton,
Mercer County,

Respondent.

Synopsis

The Board of Education of East Brunswick (East Brunswick) filed a petition of appeal regarding a dispute between petitioner and the respondent Board of Education of Trenton (Trenton) over Trenton's refusal to pay East Brunswick for the provision of extraordinary services to a minor student, S.B., who attends school in East Brunswick, but is a resident of the City of Trenton. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; since June 2016, East Brunswick and Trenton have entered into multiple sending/receiving agreements for tuition and transportation costs relating to the education of S.B., except for the costs of one-on-one aides; it is undisputed that Trenton is the educational agency responsible for creating the Individualized Education Plan (IEP) for S.B., and there is no dispute as to its content and/or appropriateness; East Brunswick, as the receiving district, is responsible for implementing the IEP; the dispute herein relates to the staffing and costs involved in providing the one-on-one aide specified in S.B.'s IEP; pursuant to *N.J.A.C.* 6A:23A-17.1(e)(5)(viii), "extraordinary services" such as one-on-one aides are not included in the actual cost per student for tuition purposes, and may be billed directly to the sending district; per regulation, East Brunswick has submitted agreements covering the extraordinary services provided to S.B. since June 2016, as well as invoices for the direct costs of aides; Trenton has argued that it has no obligation to enter into contracts with East Brunswick for S.B.'s one-on-one aides, that it contracts for such services with an outside vendor for purposes of economy, that the tuition agreements between the parties do not bar Trenton from hiring its own aides for S.B., and that Trenton owes East Brunswick only the lower amount that Trenton would have paid for one-on-one aides through its outside vendor, rather than the actual, higher cost of aides that have been provided by East Brunswick. The ALJ concluded that: Trenton is obligated to pay petitioner the direct costs incurred by East Brunswick in providing a one-on-one aide for S.B. from June 2016 to the present, and for as long as S.B. remains in East Brunswick schools and requires an aide; East Brunswick has no obligation to use the services of one-on-one aides provided by Trenton; and Trenton cannot limit its payment to East Brunswick based on the amount that Trenton would have paid its outside vendor for the same services. Accordingly, the ALJ granted summary decision in favor of the petitioner, and ordered Trenton to pay East Brunswick the full direct costs of aides assigned in compliance with S.B.'s IEP.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein.

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 22, 2019

133-19

OAL Dkt. No. EDU 18381-17
Agency Dkt. No. 235-9/17

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of East Brunswick, Middlesex County,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent Trenton Board of Education (Trenton). The petitioner, East Brunswick Board of Education (East Brunswick), did not file a reply.

This matter involves a student who is a resident of Trenton, but attends school in East Brunswick. East Brunswick has provided the student with a one-to-one aide, consistent with the terms of his Individualized Education Program (IEP), and has billed Trenton for the cost of the aide. The ALJ found that: Trenton is obligated to pay East Brunswick the direct costs incurred by petitioner to provide the aide; Trenton cannot limit its payment to East Brunswick based on the amount Trenton pays its own aides; and Trenton cannot require East Brunswick to use Trenton's aides for this student.

Trenton argues in its exceptions that it should be permitted to supply individual aides through a contracted vendor to its students who attend school in East Brunswick, rather

than be forced to contract with East Brunswick for the individual aides. Trenton contends that the cost of East Brunswick's aides is not reasonable when compared to the lower amount Trenton pays its aides, and that the facts in this case are distinguishable from those in the matter on which the ALJ relied in part, *Board of Education of the City of Trenton, Mercer County v. Board of Education of the Mercer County Special Services School District, Mercer County*, OAL Dkt. No. EDU 16465-15, decided August 5, 2016, *affirmed* Commissioner Decision No. 334-16, decided September 20, 2016.

Upon review, the Commissioner concurs with the ALJ that Trenton is obligated to pay petitioner the direct costs incurred by East Brunswick to provide the one-to-one aide. The Commissioner finds Trenton's exceptions unpersuasive. Individual aides are "extraordinary services" for which a district board of education may bill directly, pursuant to *N.J.A.C.* 6A:23A-17.1(e)(5)(viii). As such, while Trenton and East Brunswick enter into tuition agreements for the cost of a student's placement in East Brunswick,[1] Trenton is billed separately by East Brunswick for the cost of individual aides.

East Brunswick retains some autonomy in providing the services and programs that it is charged with administering, including the provision of services required by a student's IEP. Indeed, the legislature has given East Brunswick the power to "make rules . . . governing the employment, terms and tenure of employment, promotion, and dismissal, and salaries and time and mode of payment thereof of teaching staff members . . .". *N.J.A.C.* 18A:27-4. There is no legal authority for Trenton to unilaterally require East Brunswick to use Trenton's contracted vendor for individual aides when petitioner is otherwise able to provide that service, or to set the

[1] The parties disagree as to whether the 2016-17 Extended School Year (ESY), 2016-17 school year, and 2017-18 ESY agreements were fully executed. However, East Brunswick agrees that Trenton paid the tuition amounts due for this period in full and, as such, the fact of execution of the agreements is immaterial to the resolution of this matter. Tuition for 2018-19 is addressed separately herein, as it was one of the issues raised in Trenton's exceptions.

terms of compensation for East Brunswick's employees by limiting the amount it pays petitioner for services rendered by those employees.

By operation of law, East Brunswick is permitted to charge Trenton for the direct cost of the aides. *N.J.A.C.* 6A:23A-17.1(e)(5)(viii). Trenton's attempts to negotiate a contract whereby it would provide its own aides or pay East Brunswick a lower amount for its aides do not change this result. The obligation to pay arises from the law, not from a contract. Trenton argues in its exceptions that the Initial Decision has forced it to enter into a contract with East Brunswick for the cost of the aide, but no such requirement has been imposed. While *N.J.A.C.* 6A:23A-17.1 requires a written contractual agreement establishing the tuition charge, extraordinary services may be billed directly without any contract. [2]

Trenton argues that the cost charged by East Brunswick for its aides is excessive, because it exceeds what Trenton would pay for the same services. However, the regulation allowing a receiving district board of education to directly bill the sending district board of education for extraordinary services does not impose a reasonableness requirement. Even if such a requirement were imposed, Trenton has not proffered any evidence that East Brunswick's rate is unreasonable. The fact that East Brunswick's rate exceeds Trenton's rate is not, in and of itself, a basis to conclude that East Brunswick's rate is unreasonable. Moreover, the per diem rate of $181.04 charged by East Brunswick for the aide in this matter is lower than the per diem rate of $195.00 that the Commissioner has previously permitted a receiving district to charge for a one-to-one aide. *BOE Trenton, supra.* Notably, in that matter, the receiving district was also

[2] While a written contractual agreement is not required for extraordinary services, nothing prohibits the districts from entering into such an agreement, either to allow Trenton to provide its own aides, or to agree upon a cost other than the actual cost paid by East Brunswick. The Commissioner notes that should the parties enter into such an agreement, the Commissioner would not have jurisdiction over any dispute between the parties regarding the terms of or compliance with such a contract because it does not arise out of New Jersey school law. *N.J.S.A.* 18A:6-9.

permitted to charge for days when the student was absent, and so Trenton's exceptions to East Brunswick's charges for days absent are unpersuasive. *Ibid.*

Trenton further contends that the decision in *BOE Trenton, supra,* is inapposite because Trenton places students in the Mercer County Special Services District by choice and can remove students at its discretion, whereas the student in this matter attends East Brunswick because he was placed in a resource home in that district by the Division of Child Protection & Permanency. However, Trenton does not dispute that it is responsible for providing the student with a Free Appropriate Public Education (FAPE). Trenton's responsibility to provide FAPE continues regardless of the mechanism by which the student is placed in another district. Similarly, the requirements for the billing of extraordinary services by the receiving district are not dependent on whether the student is placed by choice or by another method.

Finally, Trenton argues that summary decision in favor of the petitioner was not warranted because there exists a genuine issue of material fact regarding the amount of money that Trenton owes East Brunswick. Trenton claims that the ALJ failed to deduct money already paid by Trenton for the 2018-19 school year. However, the decision clearly indicates that "Trenton is obligated to pay the amount claimed by East Brunswick, $157,052.39, reduced by the amount paid by Trenton toward invoices for the 2018-19 school year." As the ALJ's award explicitly reflects that payments have been made for the 2018-19 year and deducts those amounts from the amount that Trenton was ordered to pay, there is no remaining issue of material fact that must be decided. Trenton's remaining arguments on the topic of material fact merely repeat its other arguments regarding payments for the aide more generally, and those issues have been resolved as a matter of law as indicated in the Initial Decision and herein.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter. Summary judgment is granted in favor of East Brunswick. Trenton is ordered to pay the full direct cost of the aides retained by East Brunswick in compliance with S.B.'s IEP for the period in question, and for as long as S.B. remains in East Brunswick schools and requires the services of a one-to-one aide.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/22/19
Date of Mailing: 5/24/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

OAL DKT. NO. EDU 18381-17
AGENCY DKT. NO. 235-9/17

Micci J. Weiss, Esq. for petitioner (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Audra Pondish, Esq., for respondent (Adams Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: March 29, 2019 Decided: April 9, 2019

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Township of East Brunswick, Middlesex County (East Brunswick), as the receiving school, seeks $157,052.39, from respondent Board of Education of the City of Trenton, Mercer County (Trenton), the sending school, for extraordinary services provided to minor student S.B. for school years 2015 through 2019. N.J.A.C. 6A:23A-17.1(e)(5)(viii).

PROCEDURAL HISTORY

On September 29, 2017, East Brunswick filed a petition of appeal to the Department of Education (DOE) asserting that a dispute had arisen between East Brunswick and respondent Trenton over Trenton's refusal to pay East Brunswick for the provision of special education and extraordinary services for S.B. On December 1, 2017, following three notices from the DOE, Trenton filed its answer to the petition.

The matter was transmitted by the DOE to the Office of Administrative Law (OAL), where it was filed on December 7, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the Honorable Joseph A. Ascione, Administrative Law Judge (ALJ), on December 27, 2017. Judge Ascione convened telephonic case management conferences with counsel on February 21, 2018, and April 4, 2018, to discuss the potential issues in the case and a discovery schedule, and to schedule the matter for hearings. A telephonic status conference scheduled for July 18, 2018, was adjourned at the request of the parties, and a telephonic status conference scheduled for September 4, 2018, was adjourned as Judge Ascione was on medical leave. On September 5, 2018, East Brunswick filed a request to amend its petition, which was reviewed and granted on September 17, 2018, by the Honorable Edward J. Delanoy, Jr., Administrative Law Assignment Judge. On September 19, 2018, East Brunswick filed an amended petition.

On October 4, 2018, this matter was reassigned to the undersigned and scheduled for a telephonic case management conference on October 12, 2018. During this conference, it was agreed that Trenton would file its answer to the amended complaint on or before October 19, 2018, the plenary hearing would be held on April 2, 2019, and the deadline for the parties to file dispositive motions was March 1, 2019. On February 27, 2019, East Brunswick filed a motion for summary decision in its favor. I notified the parties that the hearing was rescheduled for May 15, 2019, to allow time to consider the motion. On March 19, 2019, Trenton filed its response in opposition to East Brunswick's motion and cross-motion for summary decision in its favor. East Brunswick replied on March 29, 2019, and the matter is now ripe for decision.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. East Brunswick is a local school district in Middlesex County, New Jersey. Trenton is a local school district in Mercer County, New Jersey.

2. S.B. is a resident of Trenton. As such, Trenton is the district responsible to provide S.B. a Free and Appropriate Public Education (FAPE), pursuant to 20 U.S.C.A. 1400(d)(1)(A).

3. While attending school in Trenton, S.B. received special education services under an Individual Education Program (IEP) developed pursuant to the requirements of the Individuals with Disabilities Education Act, 20 U.S.C.A. 1401 et seq. (IDEA), and New Jersey regulations. In accordance with his IEP, S.B. received extraordinary service, a one-to-one aide. N.J.A.C. 6A:23A-18.2.

4. Prior to June 6, 2016, the Division of Child Protection and Permanency (DCP&P) removed S.B. from his home in Trenton and placed him in a resource family home located in East Brunswick. On or about June 6, 2016, S.B. began attending school in East Brunswick. S.B. has remained at East Brunswick for each subsequent school year, including the current one.

5. Pursuant to N.J.A.C. 6A:23A-17(f), Trenton and East Brunswick entered into a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the remainder of the 2015-2016 school year, covering June 6, 2016 through June 30, 2016 (2015-2016 Tuition Agreement). Trenton executed the 2015-2016 Tuition Agreement on or about July 3, 2016, and paid East Brunswick the amount due under this agreement in full.[1]

6. East Brunswick provided a sending/receiving agreement to Trenton for a one-to-one aide for S.B. for the remainder of the 2015-2016 school year, covering

[1] See, Summary Chart, ¶ 20.

June 6, 2016 through June 30, 2016 (2015-2016 Aide Agreement). East Brunswick claims to have received the fully-executed 2015-2016 Aide Agreement from Trenton on or about July 3, 2016. Trenton claims it did not execute the 2015-2016 Aide Agreement. Trenton paid only a portion of the $2,135.34, due under this agreement.

7. S.B.'s IEP provides him with an extended school year (ESY) program and with a one-to-one aide for his ESY program.

8. East Brunswick provided Trenton a sending/receiving agreement for ESY Program and Transportation for the 2016-2017 school year, covering July 6, 2016 through August 9, 2016 (2016-2017 ESY Tuition Agreement). East Brunswick claims to have received the fully-executed 2016-2017 ESY Tuition Agreement on or about July 3, 2016. Trenton claims it did not execute the 2016-2017 ESY Tuition Agreement. Trenton paid East Brunswick the amount due under this agreement in full.

9. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2016-2017 ESY Program, covering July 6, 2016 through August 9, 2016 (2016-2017 ESY Aide Agreement). Trenton did not return the 2016-2017 ESY Aide Agreement. East Brunswick billed Trenton for $6,382.50, the cost of providing S.B. with a one-to-one aide for the 2016-2017 ESY Program; Trenton has not paid this invoice.

10. East Brunswick provided Trenton a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the 2016-2017 school year, covering September 6, 2016 through June 30, 2017 (2016-2017 Tuition Agreement). East Brunswick claims to have received the fully-executed 2016-2017 Tuition Agreement on or about July 3, 2016. Trenton claims it did not execute the 2016-2017 Tuition Agreement. Trenton paid East Brunswick the amount due under this agreement in full.

11. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2016-2017 school year, covering September 6, 2016 through June 30, 2017 (2016-2017 Aide Agreement). Trenton did not return the 2016-2017 Aide Agreement. East Brunswick billed Trenton for $45,954.00, the cost of providing S.B. with a one-to-one aide for the 2016-2017 school year; Trenton paid $17,500.00, of this invoice.

12. East Brunswick provided Trenton a sending/receiving agreement for ESY Program and Transportation for the 2017-2018 school year, covering July 6, 2017 through August 9, 2017 (2017-2018 ESY Tuition Agreement). East Brunswick claims that on or about October 11, 2017, Trenton executed the 2017-2018 ESY Tuition Agreement. Trenton does not admit or deny executing this contract; Trenton paid East Brunswick the amount due under this agreement in full.

13. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2017-2018 ESY Program, covering July 6, 2017 through August 9, 2017 (2017-2018 ESY Aide Agreement). Trenton did not return the 2017-2018 ESY Aide Agreement. East Brunswick billed Trenton $6,719.25, for the cost of providing S.B. with a one-to-one aide for the 2017-2018 ESY Program; Trenton has not paid this invoice.

14. Trenton and East Brunswick entered into a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the 2017-2018 school year, covering September 6, 2017 through June 30, 2018 (2017-2018 Tuition Agreement). On or about July 3, 2017, Trenton executed the 2017-2018 Tuition Agreement and paid East Brunswick the amount due under this agreement in full.

15. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2017-2018 school year, covering September 6, 2017 through June 30, 2018 (2017-2018 Aide Agreement). Trenton did not return the 2017-2018 Aide Agreement. East Brunswick billed Trenton $48,378.60, for

the cost of providing S.B. with a one-to-one aide for the 2017-2018 school year; Trenton paid only $17,500.00, of this invoice.

16. East Brunswick sent Trenton a sending/receiving agreement for ESY Program and Transportation for the 2018-2019 school year, covering July 3, 2018 through August 7, 2018 (2018-2019 ESY Tuition Agreement). Trenton did not return the 2018-2019 ESY Tuition Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the $5,608.50, due under this agreement.

17. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2018-2019 ESY Program, covering July 3, 2018 through August 7, 2018 (2018-2019 ESY Aide Agreement). Trenton did not return the 2018-2019 ESY Aide Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the $4,526.00, due under this agreement.

18. East Brunswick sent Trenton a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the 2018-2019 school year, covering September 5, 2018 through June 30, 2019 (2018-2019 Tuition Agreement). Trenton did not return the 2018-2019 Tuition Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the $40,636.00, due under this agreement.

19. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2018-2019 school year, covering September 5, 2018 through June 30, 2019 (2018-2019 Aide Agreement). Trenton did not return the 2018-2019 Aide Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the $32,587.20, due under this agreement.

20. In summary, East Brunswick contends that Trenton owes a balance of $157,052.39, to East Brunswick as shown below:

Contract	Billed	Paid	Owing
15/16 Tuition*	$ 1,655.42	$ 1,655.42	$ 0.00
15/16 Aide	2,135.34	875.00	1,260.00
16/17 ESY	6,329.00	6,329.00	0.00
16/17 ESY Aide	6382.50	0.00	6,382.50
16/17 Tuition	46,175.20	46,175.20	0.00
16/17 Aide	45,954.00	17,500.00	28,454.00
17/18 ESY	11,990.25	11,990.25	0.00
17/18 ESY Aide	6,719.25	0.00	6,719.25
17/18 Tuition*	86,329.00	86,329.00	0.00
17/18 Aide	48,378.60	17,500.00	30,878.60
18/19 ESY	5,608.50	0.00	5,608.50
18/19 ESY Aide	4,526.00	0.00	4,526.00
18/19 Tuition	40,636.00	0.00	40,636.00
18/19 Aide	32,587.20	0.00	32,587.20

*Indicates that parties agree that the contract was fully-executed.

21. Although petitioner contends that Trenton has failed to pay any of the costs incurred by East Brunswick to educate S.B. during the 2018-2019 school year, Trenton claims that it has paid $34,676.50, of the total owed, and will continue to make incremental payments throughout the 2018-2019 school year. Resp't Br. in Support of its Cross Motion for Summary Decision and in Opposition to Petit'r Motion for Summary Decision (March 19, 2019), p. 12; Certification of Jayne Howard (undated), ¶ 30 and Ex. 14.

DISPUTED FACTS

1. There is no dispute that East Brunswick provided a sending/receiving agreement to Trenton for a one-to-one aide for S.B. covering June 6, 2016 through June 30, 2016 (2015-2016 Aide Agreement), but there is a dispute regarding whether this contract was executed. East Brunswick claims to have received the fully-executed 2015-2016 Aide Agreement from Trenton on or about July 3, 2016. See, Br. in Support of Petit'r Motion for Summary Decision (February 27, 2019), p. 4, ¶ 10. In its answers to the initial and amended petitions, Trenton admitted "that it entered into a sending/receiving agreement for a one-to-one paraprofessional commencing on June 6, 2016 and ending on June 30, 2016." Resp't Trenton Board of Education's Answer to Amended Petition of Appeal and Affirmative Defenses (October 18, 2018), p. 2, ¶ 10. Trenton claims, however, that it did not execute the 2015-2016 Aide Agreement and in support, provided a copy of this contract that is signed only by East Brunswick. Howard Cert., Ex. 7. East Brunswick did not provide a copy of this contract, signed or unsigned. As explained below, East Brunswick's claim for payment of the amount owed under the 2015-2016 Aide Agreement is not dependent on a fully-executed contract, making this dispute one of an immaterial fact.

2. There is no dispute that East Brunswick transmitted Tuition Agreements to Trenton for the 2016-2017 ESY, the 2016-2017 regular school year, and the 2017-2018 ESY. With respect to each of these contracts, however, the parties disagree as to whether they were fully-executed. East Brunswick did not provide copies of the fully-executed contracts but since there is no dispute with respect to the amounts owed under these contracts, the fact of execution is immaterial.

3. Trenton claims that it never agreed to pay East Brunswick more than $17,500.00, on an annual (or pro-rated) basis for a one-to-one aide for S.B. In fact, Trenton refers to discussions with East Brunswick in which Trenton offered to provide an aide for S.B. and then refused to pay more than the amount Trenton pays for its

own aides. Howard Cert., ¶ 20. East Brunswick does not affirmatively deny that such discussions took place; neither party contends that any agreement was reached. As explained more fully below, these facts too are immaterial.

ARGUMENT ON THE MOTIONS

East Brunswick argues that, consistent with New Jersey regulations, it has implemented S.B.'s IEP from June 6, 2016, to the present, including providing S.B. with extraordinary services, a one-to-one aide. Pursuant to N.J.A.C. 6A:23A-17.1(e)(5)(viii), extraordinary services provided to special education students are not included "in the cost per student for tuition purposes." Therefore, as permitted by regulation, in each billing cycle, East Brunswick has billed Trenton for S.B.'s tuition and transportation and sent Trenton a separate bill for the additional direct cost of the one-to-one aide. Trenton has failed to pay the full invoiced costs for these extraordinary services.

Trenton argues that it had no obligation to enter into contracts with East Brunswick for the one-to-one aides, and the tuition contracts Trenton did sign do not bar Trenton from hiring its own aides for S.B. Trenton further claims that it never agreed to pay East Brunswick more than $17,500.00, on an annual (or pro-rated) basis for a one-to-one aide for S.B. Proof of this is that during the fall of 2016, after S.B. had been attending school in East Brunswick for approximately four months, the Districts "engaged in conversations and exchanged correspondence" regarding the decision made by Trenton to contract with an independent agency to provide one-to-one aides for its students. Resp't Br., p. 8. At that time, Trenton advised East Brunswick that this independent agency would supply an aide for S.B.; if, however, East Brunswick chose to use its own aide for S.B., Trenton only agreed to pay East Brunswick the capped amount of $17,500.00, on an annual (or pro-rated) basis for that aide.

Trenton also argues that in an attempt to save money, the District's contract with the independent agency provides that if a student is absent, there is no charge to the District for his or her aide. East Brunswick acknowledges that on days when S.B. was absent (thirty times to date), his aide was reassigned to tasks unrelated to S.B. and Trenton received no credit.

Finally, Trenton argues that the aides it uses are well-trained and qualified to serve special education students and the failure of East Brunswick to use these aides places a tremendous financial burden on Trenton, an underfunded school district.

LEGAL ANALYSIS AND CONCLUSIONS

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540.]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-3.7.]

As discussed above, I **CONCLUDE** that the parties raise no dispute with respect to material facts and the following issues can be decided as a matter of law:

1. Whether Trenton is obligated to pay East Brunswick the direct costs for the one-to-one aide retained by East Brunswick for S.B. between June 6, 2016, and the present;

2. Whether East Brunswick is obligated to accept a one-to-one aide for S.B. supplied by Trenton; and

3. Whether Trenton owes East Brunswick for S.B.'s one-to-one aides only the lower amount that Trenton would have paid had it supplied the aides.

The primary purpose of the IDEA is to ensure that all disabled children will be provided a FAPE. 20 U.S.C. 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. N.J.S.A. 18A:46-1 to -46; N.J.A.C. 6A:14-1.1 et seq. Under the IDEA, a FAPE requires special education and related services that "(a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary, or secondary education in the State involved; and (d) are provided in conformity with the IEP required under Sec. 614." 20 U.S.C. 1401(9).

"At the beginning of each school year, each local educational agency . . . shall have in effect, for each child with a disability in the agency's jurisdiction, an [IEP]." 20 U.S.C. 1414(d)(2)(A). The IEP is the "'centerpiece' of the IDEA's system for delivering education to disabled children," ensuring that each child receives a "basic floor of opportunity." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); see also, N.J.A.C. 6A:14-3.7.

The parties agree that Trenton, as S.B.'s home District, is the educational agency responsible for creating the IEP for S.B. and that East Brunswick, as the District in which S.B. was placed by DCP&P, is the educational agency responsible for implementing S.B.'s IEP. An IEP must be accessible to each "regular education teacher, special education teacher, related services provider, and other service provider who is responsible for its implementation." N.J.A.C. 6A:14-3.7(a)(2). There is no dispute as to the content and/or appropriateness of

S.B.'s IEP; the parties merely disagree as to their respective responsibilities and obligations for the staffing and costs of implementation of the IEP.

"Any board of education . . . which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education." N.J.S.A. 18A:46-21. "This tuition rate may not exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." Id. However, "extraordinary service," which includes "the services of a one-to-one aide for a student,"[2] are not included in the actual cost per student for tuition purposes and may be billed directly to the sending district. N.J.A.C. 6A:23A-17.1(e)(5)(viii).

Since June 2016, consistent with the regulations, East Brunswick and Trenton have entered into multiple sending/receiving agreements for School Year Behavior Disability Tuition and Transportation covering the actual costs to East Brunswick of educating S.B., except for the costs of the one-to-one aides. As detailed above, Trenton has (for the most part) paid those invoices. As permitted by the regulations, East Brunswick has prepared agreements covering the extraordinary services provided to S.B. during the same period and has sent those agreements to Trenton as well as invoices for the direct costs of the aides.

Trenton argues that it had no obligation to enter into contracts with East Brunswick for the one-to-one aides, and the tuition contracts Trenton did sign do not bar Trenton from hiring its own aides for S.B. Trenton is correct in that it had no obligation to sign contracts for extraordinary services, but that does not mean that Trenton can use the absence of a contract to get out of paying for those services. Trenton's obligation to pay comes from the regulations, not from contracts. While the Tuition Agreements that Trenton entered with East Brunswick for S.B. do not specifically prevent Trenton from hiring its own aides for S.B., neither do those contracts specifically obligate East Brunswick to use, or pay for, aides hired by Trenton.[3]

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[2] N.J.A.C. 6A:23A-18.2.

[3] The tuition contracts provided by Trenton (most of which are not fully-executed) appear to be a standard form in which there is no mention of extraordinary services. Howard Cert., Exs. 7 through 13.

To support its claim for payment, East Brunswick cites an earlier case, the facts of which almost replicate this one, in which Trenton unsuccessfully challenged the refusal of a receiving district to accept aides supplied by Trenton for the special education students sent to that district by Trenton. Bd. of Educ. of the City of Trenton v. Bd. of Educ. of the Mercer Cty. Spec. Servs. Sch. Dist. (MCSSSD), OAL Docket No. EDU 16465-15 (Initial Decision, August 5, 2016), aff'd., Commr. of Educ. (Final Decision, September 20, 2016). In 2015, in an attempt to balance its budget, Trenton eliminated hundreds of full-time positions, including one-to-one aides assigned to students with disabilities, and contracted with an outside agency for those aides. Id., at 2. Trenton had placed a number of special education students in the Mercer County Special Services School District (MCSSSD) and entered into contracts with MCSSSD for the costs of tuition and transportation. Similar to the present case, Trenton wanted to use aides supplied by the outside agency for those students in the MCSSSD, "rather than paying [MCSSSD] separately for services of an individual aide." Ibid. The Honorable Dean Buono, ALJ, found, and the Commissioner agreed, that the Legislature granted the receiving school control over its employment decisions and, although Trenton and the MCSSSD are free to reach agreement as to the use of aides provided by Trenton, or as to the costs of the aides, "there is no authority that states that Trenton may unilaterally force [the receiving district] to accept Trenton's preferred individual aides." Id., at 7.

Trenton now argues that the earlier case should be given limited weight as Judge Buono did not consider whether Trenton should be forced to pay an excessive amount for the out-of-district aides or to enter into a contract for the extraordinary services. As with East Brunswick, Trenton tried to convince MCSSSD to use the outside vendor of Trenton's choice for one-to-one aides and then stated its intention to only reimburse MCSSSD for the cost Trenton would have paid if it had hired the aides. The failure of the parties to reach agreement on these issues led Trenton to file the earlier lawsuit. Id., at 2-3. In the absence of an agreement otherwise, Judge Buono relied on N.J.A.C. 6A:23A-17.1(e)(5)(viii), which provides that one-to-one aides are an extraordinary service that may be billed directly by the receiving district to the sending district.

Contrary to Trenton's claim, the failure of Judge Buono to consider whether Trenton could be forced to enter into a contract for extraordinary services has no impact on the application of his ruling here. East Brunswick prepared contracts for extraordinary services for S.B. but did not force Trenton to sign them. East Brunswick hired and paid one-to-one aides for S.B. from June 2016 to the present in the absence of both valid contracts and full payment from Trenton.

Similarly, the dearth of discussion by Judge Buono as to the rate charged by MCSSSD for the one-to-one aides is of no impact here. As explained above, the regulations permit the receiving district to bill the sending district for the direct cost of the extraordinary service. In other words, East Brunswick is permitted to bill Trenton for aides in the amount that East Brunswick pays to the aides. East Brunswick states that it charges Trenton the exact cost that it incurs for S.B.'s aide. Reply Br. of Petit'r (March 29, 2019), at p. 1. Trenton has not alleged, or provided evidence, otherwise. The amount that East Brunswick pays S.B.'s aide is not necessarily excessive simply because Trenton would be able to obtain the same service at a lower cost.[4]

Trenton also contends that Judge Buono did not address the practice of the receiving district of billing Trenton for services when students are absent. Though he did not appear to directly address this question, Judge Buono stressed that the Legislature granted MCSSSD "control over its employment decisions," similar to that granted to local school boards. City of Trenton v. MCSSSD, at 7, citing N.J.S.A. 18A:46-38 and 18A:11-1(c). A school board may "make, amend and repeal rules . . . for the employment, regulation of conduct and discharge of its employees." N.J.S.A. 18A:11-1(c). Additionally, "[e]ach board of education may make rules . . . governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district[.]" N.J.S.A. 18A:27-4. The duties of staff, including one-to-one aides, are certainly within the scope of authority granted to school boards by the Legislature and it seems

[4] Although Trenton may not have argued that MCSSSD was charging an excessive rate, East Brunswick noted that in 2015, MCSSSD was charging Trenton more for aides than East Brunswick has charged. Reply Br. of Petit'r, at p. 5.

reasonable for East Brunswick to reassign these full-time employees when the students to whom they are assigned fail to show up for school.[5]

Trenton also argues that the aides it uses are well-trained and qualified to serve special education students and the failure of East Brunswick to use these aides places a tremendous financial burden on Trenton, an underfunded school district. Despite the validity of these arguments, the Legislature has not recognized either as an exception to the obligation of a sending district to pay for the extraordinary services provided to its special education students.

For the reasons described above, I **CONCLUDE** that Trenton is obligated to pay to East Brunswick the direct costs incurred by East Brunswick to provide a one-to-one aide for S.B. from June 2016, when S.B. first enrolled in the East Brunswick District, through the present, and for as long as S.B. remains in the East Brunswick schools and his IEP requires the services of a one-to-one aide. I **CONCLUDE** that East Brunswick has no obligation to use the services of one-to-one aides provided by Trenton and that Trenton cannot limit its payment to East Brunswick for one-to one aides provided to S.B. to the amount that Trenton would have paid its outside vendors for the same services for S.B. Finally, I remind the parties that there is nothing that prohibits them from reaching agreement to modify their respective obligations under applicable law and regulations.

ORDER

It is **ORDERED** that the motion for summary decision of petitioner East Brunswick for an order granting summary decision in its favor is hereby **GRANTED.** It is further **ORDERED** that the cross-motion of respondent Trenton for an order granting summary decision in its favor is hereby **DENIED.** Trenton is **HEREBY ORDERED** to pay East Brunswick the full direct costs of the aides retained by East Brunswick in compliance with S.B.'s IEP between

[5] This is not to say that the parties cannot agree to some form of credit in such an instance, but here they did not so agree.

June 6, 2016 through June 30, 2019,[6] and for as long as S.B. remains in the East Brunswick schools and his IEP requires the services of a one-to-one aide.

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

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

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

April 9, 2019
DATE

Tricia M. Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: April 9, 2019

Date Mailed to Parties: April 9, 2019

/nd

[6] Trenton is obligated to pay the amount claimed by East Brunswick, $157,052.39, reduced by the amount paid by Trenton toward invoices for the 2018-2019 school year.

134-19E

OAL Dkt. No. EDU 5627-19
Agency Dkt. No. 83-4/19

New Jersey Commissioner of Education

Order on Emergent Relief

Courtney Hambrecht,

Petitioner,

v.

Board of Education of the City of Atlantic City, Atlantic County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/22/19
Date of Mailing: 5/24/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 05627-19
AGENCY DKT. NO. 83-4/19

COURTNEY HAMBRECHT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Michael A. Armstrong, Esq., appearing for petitioner (Michael A. Armstrong & Associates, LLC, attorneys)

Michael E. Riley, Esq., appearing for respondent (Riley & Riley, attorneys)

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

The petitioner Courtney Hambrecht (Hambrecht) seeks an emergent order for injunctive relief requiring respondent, Board of Education of the City of Atlantic City (Board), to correct all its files to reflect Hambrecht's voluntary resignation as of January 29, 2019. The Board maintains that there is no imminent threat of harm from an event

that occurred over three months ago. The Board further maintains that any damage to Hambrecht by the Board's action is purely speculative.

PROCEDURAL HISTORY

On April 26, 2019, the petitioner filed a notice of motion for emergent relief, verified petition, and brief with the Office of the Commissioner of Education. The Commissioner of Education transmitted the matter to the Office of Administration Law (OAL) where it was filed the same day, April 26, 2019. Oral argument on the motion was scheduled for May 1, 2019. Due to a conflicting trial schedule by respondent's attorney, oral argument was adjourned until May 9, 2019. Respondent filed its opposition brief on May 8, 2019. I heard oral argument on May 9, 2019.

FACTUAL DISCUSSION

Hambrecht is a certified life guard. She was hired by the Board in October 2016. As part of her employment duties, Hambrecht was responsible for the safety of the students participating in the swimming program as part of the physical education curriculum.

On January 29, 2019, Hambrecht sent a letter to the Superintendent of the Atlantic City School District, Barry Caldwell, resigning her position as full-time lifeguard effective as of 12:00 p.m. on January 29, 2019.

On January 29, 2019, there was a regularly scheduled meeting of the Board.

In the verified petition, it is alleged that at the Board's regular meeting on January 29, 2019, during its open public meeting, the Board accepted Hambrecht's resignation. Immediately, thereafter, the Board went into closed session. When the Board emerged from its closed session, it rescinded its earlier acceptance of Hambrecht's voluntary resignation and moved to terminate Hambrecht's employment, instead. On January 30, 2019, the Director of Human Resources, Diane M. Saunders, sent Hambrecht a letter

informing her of the Board's decision to terminate her employment contract effective January 29, 2019.

Hambrecht's position is that the Board's action to terminate her employment was invalid because she had already resigned. She filed her motion for emergent relief to prevent the Board from disseminating any information suggesting that she had been terminated from her employment as wrongful and damaging to her future career. Hambrecht is seeking injunctive relief requiring the Board to correct its files to reflect her voluntary resignation.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

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.

[See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on her motion. See Crowe, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cnty. Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was

able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed:

1. Whether petitioner will suffer irreparable harm if Hambrecht's files are not corrected to reflect voluntary resignation as opposed to termination as of January 29, 2019.

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioners. Crowe, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

Here, petitioner claims that she is suffering irreparable harm because if news of her termination circulates through social media, the damage to her reputation will forever affect her ability to gain employment in her field. Petitioner argued that even a printed retraction would not undo the damage that social media inflicts on a person's image or reputation. Consequently, petitioner's harm cannot be adequately redressed by monetary damages because petitioner's motivation is not financial. She is seeking to preserve the accuracy of her employment record and protect her good name.

In opposition, the Board maintains that there is no harm and no immediacy. In support of its position, the Board submitted that Hambrecht's three-month delay in filing this petition is proof of the lack of immediacy. The Board terminated Hambrecht on January 29, 2019. Hambrecht waited until the end of April before she filed her motion for emergent relief.

The Board further maintains that petitioner's harm, even three months after the board meeting, is purely speculative. There are no facts before this tribunal that Hambrecht has suffered any loss to her reputation or future job prospects because of the Board's actions on January 29, 2019. Hambrecht submitted in her petition that she is prevented from completing job applications due to her fear of misrepresenting her past work history. It is unknown whether Hambrecht has been rejected from employment or whether Hambrecht has even filed applications for employment in her field.

Hambrecht's past employment will always be relevant to her future endeavors. It is also well known that social media cannot be controlled or sanitized.

Accordingly, I **FIND** that petitioner has not shown any harm to her reputation that is imminent based on the Board's action. The issue of damages remains speculative and therefore does not satisfy the first prong of the four-prong test under N.J.A.C. 6A:3-1.6(b).

2. Whether the legal right underlying petitioner's claim is well settled.

Petitioner claims that the legal right underlying her claim is well settled because once an employee resigns from employment, she cannot be terminated. Upon resignation, she was no longer an employee and therefore, not subject to termination.

As further support, petitioner relies on N.J.S.A. 18A:27-4.1(a) for its requirement that the chief school administrator must recommend removal before the Board can vote to remove an employee. Petitioner submits that the superintendent accepted her resignation; therefore, he could not have recommended her removal. Therefore, petitioner maintains that the Board's action to terminate her violated the statute.

In support of her position, petitioner submitted her letter of resignation which was stamped and acknowledged as received by the superintendent's office at 1:17 p.m. on January 29, 2019.

Respondent claims that the Board's earlier action in accepting the resignation was unwitting. It was not until the Board retreated to closed session, where it viewed a videotape of an incident involving a near drowning, that caused the Board to take corrective action.

The claim before me is unique with sparse reference to settled legal principles. Petitioner submitted that the superintendent did not recommend her termination, but I do not have an affidavit or certification from the superintendent from which to draw that conclusion. I do not have minutes from the meeting to show what action was taken by the Board. Therefore, I **FIND** that the legal issue cannot be settled as a matter of law and the disputed facts cannot be determined in a summary fashion.

3. Whether petitioner is likely to be successful on the merits of its claim.

Petitioner's moving papers combined the second and third prongs of Crowe. Respondent claims that the Board's action was justified due to petitioner's grossly negligent conduct. For the reasons set forth above, I **FIND** that these issues cannot be determined summarily.

4. Whether petitioner will suffer greater harm than respondent if emergent relief is not granted.

Petitioner claims that she will suffer greater harm than respondent if the requested relief is not granted. She is merely asking respondent to correct her personnel file to accurately reflect petitioner's resignation from employment. Respondent maintains that petitioner is attempting to scrub her record to keep future employers in the dark about her past employment.

A preliminary injunction is an extraordinary remedy. Petitioner has not shown that she will suffer greater hardship than respondent. Each side has a compelling interest in making sure that petitioner's record accurately reflects her departure from employment. While I agree that petitioner has a compelling interest to ensure that her employment

records are accurate, I cannot **FIND** that such a correction can be made in this instance by way of injunctive relief.

CONCLUSION

Petitioner has not satisfied the four prongs required to obtain emergent relief. She has not shown imminent and irreparable harm. Due to disputed issues of material fact, the claim presented herein cannot be determined summarily. The petitioner has advised me that she intends to pursue the issues in her verified petition through a due process hearing.

ORDER

The application for emergent relief is **DENIED**. The parties will participate in a telephone conference call with the undersigned to be scheduled within the next ten days.

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

Kathleen M. Calemmo

May 10, 2019
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: May 10, 2019

Date Mailed to Parties: May 10, 2019

tat/lam

135-19

OAL Dkt. No. EDU 03502-19
Agency Dkt. No. 46-2/19

New Jersey Commissioner of Education

Final Decision

Jennifer Tambakis,

Petitioner,

v.

Board of Education of the Township of Boonton, Morris County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge that the petitioner intends to withdraw this matter; it is therefore no longer a contested case. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/22/19
Date of Mailing: 5/24/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 03502-19
AGENCY DKT. NO. 46-2/19

JENNIFER TAMBAKIS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,

Respondents.

Arnold Mellk Esq. for petitioner (Mellk O'Neill)

James Plosia, Jr. Esq., for respondent Township of Booton Board of Education (Plosia Cohen)

Record Closed: April 16, 2019 Decided: April 16, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, Jennifer Tambakis (Tambakis) challenges the Township of Booton Board of Education's (Board or respondent) right to the results of her drug/alcohol test of February 20, 2019. On March 8, 2019, respondent filed a Motion for Emergent Relief to compel petitioner to provide respondent with the results of her drug/alcohol test of February 20, 2019. The matter was filed with the Office of Administrative Law (OAL) as a contested matter with the March 13, 2019. Oral argument on the motion was held on March 19, 2019. An Order denying Emergent Relief was issued on March 19, 2019, by

the undersigned. By Order dated April 9, 2019, the Commissioner of Education adopted the Order and stated that the matter shall continue at the OAL with such proceedings as the parties and the undersigned deems necessary to bring closure.

A telephone prehearing was scheduled for April 30, 2019. However, on April 16, 2019, petitioner's counsel sent correspondence stating that the parties have settled and requested, on behalf of petitioner, to withdraw and dismiss the petition in this matter, with prejudice and close the file.

I **CONCLUDE** that this matter is no longer a contested case at OAL. I further **CONCLUDE** that this matter should be dismissed and returned to the agency.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the request for the petition to be dismissed is **GRANTED**.

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

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

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

4-16-19

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: April 16, 2019

Date Mailed to Parties: April 16, 2019

ljb

DOCUMENTS RELIED ON

- Commissioner's Order, dated April 9, 2019
- Letter from Edward Cridge, dated April 16, 2019

MELLK O'NEILL
ATTORNEYS AT LAW
51 EAST BROAD STREET
HOPEWELL, NEW JERSEY 08525

Telephone (609)-924-0700
Telecopier: (609)-924-4622

Arnold M. Mellk

Edward A. Cridge

Gidian R. Mellk, Of Counsel

RECEIVED
2019 APR 16 P 2:21

By Electronic Mail:

April 16, 2019

Hon. Kimberly Moss, ALJ
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Jennifer Tambakis v. Boonton Public Schools Bd. of Education.
Agency Dkt. No. 46-2/19
OAL Dkt. No. 03502-2019N
Notice of Withdrawal of Case

Dear Judge Moss:

We represent Petitioner Jennifer Tambakis. Please be advised that the parties have settled the above-captioned matter. Accordingly, consistent with that agreement, kindly accept this request on behalf of Petitioner to withdraw and dismiss the Petition in this matter, with prejudice. Kindly close the file.

Should any further action or information be necessary, please let me know.

Thank you.

Respectfully submitted,

MELLK O'NEILL

Edward Cridge

Cc: James Plosia, Esq.
Jennifer Tambakis

96-19E

OAL Dkt. No. EDU 3502-19
Agency Dkt. No. 46-2/19

2019 APR 11 P 3:13

New Jersey Commissioner of Education

Order On Emergent Relief

Jennifer Tambakis,

Petitioner,

v.

Board of Education of the Township of Boonton, Morris County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that Boonton Township Board of Education has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Specifically, the Board failed to establish that it would suffer irreparable harm if the emergent application is not granted.[1]

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/09/19

Date of Mailing: 4/09/19

[1] It appears that the ALJ inadvertently inserted the following sentence on page 5 of the Order, "I CONCLUDE petitioner did not meet all of the criteria of N.J.A.C. 6A:3-1.6(b) because they have not shown a likelihood of prevailing on the merits."

136-19

New Jersey Commissioner of Education

Final Decision

Passaic County Technical Institute,

Petitioner,

v.

Board of Education of the City of Paterson, Passaic County, and Board of Education of the Manchester Regional School District, Passaic County,

Respondents.

Synopsis

Passaic County Technical Institute (PCTI) filed a petition of appeal seeking an order requiring the respondent boards of education to provide transportation for its non-remote students – those who reside within 2.5 miles of the school – or, in the alternative, requiring the Boards of Education of the City of Paterson (Paterson) and the Manchester Regional School District (Manchester) to pay the costs of transportation provided by PCTI for those students. PCTI argued that it is hazardous for students from Manchester and Paterson to walk to the school because of the heavily trafficked roads that they must traverse. Paterson previously provided courtesy transportation for non-remote students to PCTI, but ceased this practice in June 2017; Manchester has never provided courtesy transportation for non-remote student to PCTI. The respondents filed a motion for summary decision, contending that students who reside within 2.5 miles of their high school are not provided transportation to and from that school.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; the issues of law for determination here are whether respondents are required to provide transportation for non-remote students to PCTI, and whether petitioner's appeal was timely filed; relevant transportation regulations make clear that the meaning of the "resident district board of education shall be responsible for the... transportation costs of any resident student admitted to the county vocational school" in *N.J.A.C.* 6A:19-2.3 means transportation in accordance with *N.J.A.C.* 6A:27-1.4(a), *i.e.* transportation "shall be provided to public school students who reside remote from their assigned school of attendance..."; any other reading would give vocational school students preferential treatment regarding transportation that is not available to other high school students; *N.J.A.C.* 6A:27-1.5 stipulates that districts may choose to provide transportation for non-remote students in accordance with their own policies, but does not require a school district to provide courtesy transportation, nor does it require a district that has previously provided courtesy transportation to continue to provide it; and, as to the issue of timeliness, PCTI knew in June 2017 that Paterson was no longer providing courtesy transportation for non-remote students – and likewise knew that Manchester had never provided such service, in the 2017-18 school year or before – yet did not file its petition until September 2018. The ALJ concluded that Paterson and Manchester are not required to provide transportation costs for non-remote students to PCTI; further, petition was untimely filed. Accordingly, the ALJ granted the respondents' motion for summary decision.

Upon review, the Commissioner adopted the Initial Decision of the OAL with the modification that the 90-day rule did not preclude the filing of the within petition. The petition of appeal was dismissed.

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

May 22, 2019

136-19

OAL Dkt. No. EDU 14296-18
Agency Dkt. No. 227-9/18

New Jersey Commissioner of Education

Final Decision

Passaic County Technical Institute,

Petitioner,

v.

Board of Education of the City of Paterson, Passaic County, and Board of Education of the Manchester Regional School District, Passaic County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner Passaic County Technical Institute (PCTI) pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto filed by the Paterson Board of Education (Paterson) and the Manchester Regional Board of Education (Manchester).

In this matter, PCTI seeks an order requiring Paterson and Manchester to provide transportation for its non-remote students – those who reside within 2.5 miles of the school – or requiring Paterson and Manchester to pay the costs of transportation provided by PCTI to those students. Paterson stopped providing courtesy transportation for non-remote students attending PCTI in June 2017, while Manchester never provided courtesy transportation to PCTI students. Paterson filed an appeal with the Commissioner on September 6, 2018. Following motions for summary decision filed by Paterson and Manchester, the Administrative Law Judge (ALJ) found that Paterson and Manchester are not required to provide transportation of non-remote students to PCTI. The ALJ also found that the petition was not timely filed under the 90-day rule, because Paterson terminated its courtesy transportation more than a year before

the petition was filed, and its request for reimbursement from Manchester for the 2017-18 school year was not filed within 90-days.

PCTI takes exception to the ALJ's dismissing of this matter without the opportunity to complete discovery. PCTI argues that there are disputed material facts, which should have precluded summary decision, specifically whether Manchester or Paterson has adopted a hazardous bus policy. PCTI contends that this disputed fact implicates *N.J.S.A.* 18A:39-1.5, which requires school districts that provide courtesy busing to adopt a policy for students who walk to and from school along hazardous routes. Without discovery, PCTI claims that it cannot determine if Paterson previously designated the roads near PCTI as hazardous routes. As nothing has changed on these routes to make them less hazardous, this information could enable PCTI to prove whether Paterson or Manchester have designated routes as hazardous, which then require them to provide courtesy busing services pursuant to *N.J.S.A.* 18A:39-1.5.

PCTI contends that the ALJ failed to consider the "long history of school districts using obstructionist means to deter students from attending vocational schools." (PCTI Exceptions at 8). PCTI maintains that Paterson and Manchester are refusing to provide courtesy transportation solely to prevent students from accessing vocational schools, contrary to *N.J.A.C.* 6A:19-2.3 – which requires boards of education to ensure that students may apply to and attend county vocational schools. Further, PCTI believes educational policy also imposes upon districts a duty of care toward students, which would require the courtesy transportation of students who otherwise must walk on hazardous routes.

Finally, PCTI contends that this matter is not barred by the 90-day rule. PCTI points out that, contrary to the ALJ's finding that the petition needed to be filed within 90 days of the last day Paterson provided courtesy transportation in 2017, "each month that Paterson failed (and continues to fail) to transport, or pay the transportation costs for Paterson resident students to attend PCTI, constitutes a separate cause of action." (PCTI Exceptions at 10). With respect to Manchester, PCTI contends that it never provided courtesy transportation of non-remote students, so no occurrence exists to trigger the 90-day requirement. Alternatively, a relaxation of the rules is warranted, pursuant to *N.J.A.C.* 6A:3-1.16, because

strict adherence would result in injustice, as ongoing discussions occurred with both districts through the fall of 2017.

In reply, Paterson argues that PCTI's exceptions do not comply with the requirements of *N.J.A.C.* 1:1-18.4. PCTI cites no case law, statutes, or regulations for its argument that the ALJ's conclusions were in plain error. Additionally, Paterson points out that PCTI seeks to include evidence and arguments that were not presented to the ALJ, in violation of *N.J.A.C.* 1:1-18.4(c).

Paterson disagrees with PCTI's argument that it was prevented from completing discovery. Even so, discovery and a hearing were not necessary in this case because the issues are purely legal, and none of PCTI's assertions, even if true, would require Paterson to provide courtesy busing for non-remote students. PCTI relies on *N.J.S.A.* 18A:39-1.5 for the proposition that Paterson should be compelled to provide courtesy busing. As that regulation only applies to "[a] school district that provides courtesy busing," it does not apply here, as Paterson does not provide courtesy busing.

Paterson contends that whether the ALJ ignored policy concerns that Paterson was being obstructionist is irrelevant as there are clear and unambiguous statutes and regulations that govern this matter. It is unambiguous that *N.J.A.C.* 6A:27-1.4(a) and *N.J.S.A.* 18A:39-1.5 provide that there is no legal obligation to transport students who live within 2.5 miles of school.

Paterson argues that the ALJ did not err in dismissing the petition as untimely. PCTI never raised the argument that the limitations period should be extended by a year due to ongoing negotiations. Furthermore, Paterson maintains that there is no support for PCTI's contention that each month could constitute a new cause of action.

In reply to PCTI's exceptions, Manchester argues that the ALJ appropriately decided this matter on summary decision. Contrary to PCTI's argument, there are no disputes of material fact regarding Manchester, as PCTI does not contend that Manchester adopted a hazardous bus policy. Additionally, Manchester maintains that PCTI had a meaningful opportunity for discovery, during which time Manchester provided responses to PCTI's interrogatories and requests for production of documents.

Manchester contends that instead of focusing on the law, PCTI focuses on whether Manchester had "obstructionist motives" in not providing transportation and whether public policy requires Manchester to protect students from harm by providing transportation. Manchester notes that it could not possibly have bad motives or be attempting to dissuade students from attending vocational schools, because it has never provided courtesy transportation to any student, whether they attend PCTI or remain at Manchester Regional High School. Furthermore, Manchester students have walked on the routes to PCTI for years, and PCTI admits that the routes have not become more or less hazardous.

Manchester emphasizes that the ALJ carefully reviewed the transportation laws, appropriately applied the remoteness test applicable to all other school districts to vocational schools, and correctly found that there is no right to transportation for PCTI's non-remote students. Manchester also maintains that it was not required to adopt a hazardous route policy because *N.J.S.A.* 18A:39-1.5 only applies to districts that provide transportation to non-remote students.

Manchester further argues that the ALJ correctly found that PCTI's request for reimbursement for the 2017-18 school year was untimely. PCTI should have been aware by October 2017 that Manchester was not paying for transportation of non-remote students, but it did not file a petition until September 2018, well outside of the 90-day limitations period. Moreover, Manchester contends that PCTI's exceptions do not provide a justifiable reason why the 90-day period should be relaxed, as there were no negotiations between Manchester and PCTI regarding transportation.

As a preliminary matter, the Commissioner notes that the 90-day rule does not preclude the filing of this petition. PCTI could seek an order requiring Paterson and Manchester to provide courtesy transportation of non-remote students at any time. The fact that Paterson stopped providing courtesy transportation a year before the petition was filed does not prohibit PCTI from asking the Commissioner for relief in connection with the current school year. With respect to PCTI's request that Paterson and Manchester pay the costs of transportation, this request is not limited to the 2017-18 school year; it appears that PCTI is seeking reimbursement of the transportation cost going forward as an alternative if Paterson and Manchester do not actually provide the transportation.

Upon further review, the Commissioner agrees with the ALJ that Paterson and Manchester are not required to provide transportation costs of non-remote students to PCTI. As thoroughly set forth in the Initial Decision, the relevant regulations provide that transportation is only required when a high school student lives more than 2.5 miles from school. There is no statutory or regulatory provision that requires courtesy transportation be provided for non-remote students.

The Commissioner also does not find petitioner's exceptions to be persuasive. This matter was ripe for summary decision as the only issues were those of law. There is no evidence that Paterson or Manchester are being obstructionist or attempting to deter students from attending PCTI. Even so, such a public policy argument does not create a legal obligation for Paterson and Manchester to provide courtesy transportation to non-remote students. *N.J.S.A.* 18A:39-1.5 indicates that "[a] school district that provides courtesy busing services shall adopt a policy regarding the transportation of students who must walk to and from school along hazardous routes." It is clear and unambiguous that the statute does not require school districts to adopt a hazardous route policy, but rather only requires these policies of school districts that provide courtesy busing services. Here, Paterson and Manchester do not provide courtesy transportation, so the statute does not apply to them.

Accordingly, the Initial Decision of the OAL is adopted – as modified herein – as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 5/22/19
Date of Mailing: 5/24/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT.NO. EDU 14296-18

AGENCY DKT. NO. 227-9/18

PASSAIC COUNTY TECHNICAL INSTITUTE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY AND THE BOARD OF EDUCATION FOR THE MANCHESTER REGIONAL SCHOOL DISTRICT,

Respondents.

Melanie D. Lipomanis, Esq., for petitioner Passaic County Technical Institute (Porzio, Bromberg & Newman, P.C., attorneys)

Joseph M. Franck, Esq., for respondent, Paterson Board of Education (Ingelsino, Webster, Wyciskala Taylor, LLC, attorneys)

Rodney T. Hara, Esq. for respondent, Passaic County Manchester Regional High School (Fogarty & Hara, attorneys)

Record Closed: February 22, 2019 Decided: February 28, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

Passaic County Technical Institute (PCTI or petitioner) seeks an Order requiring respondents to provide transportation for non-remote students attending its school. Respondents moves for summary decision, based on a contention that if you live 2.5 miles or less from your high school, you will not be provided transportation to and from that school.

PROCEDURAL HISTORY

A petition was filed by PTCI requesting that the Paterson Board of Education (Paterson) and Passaic County Manchester Regional High School District (Manchester) pay for transportation of non-remote students in each district who attended PTCI with the Office of Administrative Law on October 1, 2018. Respondents filed motions for summary decision on January 11, 2019. Petitioner filed a reply to that motion on February 8, 2019. Respondents replied to the opposition on February 22, 2019, on which date the record closed.

FACTUAL DISCUSSION

Having reviewed the motions in support of and in opposition to summary decision, I **FIND** the following **FACTS**:

PTCI is a county vocational school located in Wayne, New Jersey. Students in Manchester and Paterson can attend PTCI. Paterson stopped providing courtesy transportation for non-remote students to PCTI, (non-remote students are students who reside more than 2.5 miles from PCTI) in June 2017. Manchester never provided courtesy transportation for non-remote students to PCTI. Since June 2017, PCTI has provided transportation to non-remote students from Paterson. In the 2017-2018 and 2018-2019 school years PCTI provided transportation for non-remote students in Manchester. On June 1, 2018, PCTI made a demand upon Manchester to pay

transportation for non- remote students in its district. In a letter dated June 8, 2018, Miguel Hernandez, Superintendent of Manchester, stated that Manchester would not provide transportation for non-remote students. On August 24, 2018, PCTI sent Manchester a bill in the amount of $28,833.95 for transportation of non-remote students from Manchester's district to PCTI. PCTI sent Manchester a subsequent bill for transportation of non-remote students to PCTI through January 2019.

PCTI states that it is hazardous for the students from Manchester and Paterson to walk to PCTI. There are two heavily trafficked roads that they must traverse. Neither Paterson nor Manchester has not designated any routes as hazardous. PCTI filed a verified petition to order Paterson and Manchester to provide transportation to PCTI for non-remote students on September 6, 2018.

LEGAL ANALYSIS AND DISCUSSION

Both respondents are requesting summary decision. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational

> 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.

In Martin v. Rutgers Cas. Ins Co 346 N.J. Super 320, 323 (App. Div. 202) The Court stated "The record is barren of any evidence that plaintiff had such a license other than her own self-serving assertion to that effect. That is clearly insufficient to create a question of material fact for purposes of a summary judgment motion."

In this matter there is no material issue of fact. There are issues of law. Whether respondents are required to provide transportation for non-remote students to PCTI, whether petitioner's petition was timely filed.

N.J.A.C. 6A:27-1.4 (a) 1 provides:

> (a) Transportation shall be provided to public school students who reside remote from their assigned school of attendance, nonpublic school students who reside remote from their school of attendance and meet the eligibility criteria of N.J.A.C. 6A:27-2.2, and special education students who reside remote from their assigned school or who require transportation services in accordance with their individualized education program (IEP). Transportation shall also be provided to preschool students who live remote from their school of attendance and either are enrolled in a universal preschool program or meet the age and income eligibility requirements of and are enrolled in a targeted preschool program pursuant to N.J.S.A. 18A:7F-43 et seq.
>
> 1. The words "remote from the school of attendance" shall mean beyond two and one-half miles for high school students (grades nine through 12) and beyond two miles for elementary school students (grades preschool through eight).

N.J.A.C. 6A:27-2.2(a) regarding non-public-school students' eligibility for the District to provide transportation provides:

> Elementary school students shall reside more than two miles from their nonpublic school and secondary school students shall reside more than two and one-half miles from their nonpublic school to be eligible for transportation services.

N.J.A.C. 6A:27-3.2(a) regarding charter and renaissance schools provides:

Students in kindergarten through grade eight and preschool students who meet the eligibility requirements defined in N.J.A.C. 6A:27-1.4(a) who reside more than two miles and students in grades nine through 12 who reside more than two and one-half miles from the charter or renaissance school that they attend are eligible for transportation services

N.J.A.C. 6A:27-4.2 (a) regarding interdistrict public school choice programs provides:

Students in kindergarten through grade eight and preschool students who meet the eligibility requirements defined in N.J.A.C. 6A:27-1.2(a) who reside more than two miles and students in grades nine through 12 who reside more than two and one-half miles from the choice school that they attend, and provided that the choice school is not more than 20 miles from the student's residence, are eligible for transportation services, unless the cost of such services exceeds the annual maximum statutorily established amount per student for nonpublic school transportation.

N.J.A.C. 6A: 19-2.3 provides:

Each resident district board of education shall ensure that resident students may apply to and, if accepted, attend a county vocational school pursuant to N.J.S.A. 18A:54-20.1. The existence of the same career and technical education program at the resident district board of education shall not negate a student's right to apply to and, if accepted, attend a county vocational school, subject to the following limitations:

1. The resident district board of education shall be responsible for the tuition and transportation costs of any resident student admitted to the county vocational school in which the school district is located, unless the resident district board of education maintains a vocational school pursuant to N.J.S.A. 18A:54-5 et seq., and such school offers the same program as the county vocational school where the student has been admitted. A program shall be deemed the same, for purposes of this section, if it is approved by the Department in accordance with N.J.A.C. 6A:19-3.1 and 3.2, is assigned the same Classification of Instructional Programs (CIP) code, and meets or exceeds all applicable program performance standards; and

> 2. The resident district board of education shall be responsible for the tuition, transportation costs, and nonresident fee (where applicable) of any resident student admitted to a county vocational school outside the county in which the resident school district is located, unless the district board of education maintains a vocational school pursuant to N.J.S.A. 18A:54-5 et seq., or the county in which the resident school district is located maintains a county vocational school, and either of these schools offers the same program as the non-resident county vocational school where the student has been admitted. A program shall be deemed the same, for purposes of this section, if it is approved by the Department in accordance with N.J.A.C. 6A:19-3.1 and 3.2, is assigned the same Classification of Instructional Programs (CIP) code and meets or exceeds all applicable program performance standards.

In this matter, when reading the transportation regulations, it is clear that the meaning of the "resident district shall be responsible for transportation costs of students in vocational school" in N.J.A.C. 6A: 19-2.3 means transportation in accordance with the N.J.A.C. 6A:27-1.4 (a). Any other reading would lead to results where a student who lived next door or across the street from PCTI would have to be transported to PCTI. In addition, other regulations that address transportation of students to non-public schools, inter-district schools, charter and renaissance schools, list one criteria eligibility for transportation of high school students as they have to live more than 2.5 miles from the high school. Any other reading of N.J.A.C. 6A: 19-2.3 would give students at vocational high school preferential treatment regarding transportation not available to other high school students.

N.J.A.C. 6A: 27-1.5 provides:

> (a) District boards of education may provide for the transportation of students who reside less than remote from their school in accordance with their local policies and at their own expense.
>
> 1. District boards of education may elect to charge the parent or legal guardian for all or part of the cost of this service in accordance with N.J.S.A. 18A:39-1.3.
>
> (b) District boards of education that provide for the transportation of students pursuant to N.J.S.A. 18A:39-1 or a cooperative transportation

services agency (CTSA) may provide for the transportation of resident and nonresident students who are not otherwise eligible for transportation services by any other law and charge the parent or legal guardian for all or part of the cost of this transportation in accordance with N.J.S.A. 18A:39-1.3.

1. The parent or legal guardian of a nonpublic school student who receives aid in lieu of transportation from their resident district board of education may purchase transportation services from another district board of education or CTSA.

(c) Whenever a district board of education agrees to provide nonmandated transportation to and from school for reasons of hazard, the board shall adopt a hazardous busing policy in accordance with N.J.S.A. 18A:39-1.5.

(d) When the parent or legal guardian elects to have transportation provided for their child pursuant to this section, the district board of education or CTSA may elect to charge the parent or legal guardian for all or part of the cost. However, the cost of the transportation paid by the parent or legal guardian shall be no more than the per student cost of the route and shall be paid at the time and in the manner determined by the district board of education or CTSA.

(e) Municipal governments may elect to pay the cost of transportation for students who live less than remote from their school through an interlocal agreement with the district board of education in accordance with N.J.S.A. 18A:39-1.2. Municipalities may elect to charge the parent or legal guardian for all or part of the cost of this service.

(f) Students who are unable to pay because of financial hardship may not be excluded from receiving services described under this section. The criteria used to determine financial hardship shall be the same as the Statewide eligibility standards established for free and reduced-price meals under the State school lunch program.

(g) District boards of education shall notify the Department on the Commissioner-prescribed form when transportation is provided for students pursuant to this section.

Manchester has never provided courtesy transportation to non-remote students attending PCTI. Paterson stopped providing courtesy transportation to students attending PCTI in June 2017. Neither Manchester or Paterson has adopted a hazardous bus policy. The regulation does not require a school district to provide

courtesy transportation. The regulation does not require a district that has previously provided courtesy transportation to continue to provide it.

I **CONCLUDE** Paterson and Manchester are not required to provide transportation costs of non-remote students to PCTI.

The next issue is whether PCTI's petition was timely filed. N.J.A.C. 6A:3-1(i) 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, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.
>
> Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). 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. Its purposes are 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 and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.
>
> The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Id. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow supra at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "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." Ibid. (citation omitted).

PCTI knew in June 2017 that Paterson was no longer providing courtesy transportation for non-remote students. Ninety day from June 30, 2017, would be September 30, 2017. PCTI filed the petition in this matter on September 5, 2018, over a year after it knew that Paterson was not providing transportation for non-remote students. PCTI cites the cases of Lavin v. Hackensack Board of Education 90 N.J.145 for the proposition that that ninety-day rule does not apply when a statutory right is at stake. However, there is no statutory right of transportation provided by the residents' district for non-remote students. In addition, Lavin was regarding a N.J.S.A. 2A14-1 statute of limitations and not N.J.A.C. 6A:3-1.3(i) ninety-day rule.

PCTI knew that Manchester did not provide transportation for non-resident students in the 2017-2018 school year, it never provided transportation for non-remote students. Again, PCTI did not file this petition until September 5, 2018.

I **CONCLUDE** that PCTI did not file its petition against Paterson within ninety day of Paterson's termination of courtesy transportation for non-remote students. I further **CONCLUDE** that PCTI did not file its petition against Manchester for the 2017-2018 school year within ninety day against Manchester for the 2017-2018 school year.

Since I have **CONCLUDED** that respondents are not required to provide transportation to non-remote students and that petitioner did not file its petition within the ninety-day rule, I will not address the other matters in the motion because it will not affect the outcome of my decision.

ORDER

Based on the foregoing, it is **ORDERED** that respondents motions for summary decision be and is hereby **GRANTED**.

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

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

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

2-28-19

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: 2-28-2019

Date Mailed to Parties: 2-28-2019

ljb

DOCUMENTS RELIED UPON

- Petitioner and Respondents motions, briefs and exhibits.

137-19

New Jersey Commissioner of Education

Final Decision

East Greenwich Education Association,

Petitioner,

v.

Board of Education of the Township of East Greenwich, Gloucester County,

Respondent.

Synopsis

The petitioner, the East Greenwich Education Association (Association), alleged that the East Greenwich Board of Education (Board) violated *N.J.S.A.* 18A:6-119 and *N.J.A.C.* 6A:10-1.2 when it hired a part-time (not more than 6 days per month) Interim Coordinator of Special Projects to conduct teacher observations. The Association contended that the person hired for this position, Terry Van Zoeren (Van Zoeren), is not eligible to conduct formal observations of the teaching staff members because he is not "employed in the district in a supervisory role and capacity," as required in the above statute and regulation. The Board maintained that Van Zoeren is acting in a supervisory role and capacity because he performs teacher observations as part of his duties and possesses all of the credentials required to do so. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Board hired Van Zoeren as the part-time Interim Coordinator of Special Projects, commencing in the 2016-2017 school year and continuing to the present; there is no dispute as to whether Van Zoeren is properly certified; the issue herein is whether Van Zoeren is employed by the Board in a "supervisory role and capacity"; the Association maintained that Van Zoeren's job description does not confer or assign him any supervisory duties and he is only employed on a part-time basis; Van Zoeren should therefore be prohibited from conducting teacher observations; however, Van Zoeren is in fact acting in the role and capacity of a supervisor when he performs observations of teaching staff; he is not assisting the Superintendent or the Director of Curriculum, but is rather hired to perform teacher observations, conduct post-observation meetings with teachers, and prepare the required reports. The ALJ concluded that Van Zoeren is acting in a supervisory role and capacity in his position as Interim Coordinator of Special Projects. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the Association's appeal.

Upon comprehensive review, the Commissioner remanded the matter to the OAL for further fact finding to to determine whether Van Zoeren is serving in a "supervisory role and capacity" that comports with the definition of "Supervisor" under *N.J.A.C.* 6A:32-2.1. In so doing, the Commissioner noted that throughout the record, the parties and the ALJ have incorrectly cited to *N.J.A.C.* 6A:9-2.1 for a definition of "Observation." The correct citation is *N.J.A.C.* 6A:10-1.2.

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

May 22, 2019

137-19

OAL Dkt. No. EDU 14585-18
Agency Dkt. No. 223-8/18

New Jersey Commissioner of Education

Final Decision

East Greenwich Education Association,

Petitioner,

v.

Board of Education of the Township of East Greenwich, Gloucester County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, East Greenwich Education Association (Association), and the East Greenwich Board of Education's (Board) reply thereto. In this case, the Association claims that the Board violated *N.J.S.A.* 18A:6-119 and *N.J.A.C.* 6A:10-1.2[*] by hiring Terry Van Zoeren on a part-time basis to conduct teacher observations under the title of Interim Coordinator of Special Projects. The Administrative Law Judge (ALJ) found that there were no material facts in dispute and granted summary decision in favor of the Board. In so doing, the ALJ determined that the Board did not violate *N.J.S.A.* 18A:6-119 or *N.J.A.C.* 6A:10-1.2 because Van Zoeren is acting in a "supervisory role and capacity" when he performs the duties assigned to his job description.

[*] In the petition and the Initial Decision, this reference to New Jersey Administrative Code was improperly cited as *N.J.A.C.* 6A:9-2.1. The proper citation – *N.J.A.C.* 6A:10-1.2 – will be used herein.

Upon a comprehensive review of the record, the Commissioner finds that additional fact finding is necessary to reach a determination as to whether Van Zoeren is acting in a "supervisory role and capacity." Pursuant to *N.J.S.A.* 18A:6-119, the term "Evaluation" is defined as:

> ...a process based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, **conducted and prepared by an individual employed in the district in a supervisory role and capacity** and possessing a school administrator certificate, principal certificate, or supervisor certificate. (emphasis added).

This definition is echoed in the administrative code, as *N.J.A.C.* 6A:10-1.2 defines "Observation" as:

> ...a method of collecting data on the performance of a teaching staff member's assigned duties and responsibilities. An observation for the purpose of evaluation will be included in the determination of the annual summative evaluation rating and shall be **conducted by an individual employed in the school district in a supervisory role and capacity** and possessing a school administrator, principal, or supervisor endorsement ... (emphasis added).

Moreover, because "supervisory role" and "supervisory capacity" are not defined in the code, it is helpful to consider the definition of "Supervisor" found in *N.J.A.C.* 6A:32-2.1, *i.e.*: "any appropriately certified individual assigned with the responsibility for the direction and guidance of the work of teaching staff members."

In this case, it is undisputed that Van Zoeren possesses the requisite certificates to conduct evaluations; however, it is not clear from the current record if Van Zoeren is, in fact, acting in a "supervisory role and capacity" while performing the duties of the Interim Coordinator of Special Projects. The job description states that Van Zoeren is responsible for performing teacher observations, conducting post-observation meetings, and writing reports. Yet, there is no

additional information in the record to indicate the nature of the post-observation meetings, the type of information that is provided in the written reports, or the number of observations of specific teachers that Van Zoeren performs. The record is also silent regarding whether Van Zoeren provides direction and guidance to the teachers he observes and evaluates. The extent of Van Zoeren's role in the district is simply not ascertainable based on the facts before the Commissioner; thus, a determination as to whether Van Zoeren is acting in a "supervisory role and capacity" in his position as Interim Coordinator of Special Projects cannot be made on the current record.

Accordingly, this matter is remanded to the OAL for the additional fact finding necessary to determine whether Van Zoeren is acting in a "supervisory role and capacity" pursuant to *N.J.S.A.* 18A:6-119 that also comports with the definition of "supervisor" contained in *N.J.A.C.* 6A:32-2.1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/22/19
Date of Mailing: 5/24/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 14585-18
AGENCY DKT. NO. 233-8/18

EAST GREENWICH EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST GREENWICH
Respondent.

Cosmas P. Diamantis, Esq., for petitioner (Zeller & Wieliczko, LLP, attorneys)

Stephen J. Edelstein, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: January 22, 2019 Decided: March 7, 2019

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

The petition filed by East Greenwich Education Association (Association) alleges that East Greenwich Board of Education (Board) violated N.J.S.A. 18A:6-119 and N.J.A.C. 6A:9-2.1 by hiring a part-time Interim Coordinator of Special Projects to conduct teacher observations. The Association contends that Terry Van Zoeren (Van Zoeren) is

statute and regulation. The Board maintains that because Van Zoeren possesses all the required credentials and he performs teacher observations as part of his duties, he is acting in a supervisory role and capacity. His status as part-time is irrelevant under the above statute and regulation.

PROCEDURAL HISTORY

On August 31, 2018, the Association filed its Petition of Appeal pursuant to a Consent Order[1] transferring the dispute to the New Jersey Commissioner of Education. On October 5, 2018, the Board filed its Answer to the Petition of Appeal and a Notice of Motion for Summary Decision with supporting brief and Certification of Dr. James Lynch with supporting exhibits. (R-1.) The matter was transmitted to the Office of Administrative Law (OAL) on October 9, 2018. On November 5, 2018, the Association filed its brief in opposition to the motion with a Certification from Cosmas P. Diamantis, Esq. with supporting exhibits (P-1), and an Affidavit from Joy Strehle with supporting exhibits (P-2). On November 16, 2018, the Board filed its reply brief. I scheduled oral argument for December 19, 2018, but that date was adjourned at the request of the Board with consent from the Association. Oral argument was rescheduled for January 22, 2019 and the record closed on that day.

FACTUAL DISCUSSION AND FINDINGS

Based upon the parties' responses to the Statement of Material Facts and Counterstatement of Material Facts contained within the briefs, I **FIND** the following **FACTS**, which are not disputed:

[1] The Consent Order was entered in the Superior Court of New Jersey, Gloucester County, by the Honorable Anne McDonnell, P.J.Ch. As this Consent Order, transferred the dispute between the parties to the New Jersey Commissioner of Education, I will not consider the Board's request for dismissal under N.J.A.C. 6A:3-1 on the grounds that the Association's filing was untimely. A true copy of the Consent Order was attached to the Certification of Cosmas P. Diamantis, Esq. (P-1 at A.)

1. The Board is a public employer within the meaning of the Employer-Employee Relations Act (Act), N.J.S.A. 34:31A-1 et. seq., and is statutorily empowered to operate and supervise the East Greenwich School District (District).

2. The Association is a duly organized employee representative under the Act, and is the exclusive negotiations representative for all regularly employed non-administrative, non-supervisory, and non-confidential certificated professional employees, support and custodial staff.

3. The Board and the Association are parties to a collective bargaining agreement (CBA) which was effective July 1, 2014 through June 30, 2017 and are currently in negotiations for a successor to that agreement. (R-1 at A.)

4. Commencing with the 2016-2017 school year, the District employed Van Zoeren, on a part-time basis (not more than six days per month), as an Interim Coordinator for Special Projects, reporting to the Superintendent. (R-1 at B and C.)

5. Van Zoeren began conducting teacher observations on a part-time basis in September 2016 and continues in that position until the present date.

ADDITIONAL FACTUAL FINDINGS

Summary Decision may be rendered in an administrative proceeding if the pleadings, discovery, and affidavits "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to N.J.A.C. 1:1-12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a

matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide 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 533.

A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, 142 N.J. at 528-29. When making a summary decision, the "judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540.

Based upon a review of the documentary evidence, including the Certification of Dr. James Lynch and the exhibits attached thereto (R-1) submitted in support of the motion and the Affidavit of Joy Strehle, President of the Association and the exhibits attached thereto (P-2) submitted in opposition, I **FIND** the following **FACTS**, upon which there are no genuine issues:

1. Van Zoeren's job duties described in his Agreement (R-1 at B) with the Board are as follows:

> The Interim Coordinator of Special Projects duties include observations of teaching staff. Each day worked will include completing both "short" and "long" observations along with completing reports for each observation and post conference meeting with teachers. (allotted time is approximately 1½ hours for "short" and 2½ hours for "long" observations.) Other tasks may be assigned by the Superintendent or Director of Curriculum. Position reports directly to the Director of Curriculum.

2. The qualifications for the Interim Coordinator for Special Projects were listed in the Job Description (R-1 at D) as follows:

> Previous experience as a Supervisor, Principal, Assistant Superintendent, or Superintendent;
> NJ Supervisor Certificate or higher; and

> Understanding and/or training in one of the Teacher for NJ observation/evaluation instruments.

3. Superintendent Lynch stated in his Certification that "Van Zoeren is a former superintendent who meets all the criteria set out in the Job Description for the position, is properly certified, and is trained in the evaluation model used by the district." (R-1 at par.7.) Van Zoeren has the following Certificates: Teacher, Principal, and School Administrator. (R1 at E.)

4. On January 3, 2018, respondent's Superintendent of Schools, Dr. Lynch, contacted the Interim Executive County Superintendent, Ave Altersitz, by email to inquire whether the District could utilize a part-time administrator to conduct observations.

5. On January 16, 2018, the Association submitted a written grievance (R-1 at G) wherein it contended as follows:

> The Association contends that teachers should be evaluated by a trained evaluator who is employed in a daily supervisory capacity. At this time, the part-time employee works six days a month to conduct teacher evaluations and coordinate grants. This part-time employee is in a supervisory role, however not in a supervisory capacity. The association believes this is a violation of N.J.S.A. 18A:6-119.

6. Van Zoeren remains employed as the Interim Coordinator for Special Projects for the 2018-2019 school year.

As there is no dispute to the material facts, I **FIND** that this matter is ripe for summary decision.

CONCLUSIONS OF LAW

The Board argues that its motion for summary decision to dismiss the grievance should be granted because the Association is incorrect in its interpretation of N.J.S.A. 18A:6-119 and N.J.A.C. 6A:9-2.1. The Association maintains that the statutes require

that any individual that performs observations and evaluations of teaching professionals be employed by the District in a "supervisory role and supervisory capacity."

N.J.S.A. 18A:6-119 defines terms relative to the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act. The term "evaluation" is defined as follows:

> "Evaluation" means a process based on the individual's job description, professional standards and statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district **in a supervisory role and capacity** and possessing a school administrator certificate, principal certificate, or supervisor certificate. (emphasis added)

Pursuant to N.J.A.C. 6A:9-2.1, the term "supervisor" is defined as follows:

> "Supervisor" means an appropriately certified teaching staff member, as defined in N.J.S.A. 18A:1-1, employed by a school district **in a supervisory role and capacity**, and possessing a school administrator, principal, or supervisor endorsement. (emphasis added)

There is no dispute between the parties that Van Zoeren is appropriately certified. The issue framed by the Association is whether Van Zoeren is employed by the District in a supervisory role and capacity, thereby, allowing him to perform teacher observations in accordance with the language set forth above. The Association maintains that the regulation requires satisfaction of a two-prong test. The first prong, being "appropriately certified," is satisfied. However, the second prong, employment "in a supervisory role and capacity" cannot be met by Van Zoeren. In support of its position, the Association argued that Van Zoeren's Job Description does not confer or assign him any supervisory duties and he is only employed on a part-time basis. Therefore, the legislative intent of N.J.A.C. 6A:9-2.1 cannot be satisfied and Van Zoeren should be prohibited from conducting teacher observations.

To illustrate its point, the Association offered the following definitions: "supervision" is defined as "the act of managing, directing, or overseeing persons or projects." Black's Law Dictionary 1576 (9th ed. 2009). Pursuant to N.J.A.C. 6A:32-2.1, "supervisor" is defined as "any appropriately certified individual assigned with the responsibility for the direction and guidance of the work of teaching staff members."

The Association further argued that Van Zoeren's role is primarily to assist the administrative staff in conducting teacher observations or grant writing and that assisting is not managing.

The Board's position is that when an employee is hired to observe and/or evaluate employees, he is acting in a supervisory role and capacity. The Board cites In the Matter of Cliffside Park Board of Education and Cliffside Park Supervisors Association, 1982 NJ PERC LEXIS 442 (September 3, 1982) for the position that Van Zoeren is in a supervisory role and capacity because he is employed to perform observations and make recommendations. The issue in Cliffside Park Board of Education was whether teachers, who were also department heads, participating in the observation, evaluation, and recommendation process could remain in a negotiation's unit for purpose of collective bargaining with teaching staff members whom they supervise under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1. The decision is illustrative because the Director determined that department heads were supervisors based on the functions they performed. Namely, the department heads were deemed to be supervisors because they were involved in the observation/evaluation/recommendation process. An employee involved in the observation and evaluation process has substantial power to affect the careers of the teachers whom he evaluates. For that reason, the Hearing Officer and the Director both determined that it would be a conflict of interest if the department heads remained in the same negotiation unit with the teachers whom they observe.

Likewise, Van Zoeren is acting in the role and capacity of a supervisor when he is performing the duties assigned in his job description, namely, observations of the teaching staff. Van Zoeren in not merely assisting the Superintendent or the Director of Curriculum. He was hired to perform teacher observations, conduct post-observation

meetings with the teachers, and prepare the required reports. I **CONCLUDE** that Van Zoeren is acting in a supervisory role and capacity when he is performing these functions.

I further **CONCLUDE** that because Van Zoeren contains the required certifications and is acting in a supervisory role and capacity when conducting teacher observations, the Board is entitled to summary decision dismissing the Association's petition of appeal.

ORDER

Based upon the Board's moving papers, including the Certification of Dr. Lynch and its supporting exhibits, I **GRANT** the Board's motion for summary decision and dismiss the Association's appeal.

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

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

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

March 7, 2019
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: March 7, 2019

Date Mailed to Parties: March 7, 2019

tat/mph

APPENDIX

LIST OF EXHIBITS

For petitioner:

P-1 Exhibit A - Consent Order

P-2 Exhibit A - Van Zoeren's Agreement

Exhibit B - Job Description

For respondent:

R-1 Exhibit A - Agreement between Association and Board

Exhibit B - Van Zoeren's Agreement – 2016

Exhibit C - Van Zoeren's Agreement – 2017

Exhibit D - Job Description

Exhibit E - Certifications

Exhibit F - Emails

Exhibit G - January 16, 2018, Association Grievance Letter

Exhibit H - Arbitration Demand

Exhibit I - Grievance Withdrawal Letter

138-19

OAL Dkt. No. EDU 17356-15
Agency Dkt. No. 298-9/15

New Jersey Commissioner of Education

Final Decision

C.F.W., on behalf of minor child, J.W.,

Petitioner,

v.

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

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled April 25, 2019 OAL hearing, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/19
Date of Mailing: 6/07/19

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

139-19

Agency Dkt. No. 44-2/19

New Jersey Commissioner of Education

Decision

In the Matter of the Tenure Hearing of
Patrice O'Keefe, Morris County
Vocational School District,
Morris County.

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved, and the tenure charges are dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/19
Date of Mailing: 6/07/19

140-19

OAL Dkt. No. EDU 02970-18
Agency Dkt. No. 29-1/18

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Burlington, Burlington County,

Petitioner,

v.

Board of Education of the Township of Edgewater Park, Burlington County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/19

Date of Mailing: 6/07/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2970-18

AGENCY DKT. NO. 29-1/18

CITY OF BURLINGTON BOARD OF EDUCATION,

Petitioner,

v.

TOWNSHIP OF EDGEWATER PARK BOARD OF EDUCATION,

Respondent.

Alicia D'Anella, Esq., for petitioner (Comegno Law Group, P.C., attorneys)

Amy R. Guerin, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: April 22, 2019 Decided: May 3, 2019

BEFORE **SUSAN M. SCAROLA,** ALJ (Ret., on recall):

This matter was transmitted to the Office of Administrative Law on February 26, 2018, 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** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

May 3, 2019
DATE

SUSAN M. SCAROLA, ALJ
(Ret., on recall)

Date Received at Agency: 5.8.19

Date Mailed to Parties: 5.8.19

/cb

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(856) 234-4114
(856) 234-4262 Fax #
Attorneys for Petitioner,
City of Burlington Public School District Board of Education

RECEIVED
2019 APR 23 P 3:42
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BY: ALICIA D'ANELLA, ESQUIRE (Attorney ID # 22652008)

CITY OF BURLINGTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION, Petitioner, v. THE BOARD OF EDUCATION OF EDGEWATER PARK TOWNSHIP IN THE COUNTY OF BURLINGTON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF No.: 29-1/18 DOCKET No.: EDU-02970-2018 **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED by and between Petitioner, CITY OF BURLINGTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION and the Respondent, BOARD OF EDUCATION OF EDGEWATER PARK TOWNSHIP that any and all claims and counterclaims asserted herein are dismissed with prejudice and without costs.

By: _____ Dated: 4/15/19
Victoria S. Beck, Esq.
PARKER MCCAY P.A.
9000 Midlantic Dr #300
Mount Laurel, New Jersey 08054
Attorney for Petitioner, Board of Education of Edgewater Park Township

By: _____ Dated: 4/16/19
Alicia D'Anella, Esq.
COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
Attorney for Respondent, Montague Township Board of Education

SETTLEMENT AGREEMENT AND RELEASE

RECEIVED
2019 APR 23 P 3:42
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

This Settlement Agreement and Release (the "Agreement") made this _____ day of January, 2019 by and among, the CITY OF BURLINGTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION ("BURLINGTON CITY"), together with its respective successors, assigns, attorneys, agents and all other persons or entities acting on its behalf,

and

The BOARD OF EDUCATION OF EDGEWATER PARK TOWNSHIP ("EDGEWATER PARK"), together with its respective successors, assigns, attorneys, agents and all other persons or entities acting on its behalf. (Edgewater Park and Burlington City are hereinafter referred to as the "Parties".)

RECITALS

WHEREAS, the Parties have a long standing send-receive relationship whereby Edgewater Park sends its students in grades 9 through 12 to Burlington City's schools; and

WHEREAS, each year the Parties memorialize the tentative tuition charged by Burlington City for Edgewater Park students through a signed Tuition Contract Agreement, which is in the form prepared by the Department of Education; and

WHEREAS, N.J.A.C. 6A:23a-17.1(f) provides a mechanism to reconcile the tentative tuition rate charged with the actual tuition rate, subsequently certified by the Commission of Education; and

WHEREAS, a dispute has arisen with respect to the difference between the tentative tuition rate and the certified tuition rate for the years 2013-2014, 2014-2015, 2015-2016, and;

WHEREAS, as a result of the dispute, Burlington City initiated a petition of appeal before the Commissioner of Education captioned City of Burlington Public School District Board of

Education v. Board of Education of Edgewater Park Township, under OAL Docket No. EDU 02970-2018 (the "Litigation"); and

WHEREAS, during the pendency of the Litigation, the Parties determined that there is also a dispute regarding the difference between the tentative tuition rate and the certified tuition rate for the years 2016-2017 and 2017-2018 (together with the Litigation hereinafter referred to as "Tuition Disputes"); and

WHEREAS, Edgewater Park and Burlington City desire to amicably resolve all presently known Tuition Disputes without further legal proceedings; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties agree as follows:

1. **Tuition Repayment Schedule.** Subject to the terms and conditions herein, Edgewater Park agrees to pay Burlington City as follows:

   A) By no later than June 30, 2019, Edgewater Park shall pay Burlington City $219,591.20.

   B) By no later than July 30, 2019, Edgewater Park shall pay Burlington City $219,591.20.

   C) By no later than June 30, 2020, Edgewater Park shall pay Burlington City twenty five percent (25%) of the tuition adjustment for the 2017-2018 school year. For purposes of this Agreement, "tuition adjustment" shall be defined as the difference between the total amount of tuition paid by Edgewater Park in a given school year based on the tentative tuition rate calculated by Burlington City, and the actual amount owed to Burlington

City for the same school year, based on the certified tuition rate as calculated by the Commissioner of Education.

D) By no later than June 30, 2021, Edgewater Park shall pay Burlington City $65,204.40, plus twenty five percent (25%) of the tuition adjustment for the 2017-2018 school year, plus the tuition adjustment, if any, for the 2018-2019 school year.

E) By no later than June 30, 2022, Edgewater Park shall pay Burlington City $65,204.40, plus twenty five percent (25%) of the tuition adjustment for the 2017-2018 school year, plus the tuition adjustment, if any, for the 2019-2020 school year.

F) By no later than June 30, 2023, Edgewater Park shall pay Burlington City $65,204.40, plus twenty five percent (25%) of the tuition adjustment for the 2017-2018 school year, plus the tuition adjustment, if any, for the 2020-2021 school year.

G) By no later than June 30, 2024, Edgewater Park shall pay Burlington City $65,204.40, plus the tuition adjustment, if any, for the 2021-2022 school year.

2. **Credit for Prior Years.** In the event that the tuition adjustment for the 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, or 2023-2024 school years result in an overpayment by Edgewater Park, Edgewater Park agrees not to seek reimbursement, or a credit, from Burlington City.

3. **Additional Consideration.** For the consideration contained herein, Burlington City and Edgewater Park agree to the following non-financial terms, which shall govern the send-receive relationship going forward:

A) Unless otherwise agreed to in writing, Burlington City shall establish its tentative tuition rate by using a calculation method provided for by law or regulation. If Burlington City fails to use a calculation method provided for by law, Edgewater Park shall only be obligated to pay 1.5% of the tuition adjustment for that year.

B) Edgewater Park shall provide Burlington City with its prospective enrollment numbers by the date provided for by law, which is presently December 15th. Edgewater Park acknowledges that the accuracy of its estimated enrollment numbers will ultimately impact the certified rate, and when the estimated enrollment is greater than the actual enrollment, causing the certified rate to be higher, as a result, this will not form the basis for limiting Edgewater Park's responsibility to pay the tuition adjustment, provided the tentative rate was calculated as set forth herein.

C) Burlington City shall provide Edgewater Park with its tentative tuition rate, and underlying calculation method, by the date provided for by law, which is presently February 4th. Edgewater Park shall review Burlington City's calculation method, and if Edgewater Park believes that the tentative tuition rate was not calculated using a method provided for by law or regulation, Edgewater Park shall notify Burlington City, in writing, of its objections by no later than ten (10) days prior to the deadline for submission of budgets

to the County Office. This provision shall not limit either Party's ability to later raise an objection, in good faith, based on information not available at the time the calculation was performed by Burlington City and/or reviewed by Edgewater Park

4. **Release of Claims.** In consideration of the conditions and terms above, the Parties agrees as follows:

a. Edgewater Park, on its own behalf and on behalf of its officers, directors, shareholders, stockholders, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, employees, predecessors, successors in interest, and assigns, hereby completely releases and forever discharges Burlington City, and all of its respective past, present and future board members, officers, directors, attorneys, agents, insureds, servants, representatives, employees, administrators, managers, and assigns, from any and all claims, demands, obligations, actions, causes of action, rights, damages, costs, attorneys' fees, loss of services, loss of earnings, expenses and compensation of any nature whatsoever, whether based on tort, contract (express, implied or otherwise) or any other theory of recovery, and whether for compensatory or punitive damages, arising out of the Tuition Disputes.

b. Burlington City, on its own behalf and on behalf of its officers, directors, shareholders, stockholders, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, employees, predecessors, successors in interest, and assigns, hereby completely releases and forever discharges Edgewater Park, and all of its respective past,

present and future board members, officers, directors, attorneys, agents, insureds, servants, representatives, employees, administrators, managers, and assigns, from any and all claims, demands, obligations, actions, causes of action, rights, damages, costs, attorneys' fees, loss of services, loss of earnings, expenses and compensation of any nature whatsoever, whether based on tort, contract (express, implied or otherwise) or any other theory of recovery, and whether for compensatory or punitive damages, arising out of the Tuition Disputes.

4. **Successors and Assigns**. This Agreement shall bind and inure to the benefit of each Party, its officers, directors, shareholders, stockholders, attorneys, agents, insureds, servants, representatives, employees, subsidiaries, affiliates, partners, executors, administrators, managers, employees, board members, predecessors, successors in interest, and assigns, separately and collectively. Without limitation, it is expressly understood that this Agreement shall not be impacted in the event Edgewater Park successfully severs the send-receive relationship with Burlington City, merges and/or consolidates with another District, and/or otherwise ceases to exist in its present configuration.

5. **Warranties**. The Parties acknowledge, represent, warrant, affirm and confirm the following:

a. Each Party has read and understands the effect and scope of this Agreement, has relied and is relying solely upon its own judgment, belief and knowledge and/or upon the advice of its independent legal counsel as to the nature, extent, effect and consequences relating thereto.

b. This Agreement is being made without reliance upon any statement or representation by any other party hereto, except those expressly set forth herein.

c. No promise, inducement or agreement not herein expressed has been made to any of the Parties hereto.

d. Each individual signing this Agreement on behalf of a Party has the right, power and authority to sign and enter into this agreement on behalf of that Party and is competent to sign and enter into this agreement on behalf of that Party.

e. The Parties each execute and deliver this Agreement as a free and voluntary act, without any duress, coercion or undue influence exerted by or on behalf of any other party.

f. This Agreement is a valid, binding and enforceable agreement and does not violate any law, rule or regulation, or any contract or agreement to which any individual or entity on whose behalf this Agreement is executed is a party.

6. **Interpretation of Agreement**. This Agreement shall not be construed against any party on the basis that it or its attorney drafted it.

7. **Entire Agreement / Amendment**. This Agreement constitutes the entire agreement between the Parties with respect to its subject matter and there are no representations, warranties or agreements between the Parties not expressed herein. This Agreement supersedes and replaces all prior understandings and agreements between the Parties hereto, whether written

or oral, express or implied, with respect to its subject matter. This Agreement may be amended or modified at any time or times only by written agreement of both Parties.

9. **Execution in Counterparts**. This Agreement may be executed simultaneously in several counterparts, each of which shall be deemed to be one and the same instrument.

10. **Facsimile/E-mail Signature**. Signature by facsimile or electronic mail transmission is acceptable and will be fully enforceable as an original document. Electronic facsimiles of signatures will have the same force and effect as original signatures.

11. **Forum Selection**. The Parties agree that all claims, disputes, and other matters arising out of or relating to this Agreement, or the breach thereof, will be decided by proceedings instituted and litigated in the Superior Court of the State of New Jersey, Burlington County Vicinage, or by Petition filed with the Commissioner of Education, as appropriate.

12. **Necessary Documents**. Prior to and at all times following the date of this Agreement, the Parties agree to execute and deliver, or to cause to be executed and delivered, such documents and to do, or cause to be done, such other acts and things as might reasonably be requested by the Parties, to assure that the benefits of this Agreement are realized by the Parties.

13. **Agreement Subject to Approval**. The Parties agree that this Agreement is contingent upon approval by both Edgewater Park and Burlington City.

14. **No Admission.** Both parties agree and acknowledge that this Agreement does not constitute an admission of any kind by either party.

[The remainder of this page is intentionally left blank]

THE UNDERSIGNED HAVE CAREFULLY READ THIS "SETTLMENT AGREEMENT AND RELEASE;" THEY HAVE READ, KNOW AND UNDERSTAND ITS CONTENTS; THEY FREELY AND VOLUNTARILY AGREE TO ABIDE BY ITS TERMS, AND ARE FULLY AUTHORIZED TO SO AGREE AND BE BOUND; AND THEY HAVE NOT BEEN COERCED INTO SIGNING THIS AGREEMENT.

CITY OF BURLINGTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION

By: _____
Jennifer Mentus, Board President

_____
Witness
Print or type name: Raymond Cexe, Board Secretary

BOARD OF EDUCATION OF EDGEWATER PARK TOWNSHIP

By: _____

_____
Witness
Print or type name:

141-19

OAL Dkt. No. EDU 00244-19
Agency Dkt. No. 298-12/18

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Susan Alswang, Freehold Regional High School District, Monmouth County.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/07/19
Date of Mailing: 6/07/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 244-19
AGENCY DKT. NO. 298-12/18

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF SUSAN ALSWANG, FREEHOLD REGIONAL HIGH BOARD OF EDUCATION, MONMOUTH COUNTY.

Mark G. Toscano, Esquire, for petitioner Freehold Regional Board of Education (Comegno Law Group, P.C., attorneys)

Jerry L. Tanenbaum, Esquire, for respondent Susan Alswang (Mattleman, Weinroth & Miller, P.C., attorneys)

Record Closed: May 2, 2019 Decided: May 7, 2019

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 4, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

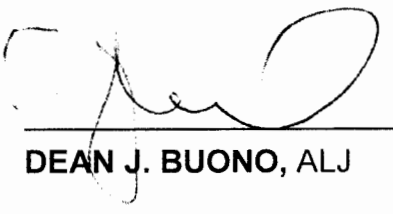
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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



May 7, 2019
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5.8.19

Date Mailed to Parties: 5.8.19

mph

RECEIVED
2019 MAY -2 P 12:03
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
T: (856) 234-4114
F: (856) 234-4262
Attorneys for Petitioner, Freehold Regional High School District Board of Education

BY: MARK G. TOSANCO, ESQUIRE
DANIEL F. THORNTON, ESQUIRE

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SUSAN ALSWANG, FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt.: EDU 00244-2019 Agency Ref.: 298-12/18

SETTLEMENT AGREEMENT AND GENERAL RELEASE

WHEREAS, the Freehold Regional High School District Board of Education ("Board"), previously requested that the Commissioner of Education issue an Order to Show Cause concerning an alleged failure by Susan Alswang ("Ms. Alswang") to provide proper notice of her separation from employment with the District.;

WHEREAS, on December 27, 2018, Ms. Alswang denies any and all wrongdoing;

WHEREAS, the Parties having a desire to settle the above matters in an amicable way, hereby agree in this Settlement Agreement and General Release ("Agreement") as follows:

1. In exchange for the mutual covenants set forth herein, the Board shall take whatever action is required to withdraw with prejudice its Request for an Order of Suspension of Ms. Alswang's New Jersey Standard Teaching Certificate.

2. Ms. Alswang agrees to provide a check made payable to the Board in the amount of $1,126.96, which is the equivalent of one week's net salary for Ms. Alswang during her employment with the Board.

3. Ms. Alswang, for and in consideration of the undertakings of the Board as set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or hereafter may have, known or unknown, or which her heirs, executors or administrators hereafter may have by reason of any actual or perceived disability, any actual or perceived discrimination, her entire employment relationship and/or the termination of her employment relationship and/or affiliation with the Board, including, but not limited to the following:

- All claims of discrimination, harassment and retaliation based upon age, race, color, religion, gender, sex, sexual orientation, handicap, disability, national origin or any other legally protected class, including claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 through 29 U.S.C. § 634, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, et seq., Executive Order 11246, as amended,, the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., the New Jersey Family Leave Act, N.J.S.A. 34:11B, et seq., COBRA, the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq. & 5 U.S.C. §6381, et seq., the National Labor Relations Act, as amended, The Equal Pay Act, as amended, the New Jersey Wage and Hour Law, as amended, the New Jersey Worker Health and Safety Act, as amended, as well as any other anti-retaliation provision of any statute or law, and any other applicable federal, state or local, constitutional or

statutory provision, order or regulation, arising from any event or act of omission or commission;

- All claims for breach of contract, whether express or implied, as well as all claims for wrongful discharge or termination;
- All tort claims, including claims for libel, slander, negligence, invasion of privacy, intentional or negligent infliction of emotional distress, fraud, interference with actual or prospective contractual rights or relations, and violation of public policy;
- All claims under any federal, state and municipal laws, regulations, ordinances or court decisions of any kind;
- All claims for wages and benefits (including bonuses, health and welfare benefits, vacation pay, sick pay and/or any other fringe benefits;
- All claims for any type of monetary damages, including back pay, front or prospective pay, compensatory damages, and punitive damages, except as otherwise provided in this Agreement;
- All claims for equitable relief, including injunctive relief and reinstatement; and
- All claims for attorneys' fees, litigation expenses and costs.

The sole exception to the waivers set forth above are as follows: claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., the Teachers' Pension and Annuity Fund Act, N.J.S.A. 18A:66-1 et seq., the indemnity provisions of N.J.S.A. 18A:16-6 and 6.1 with regard to civil and criminal actions, claims by third parties, as well as claims arising from any breach of this Agreement. The Board does not waive any rights that it may have to oppose indemnification pursuant to N.J.S.A. 18A:16-6 and 6.1.

4. Ms. Alswang confirms that no charge, complaint, action, or grievance is pending in any forum or form. Further, Ms. Alswang covenants and agrees not to bring any charge, complaint, action, suit, grievance or administrative proceeding in any forum whatsoever, including before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement or the date of Ms. Alswang's resignation; provided, however, it does not interfere with or limit either of the Parties protected right to file a charge

with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nothing contained herein shall in any manner be deemed a waiver or extension of any applicable statute of limitations, whether administrative or otherwise. Nonetheless, the Parties understand that, by signing this Agreement, they each waive any rights they may have to recover money or other relief in any lawsuit or proceeding they bring or that is brought on his behalf by any agency or third party against any of the Released Parties based on events arising out of Ms. Alswang's employment with the Board. Except where otherwise permitted under this paragraph, the Parties agree that any such action shall be dismissed with prejudice upon presentation of this Agreement. Nothing in this paragraph is intended to limit either of the Parties from instituting legal action for the sole purpose of enforcing this Agreement.

5. Each Party shall be responsible for their own attorneys' fees and expert costs incurred in connection with the matter presently pending in the Office of Administrative Law.

6. The Board and Ms. Alswang each hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning. The parties further expressly state that they are fully satisfied with the representation provided by their legal counsel

7. Both Parties agree and acknowledge that this Agreement does not constitute an admission of any kind by either party. The Parties also agree and acknowledge that this Agreement is subject to approval by the Board during its next regularly scheduled meeting

following the execution of this Agreement.

8. This Agreement contains the entire agreement between the Parties and is intended to resolve all disputes and issues between them as of the date of execution of this Agreement. It is understood between the Parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

9. The Parties mutually understand and agree that the terms of this Agreement are completely confidential. The Parties, including their representatives or agents, further agree that they shall not reveal to anyone, other than as may be mutually agreed upon in writing, any information, facts, or terms and conditions concerning this Agreement. This non-disclosure provision does not bar the following disclosures by Ms. Alswang: (1) disclosures to members of Ms. Alswang's immediate family; or (2) disclosures for purpose of obtaining legal, tax, accounting, or financial advice; or (3) disclosures which may be required by law; or (4) disclosures for the purpose of obtaining or maintaining publicly or privately funded benefits or insurance. This non-disclosure provision also does not bar the following: (1) disclosures pursuant to a lawful request under the Open Public Records Act; or (2) disclosures as may otherwise be compelled by law, regulation or Court Order. The Parties agree to inform those persons with whom they are permitted to share such information as to the confidentiality of this Agreement, and further agree to require such persons to hold information received by them about this Agreement as confidential pursuant to the terms herein. In the event that a party or parties is

alleged to have breached the confidentiality provision of this Agreement, then the other party or parties may commence appropriate legal action.

10. In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect

11. The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey. All disputes arising under or relating to this Agreement or the breach of this Agreement shall be brought exclusively in the State courts of the State of New Jersey.

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

13. By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved and consented to as to terms.

14. Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 et seq., Ms. Alswang acknowledges that she has been given the opportunity, if she so desires, to consider this Agreement for twenty-one (21) days before executing it. In the event that Ms. Alswang executes this Agreement within less than twenty-one (21) days of the date of its delivery to her, Ms. Alswang acknowledges that such decision was entirely voluntary and that she had the opportunity, if she had so desired, to consider this Agreement for the entire twenty-

one (21) day period. Ms. Alswang further acknowledges that for a period of seven (7) days from the date of her execution of this Agreement, she shall retain the right to revoke this Agreement by written notice to Mark G. Toscano, Esquire, Comegno Law Group, PC, 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Agreement shall not become effective or enforceable until the expiration of such revocation period.

Intending to be legally bound hereby, Mr. Birkhead and the Board execute the foregoing Agreement as indicated below.

WITNESS:

_____

Susan Alswang
SUSAN ALSWANG

DATED: 4/3/2019

WITNESS:

SEAN BOYCE
BOARD SECRETARY

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Carl Accetola
CARL ACCETOLA
BOARD PRESIDENT

DATED: 4-15-19

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT

Sean P. Boyce, CPA
Assistant Superintendent for
Business Administration/
Board Secretary

11 Pine Street
Englishtown, NJ 07726
(732) 792-7300 ext. 8519
Fax: (732) 446-5192

May 2, 2019

Comegno Law Group, PC
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Dear Mr. Toscano:

At a meeting of the Freehold Regional High School District Board of Education, the below listed motion was adopted and is referred to you for your information and/or action:

4. Personnel & Negotiations

Motion by A. Fankhauser, seconded by P. Bruno and carried by unanimous roll call vote to adopt the following resolution:

12. Approval of Settlement Agreement

BE IT RESOLVED, that upon recommendation of the Superintendent, the Freehold Regional High School District Board of Education, approves the Settlement Agreement on file with the Board Secretary with employee #12025 effective April 15, 2019.

I, Sean P. Boyce, Board Secretary of the Freehold Regional High School District Board of Education in the county of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing is a complete and correct copy of the original minutes of a meeting of the Board held on May 2, 2019.

SPB/CC
cc:
4/15/19 Agenda Folder

New Jersey Commissioner of Education

Final Decision

K.B., on behalf of minor children, L.P., K.P. and J.P.,

Petitioner,

v.

Board of Education of the Township of South Harrison, Gloucester County,

Respondent.

Synopsis

Petitioner filed a *pro se* residency appeal challenging the respondent Board's determination that her minor children are not eligible to receive a free public education in the South Harrison School District. The Board filed a motion to dismiss the petition as untimely.

The ALJ found, *inter alia*, that: petitioner's appeal was untimely filed; further, by petitioner's own admission, the children are not domiciled within the South Harrison School District as required under *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:22-3.1. The ALJ concluded that petitioner's claims against the respondent Board are without merit; accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred, *inter alia*, that the Board's motion to dismiss the petition for untimeliness is appropriately granted. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

June 18, 2019

146-19

OAL Dkt. No. EDU 00790-19
Agency Dkt. No. 308-12/18

New Jersey Commissioner of Education

Final Decision

K.B., on behalf of minor children, L.P., K.P. and J.P.,

Petitioner,

v.

Board of Education of the Township of South Harrison, Gloucester County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's Motion to Dismiss for untimeliness of the petition is appropriately granted. Moreover, even assuming, *arguendo*, that petitioner had timely filed her appeal, the Commissioner further concurs that petitioner has not sustained her burden of demonstrating that her children are domiciliaries of South Harrison so as to entitle them to a free public education in the District's schools.

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.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
PETITIONER'S APPEAL
OAL DKT. NO. EDU 00790-19
AGENCY DKT. NO. 308-12/18

K.B. ON BEHALF OF MINOR CHILDREN, L.P., K.P. AND J.P.,
Petitioner,
v.
SOUTH HARRISON BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

K.B., petitioner, pro se

Daniel F. Thornton, Esq. for respondent, South Harrison Board of Education (Comegno Law Group, P.C., attorneys)

Record Closed: April 1, 2019 Decided: May 10, 2019

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petition in this matter was filed on January 14, 2019. Petitioner K.B. is the mother of the minor children L.P., K.P. and J.P. who attended schools within the purview of the South Harrison Township Board of Education in November of 2018.

Respondent South Harrison Township Board of Education filed a Motion for Dismissal of the petition on January 7, 2019.

FACTUAL DISCUSSION

K.B. ("petitioner") filed this petition on behalf of her minor children L.P., K.P. and J.P., students who attended schools within the purview of the South Harrison Township Board of Education in November of 2018.

During prehearing conferences held with the parties, the petitioner admitted that her children stayed with their grandparents during the week due to the petitioner's work schedule. The children then attended school in the grandparents' school district, that being Mullica Hill. The children were residents of Piles Grove Township which is the address of the petitioner and is outside of the South Harrison School District.

Subsequent to the conference in this matter, counsel for the school board provided to the court a copy of a of an order entered by the Hon. John Tomasello, JSC on March 22, 2019. Judge Tomasello's order granting custody of the three children in question to their father who is a resident of Pennsylvania. The order further authorizes and grants the father's application to relocate the children to Pennsylvania. Petitioner did not respond to counsel's submission. Nor did petitioner appear for an in-person settlement conference scheduled for March 22, 2019. No explanation for non-appearance was received by the petitioner and the record closed on April 1, 2019. In the event that relocation of the children has not yet occurred, this Initial Decision granting respondent's Motion for Summary Decision (R-1) shall resolve this matter.

LEGAL DISCUSSION

Petitioner lists two causes of action for their motion. The first is that petitioner's filing is untimely under N.J.S.A. 18A:38-1(b)(2). The second that petitioner's children, by her own admission, do not reside in the district; thus a violation under N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1.

The date of the appeal evidences the untimely filing. The petitioner's own admission evidences the children are not residents and imaged municipality under the

South Harrison Board of Education jurisdiction. In light of this information I **FIND** that any claims petitioner might have against the South Harrison School Board that are subject to the jurisdiction of the Commissioner of Education are plainly time-barred by N.J.A.C. 6A:3-1.3(i) and I **CONCLUDE** therefore that they should be dismissed.

I further **FIND**, that the children of the petitioner are not residents of Mullica Hill Township and are therefore not residents entitled to educational benefits within the South Harrison School District and are therefore not under the jurisdiction of the South Harrison Board of Education.

Therefore, I **CONCLUDE** that all of petitioner's claims against the South Harrison Board of Education and should be **DISMISSED**.

CONCLUSION

The petition warrants dismissal on two counts:

1. Petitioner admits that the children are not residents of the district governed by the South Harrison Board of Education. She freely stated that the children reside with her parents (in Mullica Hill) during the week as a convenience to accommodate her work schedule – therefore they go to school in the South Harrison District. She also admits that she resides in Woodstown – not in an area under the jurisdiction of the South Harrison District and that is where her children reside; and

2. Petitioner failed to file an appeal within the appropriate time frame as detailed under R. 4:6-2(e) and N.J.A.C. 1:1.3(a).

The claim must be dismissed under the dictates of both.

For the reasons stated herein, I **FIND** that the petition filed by petitioner does not comply with the appropriate rules and administrative guidelines, nor are the children residents of the South Harrison District. Therefore, I **CONCLUDE** that petitioner's claims should be **DISMISSED**.

ORDER

Based upon all of the foregoing, it is hereby **ORDERED** that the petition in this matter be and hereby is **DISMISSED**.

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

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

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

May 10, 2019
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 5/10/19

Date Mailed to Parties: 5-13-19

/lam

LIST OF EXHIBITS

For petitioner:

None

For the respondent:

R-1 Motion for Dismissal

R-2 Letter, dated March 14, 2019

R-3 March 25, 2019 letter

147-19E

OAL Dkt. No. EDU 4272-19
Agency Dkt. No. 62-3/19

New Jersey Commissioner of Education

Order on Emergent Relief

Board of Education of the Borough of Butler, Morris County,

Petitioner,

v.

Board of Education of the Borough of Bloomingdale, Passaic County and Board of Education of the Township of Pequannock, Passaic County,

Respondents.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. During the emergent proceedings, the parties agreed to enter into a Consent Order pending a final decision on the underlying appeal. Pursuant to the Consent Order, the petitioner agreed to withdraw the application for emergent relief. Accordingly, the petitioner's application for emergent relief is deemed withdrawn. This matter shall continue at the Office of Administrative Law with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

149-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

June 19, 2019

Samuel Wenocur, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Lauren Jensen, DAG
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *In the Matter of the Certificates of Gail Wunsch, State Board of Examiners, Agency Dkt. No. 3-5/19A*

Dear Parties,

I have considered the papers filed in connection with the petitioner's request for interlocutory review of the State Board of Examiners' Order dated April 16, 2019 in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.[1]

Sincerely,

Dr. Lamont O. Repollet
Commissioner of Education

c: Honorable Leslie Z. Celentano, A.L.J.
Rani Singh, Acting Secretary, Board of Examiners

LOR/JKH/JS
Via Facsimile and Regular Mail

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

150-19A

State Board of Examiners Dkt. No. 1617-240
Agency Dkt. No. 1-1/19A

New Jersey Commissioner of Education

Decision

In the Matter of the Revocation of
the Certificates of John P. McCabe
by the State Board of Examiners.

Order of Revocation by the State Board of Examiners, December 21, 2018

For the Respondent-Appellant, Kevin Sisco, Esq.

For the Petitioner-Respondent, State Board of Examiners, Jennifer Hoff, Deputy Attorney General (Gubrir S Grewal, Attorney General of New Jersey)

Appellant filed an appeal with the Commissioner of Education on January 24, 2019, challenging the determination of the New Jersey State Board of Examiners (Board) that his actions warranted the revocation of his Teacher of Health and Physical Education Certificate of Eligibility with Advanced Standing and his Teacher of Health and Physical Education and Teacher of Driver Education certificates.

On February 13, 2019, the Office of Controversies and Disputes (Office) directed the appellant to file a brief in support of his appeal by March 5, 2019. The Office also set forth a briefing schedule for the Board's answer brief and appellant's reply brief, and instructed the Board to certify the record and submit it to the Commissioner, along with the statement of items comprising the record on appeal (SICRA).

Thereafter, by letter dated February 28, 2019, the Board requested a 10-day extension of time by which to certify the record and to file the SICRA, and also requested that the deadline for both parties' briefs be extended by ten days. The Office granted the extension, thereby extending the deadline for appellant's brief to March 15, 2019. The Board subsequently

filed the certification of the record and SICRA, but no brief in support of the appeal was filed by, or on behalf of, the appellant.

On April 11, 2019, the Office directed appellant – via certified mail, regular mail, and facsimile – to file a brief in support of the Notice of Appeal by April 22, 2019. The letter advised appellant that if his brief was not received by that date, the appeal would be dismissed for failure to perfect the appeal, pursuant to *N.J.A.C.* 6A:4-2.7(c). On April 22, 2019, counsel for appellant requested a 30-day extension of time to file his brief because he needed appellant to confirm whether he desired to proceed with the appeal. The Office granted the extension of time to May 22, 2019. To date, the appellant has not filed a brief in support of his appeal.

Pursuant to *N.J.A.C.* 6A:4-2.7(c), "[f]ailure to meet the filing deadline for an appeal brief or brief in support of a cross appeal may be viewed as a failure to perfect the appeal or cross appeal and may result in dismissal of the appeal or cross appeal." Appellant failed to file his appeal brief, which was originally due on March 5, 2019, despite receiving two extensions. As such, the Commissioner finds that appellant has failed to perfect the appeal.

Accordingly, the appeal is dismissed, and the decision of the State Board of Examiners revoking appellant's certificates is affirmed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

151-19

New Jersey Commissioner of Education

Final Decision

L.M., on behalf of minor children, J.M. and J.M.,

Petitioner,

v.

Board of Education of the Township of Allamuchy, Warren County,

Respondent.

Synopsis

This case involves a dispute over summer homework in reading and mathematics, assigned to all students in the Allamuchy School District for completion during the summer of 2018. Petitioner, the mother of minor children J.M. and J.M., challenged the respondent Board's Homework Policy 2330, and sought to remove summer homework grades from her older child's overall average. Petitioner contended that she sent several notifications to the school district stating that her children would not be participating in summer homework, and asserted that her children should not be "punished" for a parental decision that she made. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in dispute in this case, and the matter is ripe for summary decision; petitioner sought to have certain zeros removed from her older child's average, asserting that the Board does not have a written policy addressing summer homework and that the Board lacks authority to require students to complete any assignments outside of the 180-day school year; the Board interprets its homework policy to support its practice/policy of assigning grade-appropriate math and reading over the summer; the Board's policy is entitled to a presumption of correctness, and should not be disturbed unless the policy or its implementation, with respect to petitioner's children, is arbitrary, capricious or unreasonable; and the Board has a long-standing practice of assigning summer homework which is intended to reinforce the school learning experience and help students prepare for the coming school year. The ALJ concluded that the Board did not exceed the scope of its authority, nor has it violated any of its policies or any law, by supporting the assignment of summer homework; such practice/policy is not arbitrary, capricious or unreasonable; and the grades of zero that were given to J.M. when he failed to complete summer homework assignments did not reflect any arbitrary, discriminatory or unreasonable action taken by the Board. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision of the OAL was adopted as the final decision 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.

June 18, 2019

151-19

OAL Dkt. No. EDU 17944-18
Agency Dkt. No. 271-11/18

New Jersey Commissioner of Education

Final Decision

L.M., on behalf of minor children, J.M. and J.M.,

Petitioner,

v.

Board of Education of the Township of Allamuchy, Warren County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the Board's practice of assigning summer homework is not arbitrary, capricious, unreasonable, or contrary to law. The Commissioner further concurs that the Board did not act in an arbitrary, capricious, or unreasonable manner by implementing grading consequences for the failure to complete summer homework assignments.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons thoroughly expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 17944-18
AGENCY DKT. NO. 271-11/18

L.M. ON BEHALF OF J.M. AND J.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ALLAMUCHY, WARREN COUNTY,
Respondent.

L.M., petitioner, pro se

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

Record Closed: April 1, 2019 Decided: May 15, 2019

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or around November 14, 2018, L.M., parent of minor children J.M. and J.M., (petitioner) filed a Petition of Appeal with the Commissioner of Education seeking to remove certain grades from her minor child's average, and challenging the Allamuchy Board of Education's (Board or respondent) Homework Policy. The Bureau of

Controversies and Disputes transmitted the matter to the Office of Administrative Law as a contested case on December 5, 2018.

The Board filed a motion for summary decision, which was opposed by petitioner. After final submission on the motion was received, the record closed.

FACTUAL DISCUSSION

Based on the submissions presented, including a Joint Stipulation of Facts, I rely on the following **FINDINGS of FACT** in deciding this motion:

L.M. is the mother of two students who attend the Allamuchy Township Schools. During the 2017–2018 school year, J.M. was a sixth-grade student and J.M.'s younger sibling, J.M., was a third-grade student. They are currently in seventh and fourth grade, respectively.

Towards the end of the 2017–2018 academic year, students in the Allamuchy School District, including rising seventh-graders and rising fourth-graders, were assigned summer homework in the areas of reading and mathematics to be completed during the summer of 2018.

Petitioner's rising fourth-grade student, J.M., did not complete any of the summer homework assignments during the summer of 2018, and no academic consequences were imposed as a result of his non-completion of these assignments.

For students in the District who were rising seventh-graders during the summer of 2018, the summer reading homework consisted of an assignment to read two books and to complete a writing assignment for each book. The students were permitted to read two books of their choice, provided that the books were of an age-appropriate reading level and had not been made into a movie.

Rising seventh-grade students, including J.M., were required to complete a writing assignment relating to one book during the summer of 2018. This writing assignment

was due on the first day of school in September 2018 and was graded, with the grade factoring into each student's overall first marking period grade as a homework assignment. With respect to the second book, students were required to complete an in-school writing assignment on the first day of school in September 2018. This in-school writing assignment was graded, with the grade factoring into each student's overall first-marking-period grade as a homework assignment. Petitioner's seventh-grade child, J.M., completed the in-school writing assignment and received a grade of 100 percent. J.M. did not complete the writing assignment that was due on the first day of school in September 2018.

The summer mathematics homework for rising third- through eighth-grade students in the District consisted of a math practice assignment to be completed using an online computer program. Students were required to complete the math practice assignment to minimal mastery for their grade level, as indicated by a "SmartScore" of 70, for several types of math skills. J.M., petitioner's rising seventh-grader, did not complete the summer mathematics homework.

On June 21, 2018, petitioner sent an e-mail to Allamuchy superintendent of schools, Mr. Flynn, advising that her children "will not be participating in summer homework." This was the third e-mail petitioner had sent regarding the issue of summer homework that month.

As a consequence of J.M. not completing one of the two writing assignments over the summer and the mathematics summer homework, J.M. received a grade of "zero" for one homework-assignment grade in his seventh-grade literature class for the first marking period of the 2018–2019 school year, and a "zero" for one homework-assignment grade in his seventh-grade mathematics class for the marking period.

On October 17, 2018, petitioner sent an e-mail to a member of the Allamuchy Board of Education with a "Formal complaint," requesting a closed-session meeting before the Board at the suggestion of the executive county superintendent (ECS). In her e-mail, petitioner indicates that she had contacted the ECS concerning the "ongoing issue" regarding petitioner's decision to not have her children participate in summer work,

"as it is summer and it is [her] decision to make, not the Board's." This issue, petitioner asserts, had now affected her "honor roll son who received zeros for the summer assignments, which has now brought his average down to Bs." In her e-mail, petitioner also suggests that her children are being "punished" for something she decided to do, and which she believes is "well within [her] parental authority to do."

At all times relevant, Board Policy 2330 titled "Homework" was in effect. This Policy does not expressly reference "summer homework." The Board has maintained a long-standing practice of assigning and grading grade-appropriate summer homework.

On October 22, 2018, petitioner and her husband appeared before the Board, in closed executive session, for an informal hearing in response to the petitioner's complaint regarding the District's handling of the aforementioned homework assignments, and Policy 2330. Following the hearing, the Board issued a written decision and response to petitioner on October 30, 2018, addressing the statements petitioner had made during the hearing. In its letter to petitioner, the Board wrote, regarding Policy 2330, that "Homework is a means of reinforcing the learning experience of the school," and having students perform academic work during the summer reinforces the prior year's learning and helps students to prepare for the upcoming school year. Also, while the Policy does not expressly authorize "summer" homework, it also does not limit when and/or how homework can be assigned. The Board also explained that assigning students homework in the summer is not "punitive," but a benefit to student learning, and a student's failure to complete the work does not make the assignment punitive. Finally, the Board writes that there is no basis for petitioner's assertion that the Board has exceeded its authority by continuing its long-standing practice and policy of having students complete homework over the summer. The Board is not aware of any limitations imposed by law or policy that would restrict the Board in its use of work assigned over the summer to support student learning.

Following the receipt of the Board's written decision, petitioner sent a letter to the Board expressing her disagreement with the Board's decision and informing the Board that a complaint had been filed with the New Jersey Department of Education, Bureau of Controversies and Disputes. In her letter to the Board, petitioner first argues that the

policy referenced by the Board does not apply to summer work and that the Board is acting beyond its authority in assigning work over the summer. Second, petitioner asserts that respondent acted punitively in giving her son zeros for not completing the assignments when she, as a parent acting within her right, instructed the child not to complete the assignments. The Board, she asserts, acted contrary to its policy when it gave her child a "zero" for not completing an assignment that the Board had no right to assign. Third, petitioner again challenges the Board's authority to "dictate to our children what they can and can not do when school is not in session," and asserts that simply because the District has a long-standing practice and policy of assigning summer homework, it does not mean that the Board has not exceeded its authority.

Respondent's Motion for Summary Decision

Respondent asserts that the Board is entitled to summary decision because there are no material facts in dispute and petitioner has failed to show any action by the Board that should be overturned as arbitrary, capricious, or unreasonable.

Local boards of education are vested with broad authority and discretion to develop and adopt educational policies and practices as they deem appropriate, based upon the unique needs and characteristics of the students, parents, and members of the community who are served by the district. Unless the decision made by the board of education clearly violates the law or was arbitrary, capricious, or unreasonable, the board's discretionary actions are entitled to deference and a presumption of validity. Here, the Board properly determined to exercise its educational decision-making authority by adopting a general policy governing the ability to assign homework to students, which describes the pedagogical rationales for and purposes of homework, and does not prohibit or limit any teaching staff members from assigning homework in the areas of reading and mathematics over the summer. In compliance with Policy 2330, the Board has determined that assigning homework during the summer months is appropriate to serve the academic needs of the students in the District, reinforce their learning during the summer breaks, and sufficiently prepare them to transition back into their regular educational programing each September.

There is nothing "punitive" about the Board's policy and practice with regard to assigning summer homework. The Board did not act arbitrarily, capriciously, or unreasonably in upholding and adhering to its long-standing policy and practice of assigning summer homework to its students, and in grading the summer homework assignments for seventh-grade students.

N.J.S.A. 18A:11-1(d) provides that boards of education shall "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." When a local board acts within its legal authority, its actions carry a presumption of validity and will not be disturbed, absent an affirmative showing that its judgment was arbitrary, capricious, or unreasonable. Moreover, academic grading policies and systems that may be adopted and implemented by a board of education or the school district are merely required to be reasonable and non-discriminatory. Academic issues relating to students' grades and how they are determined or calculated fall well within the board's educational decision-making authority. Here, the Board's general policy concerning homework, Policy 2330, does not preclude assigning academic work to students during the summer months, nor does it restrict or limit the District in assigning any type of homework deemed necessary, reasonable, and appropriate to adhere to the policy's goals and purposes. The Policy itself, as well as the Board's interpretation and application of the Policy, is entitled to a presumption of validity and should not be disturbed since neither the Policy nor its implementation by the Board with respect to J.M. and J.M. was arbitrary, capricious, or unreasonable.

Pursuant to New Jersey law, the Board is permitted to determine, as an exercise of its discretionary authority, that the educational needs of the students in the District are properly served by assigning summer reading and math homework, and grading that homework during the first marking period of the school year for seventh-graders. The Board's actions in assigning and grading summer homework are based upon legitimate and reasonable educational-policy rationales and the academic needs of the District's students, including: (1) the need for reinforcement of the material each student has learned during the prior school year; (2) the need for adequately preparing students to transition back into the regular educational program each September, following the

extended summer break; and (3) the differences in academic standards, demands, and expectations for students entering seventh grade as opposed to those entering fourth grade.

Petitioner's Response to the Motion for Summary Decision

Petitioner opposes the motion for summary decision by asserting that there are material facts in dispute.

Petitioner argues that Policy 2330 does not mention "summer" or "summer homework," and therefore does not apply to homework assigned outside the 180-day academic year. Policy 2330 mentions homework as it relates to a "marking period" or "school days," and therefore only applies to homework given during the school year. Petitioner asserts that the Board does not have authority over her children outside the 180-day school year, and the Board cannot unilaterally impose its authority when school is not in session. Simply because the Board claims that it has a long-standing practice of assigning summer work does not mean that it has not exceeded its authority.

Petitioner challenges statements made by superintendent Joseph Flynn in his certification, and specifically his statements regarding the Board's policy and practice of assigning summer work and the different academic demands and standards that apply to middle-school versus elementary-school students. Petitioner argues that there is no written policy to support what he asserts, including no written policy addressing the consequences of not completing summer homework by seventh-graders versus fourth-graders. She argues that her seventh-grader received zeros for partially completing summer homework, while her fourth-grade child suffered no consequence, and this inconsistency is arbitrary since Flynn's explanation for treating these students differently cannot be verified. Petitioner also claims that the Board is acting arbitrarily by not giving petitioner the option to opt out of summer homework assignments while parents of children with individualized education program (IEPs) are able to opt out of an extended school year program.

Finally, petitioner asserts that neighboring districts do not have mandatory summer-homework policies, and that the Board has ignored evidence to support that summer homework does not carry the benefits that it claims. According to petitioner, the Board is choosing to punish J.M. for doing what petitioner instructed him to do, as she felt it was best for their family.

Respondent's Reply to Petitioner's Opposition

In response to petitioner's opposition to the motion for summary decision, respondent points out that petitioner failed to cite any statute, regulation, or caselaw in support of her argument that the Board has no authority to require students to complete graded homework over the summer. Also, nothing in the Policy negates the Board's right to exercise its discretionary authority to determine that the educational needs of the District's students are properly served by assigning summer homework. Consistent with the Policy's statement that homework is intended to extend learning beyond the limited hours of school attendance, and support lessons learned in the curriculum, the Board's stated rationales for its practice of assigning summer homework include reinforcement of the prior year's learning and helping students to prepare for the upcoming school year. The Policy states that "homework is a means of reinforcing the learning experience of the school," and requires the assessment and evaluation of homework in order to "underscore the value of homework as an evaluation tool." The Policy does not limit such assessment and evaluation to homework completed during non-summer months.

Respondent stresses that a local board of education's authority is limited by its obligation to refrain from arbitrary, capricious, or unreasonable decision making, and that petitioner's efforts to show arbitrary, capricious, or unreasonable action by the Board are meritless and should be rejected.

Petitioner's disagreement with the District's approach to grading summer homework assignments of seventh vis-à-vis fourth-graders does not make it arbitrary, capricious, or unreasonable and does not warrant judicial intervention. Also, the absence of any formal or written Board policy or regulation specifying that students may be subject to different grading consequences for not completing homework does not constitute

arbitrary, capricious, or unreasonable action by the Board. Fourth-graders and seventh-graders are not similarly situated with respect to their education, and implementing different academic standards for these students is not inappropriate. With respect to grading, respondent cites to several cases to support its position that it is the prerogative of a local board of education, which need not be formally codified in any written policy, that an academic grading system and its implementation is the prerogative of a local board of education. The Board is not required by law to enact a formal written policy describing its grading system or to explicitly authorize the assignment of summer homework.

In response to petitioner's claim that the District is arbitrarily picking and choosing who is required to complete summer work because some students with IEPs are not required to do summer work, respondent explains that the mere fact that an IEP team may determine that a student will not participate in a summer program that may be offered, or that a student with an IEP should have modified homework requirements, does not constitute an arbitrary, capricious, or unreasonable Board action.

Finally, respondent cites to J.L. & J.E.H. ex rel T.H.L. v. Hopewell Valley, EDU 2658-99, Initial Decision (September 2, 1999), aff'd, Comm'r (October 8, 1999), aff'd, State Bd. (February 2, 2000), http://njlaw.rutgers.edu/collections/oal/, to support its argument that a grade of "zero" for non-compliance of homework is purely an academic consequence and does not constitute discipline or punitive action.

Petitioner's Sur-reply

Petitioner submitted a sur-reply which was considered over the Board's objection. In the sur-reply, petitioner repeats her position that there is no written policy governing summer homework, and that the Board lacks authority to "mandate what children must do when school is not in session." Petitioner states that the Board is engaging in unreasonable decision-making with its refusal to accept that its authority does not exist when school is not in session, and its refusal to accept the limitation on its authority, and that results in arbitrary, capricious, and unreasonable decision making.

LEGAL DISCUSSION AND CONCLUSIONS

The Summary Decision Standard

As the moving party, respondent Board carries the burden of proof to demonstrate, by a preponderance of the credible evidence, that summary decision should be entered in favor of respondent. Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). To survive a summary decision motion, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary judgment/decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

The pivotal issues in this matter are whether the Board or its agents were authorized to assign and grade summer homework, and whether the grades given to J.M. when he did not complete two summer homework assignments should be removed.

In petitioner's opposition to the Board's motion for summary decision, she argues that there are material issues of fact in dispute. She asserts that these include, for example, statements allegedly made by the superintendent to petitioner in a June 2018 e-mail concerning homework and summer work, and whether Policy 2330 applies to summer homework. In carefully considering the issues of fact raised by petitioner, I am not convinced that any of the factual issues raised are material to the disposition of this matter and must be determined at an evidentiary proceeding. Based on my consideration of the facts as presented in the Joint Stipulation, and the parties' submissions, I **CONCLUDE** that there is no genuine issue as to any material fact and the matter is ripe for summary decision.

Authority of the Board to Require Summer Homework

Petitioner seeks to have certain zeros removed from her minor child's average because, she asserts, the Board does not have a written policy addressing summer

homework and the Board lacks the authority to require her children to complete any assignments outside the 180-day school year.

To support her position, petitioner argues that Policy 2330, on "Homework," does not refer to "summer homework," and therefore does not apply to the assignment of summer work in the District. Petitioner is correct, and respondent does not dispute, that Policy 2330 does not expressly refer to "summer homework." However, it also does not preclude the assignment of summer work. In fact, there is no law in New Jersey that expressly precludes a board, or its agents, from assigning summer work.

The Board interprets Policy 2330 to support its practice/policy of assigning grade-appropriate reading and math homework over the summer. Policy 2330, as well as the Board's interpretation and application of the Policy to include summer homework, is entitled to a presumption of validity. Boards of education have wide policymaking discretion and their decisions may not be disturbed unless there is an affirmative showing that the decision was arbitrary, capricious, or unreasonable. Thomas v. Morris Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The management prerogative of boards of education cannot be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis. G.M. v. Roselle Park Borough Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109 (citing Paddock v. Bd. of Educ. of Demarest, 1974 S.L.D. 435).

Even assuming arguendo that Policy 2330 does not apply to summer homework, the absence of a written policy explicitly addressing summer homework does not preclude the Board or its agents from maintaining a practice (or unwritten policy) supporting the assignment of grade-appropriate summer work. This practice/policy should not be disturbed unless the policy or its implementation with respect to J.M. or J.M. is arbitrary, capricious, or unreasonable. Here, it is undisputed that the Board has maintained a long-standing practice supporting the assignment of summer homework in the District. The Board asserts that this practice/policy is a means of reinforcing the learning experience of the school and helps students to prepare for the upcoming school year. While petitioner may not agree with the Board's position, there is clearly a nexus between the assigning

of grade-appropriate summer homework and the Board's stated purpose for assigning this work. While petitioner argues that the Board's authority does not extend beyond the school year, there is no legal authority that restricts its authority in this fashion. Rather, boards are restricted generally by their obligation to refrain from actions or decisions that are arbitrary, capricious, or unreasonable.

Petitioner fails to make a viable argument that the Board's practice or policy (even if unwritten) supporting the assignment of summer homework is in any way arbitrary, capricious, or unreasonable. Petitioner's argument that the Board violated its own policy by assigning summer homework is also entirely without merit. Simply because petitioner does not agree with the assigning of summer homework, and some neighboring districts may not require summer homework, does not make the Board's practice/policy arbitrary or unreasonable.

I **CONCLUDE**, therefore, that neither the Board nor its agents here have exceeded the scope of their legal authority by adopting and maintaining a practice/policy of assigning summer homework, nor has the Board violated any of its policies, or any law, by supporting the assignment of summer homework. I also **CONCLUDE** that the Board's general practice/policy supporting the assigning and grading of summer homework is not arbitrary, capricious, or unreasonable.

J.M.'s Grades

The Board's written decision references its expectation that all students complete their assigned work in a timely manner, and that consequences result if a student fails to complete the assigned work. There is no evidence, and petitioner does not assert, that her children were treated any differently from other similarly situated students. Petitioner's seventh-grader received zeros for not completing two summer assignments while her fourth-grader was not graded on his summer homework assignment. It is, however, a valid and reasonable exercise of the Board's authority to maintain different grading practices for middle- and elementary-school students. It is well settled that "[t]he grading system is the prerogative of local school boards and need not be formally codified, although it must be reasonable and nondiscriminating." M.M. v. Demers, et al., 92

N.J.A.R. 2d (EDU) 525, 526 (citing Dooner v. Bd. of Educ. of Toms River, 1976 S.L.D. 619; Tarlarsky v. Edison Twp. Bd. of Educ., 1977 S.L.D. 862). There is nothing in petitioner's moving papers or the record in general to suggest that the two zeros given to petitioner's older child for failing to complete the summer homework were in any way "punitive" or discriminatory. There is nothing in the record to suggest that the grades given to J.M. were anything other than a consequence of his failure to complete the work assigned to the students in his grade.

There is also no requirement that the Board maintain a formal or written policy addressing how these assignments are graded, and there is no indication that the grading practices for summer homework here constitute a violation of any rule, policy, law, or that they are in any way unreasonable or discriminatory.

Petitioner argues that the Board/administration is acting in an arbitrary manner because it did not give her the option of having her children opt out of summer homework without any consequences, while the parents of children with IEPs have the option not to participate in the extended-year program without consequence. Petitioner's strained comparison of the Board's handling of this matter with accommodation provided to students with special needs in the District is entirely misguided, meritless, and does not support her argument that the Board acted in an arbitrary, capricious, or unreasonable manner.

For the reasons set forth above, I **CONCLUDE** that petitioner has identified no basis upon which this tribunal could conclude that the Board acted in an arbitrary, capricious, or unreasonable manner with regard to the grading consequences imposed upon J.M. and/or J.M. I also **CONCLUDE** that the grades of "zero" given to J.M. when he failed to complete the summer homework assignments did not reflect any arbitrary, discriminatory, or unreasonable action taken by the Board or its agents.

Even when considering all of the facts presented in the light most favorable to the petitioner, petitioner cannot demonstrate that the Board's actions should be reversed as arbitrary, capricious, or unreasonable. The Board was acting within its legal authority when it adopted its practice/policy of supporting the assigning and grading of summer

homework, and the Board's assigning and grading of summer homework is based upon legitimate and reasonable educational-policy rationales. Absent any showing that the Board's judgment was arbitrary, capricious, or unreasonable, the Board's action is presumed to be valid and will not be disturbed. Nothing in the petition or petitioner's opposition to the motion for summary decision can support overturning the Board's action here as arbitrary, capricious, or unreasonable. Therefore, the Board's action must stand. Based on the foregoing, I **CONCLUDE** that the respondent's motion for summary decision should be **GRANTED**.

ORDER

It is **ORDERED** that the motion for summary decision filed by the respondent, the Allamuchy Township Board of Education, is **GRANTED** for the reasons stated herein.

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

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

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

May 15, 2019
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: May 16, 2019

Date Mailed to Parties:

jb

152-19SEC

New Jersey Commissioner of Education

Final Decision

Anthony M. Fleres,

Complainant,

v.

Yu Taylor Zhong, West Windsor-Plainsboro Board of Education, Mercer County,

Respondent.

Synopsis

Petitioner, a member of the Board of Education of the West Windsor-Plainsboro Board of Education, alleged that respondent, a fellow Board member, violated *N.J.S.A.* 18A:12-24.1(g) of the School Ethics Act when he forwarded a message to members of his immediate family about an incident involving a student that resulted in discipline. The matter was heard in the Office of Administrative Law in December 2018, and the ALJ issued an Initial Decision concluding that the respondent's actions violated the confidentiality provision of *N.J.S.A.* 18A:12-24.1(g), and that a penalty of reprimand was warranted. The School Ethics Commission (SEC) adopted the findings of fact and conclusions of the ALJ, but rejected the ALJ's penalty recommendation, determining instead that censure is the appropriate penalty in this case.

Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondent shall be censured as a school official found to have violated the School Ethics Act.

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

June 18, 2019

152-19SEC

Agency Dkt. No. 105-5/19
SEC Dkt. No. C17-18

New Jersey Commissioner of Education

Final Decision

Anthony M. Fleres,

Complainant,

v.

Yu Taylor Zhong, West Windsor-Plainsboro Board of Education, Mercer County,

Respondent.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-24.1(g) when he forwarded a message to members of his immediate family about an incident involving a student that resulted in discipline (which was subsequently shared by a family member with countless others), and recommended a penalty of censure. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the SEC. Accordingly, the respondent shall be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

153-19SEC

New Jersey Commissioner of Education

Final Decision

In the Matter of Israel Varela and Kenneth Puccio, Perth Amboy Board of Education, Middlesex County.

Synopsis

The School Ethics Commission (Commission) found that respondent Israel Varela – a member of the Perth Amboy Board of Education (Board) – violated several provisions of *N.J.S.A.* 18A:12-24.1, the Code of Ethics for School Board Members (Code), when he failed on multiple occasions to comply with the procedures detailed in the school district's Visitor Policy, thereby persistently ignoring mandated school security practices. Additionally, the Commission found that Mr. Varela also violated several provisions of the Code when – in regard to improper meetings with Hector Muniz, a school secretary – he became involved in the day-to-day functions and responsibilities of school personnel, conducted a private and unauthorized investigation, made promises to employees, and sought to obtain information in a private setting with the purpose of undermining school personnel. As Mr. Varela is no longer a member of the Board, the Commission recommended a penalty of censure in this matter.

Upon review, the Commissioner preliminarily found that the consolidated matter concerning Kenneth Puccio has been appealed, and will therefore be the subject of a separate decision to be issued under Agency Docket No. 4/4-19A at a later date. In regard to the matter concerning Israel Varela, the Commissioner concurred that censure is the appropriate penalty for the violation found. Accordingly, the Commissioner directed that respondent 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 18, 2019

153-19SEC

SEC Dkt Nos. C17-12, C18-12, and C21-12 (Consolidated)
OAL Dkt. Nos. EEC 13642-12, EEC 13643-12, and EEC 13644-12
Agency Dkt. No. 106-5/19

New Jersey Commissioner of Education

Final Decision

In the Matter of Israel Varela and Kenneth Puccio, Perth Amboy Board of Education, Middlesex County.

The Commissioner has reviewed the record of this matter and the May 2, 2019 decision of the School Ethics Commission (Commission). The Commission found that respondent Israel Varela, a member of the Perth Amboy Board of Education, violated the following provisions of the Code of Ethics for School Board Members: *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(i) in connection with violations of the district's visitor policy; and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in connection with improper interference relating to meetings with Hector Muniz.[1] The Commission recommended a penalty of censure for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent Israel Varela has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

[1] The Commission's May 2, 2019 decision also contains findings of fact and legal conclusions regarding Respondent Kenneth Puccio, whose matter was consolidated with Mr. Varela's due to the similarity of the legal issues and evidence. Mr. Puccio has appealed the Commission's decision pursuant to *N.J.A.C.* 6A:4-1 *et seq.*; therefore, this decision only pertains to respondent Israel Varela (SEC Docket Nos. C17-12 and C18-12; OAL Docket. Nos. EEC 13462-12 and EEC 13463-12). The Commissioner will issue a separate decision regarding Mr. Puccio's appeal under Agency Docket No. 4/5-19A.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to comply with the district's visitor policy and for his improper interference in the day to day functions of school personnel.

Accordingly, respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

Before the School Ethics Commission
OAL Docket No.: EEC-13642-12, EEC-13643-12, and EEC-13644-12
SEC Docket No.: C17-12, C18-12, and C21-12
(Consolidated)

Final Decision

In the Matter of Israel Varela and Kenneth Puccio,
Perth Amboy Board of Education,
Middlesex County

I. Procedural History

This consolidated matter arises from three (3) separate but related Complaints filed with the School Ethics Commission (Commission). On April 24, 2012, Janine Walker Caffrey, then Superintendent of the Perth Amboy School District (District) filed a Complaint against Israel Varela, a member of the Perth Amboy Board of Education (Board), and alleged violations of *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), *N.J.S.A.* 18A:12-24.1(h), and *N.J.S.A.* 18A:12-24.1(i). At its meeting on September 25, 2012, the Commission adopted a decision finding probable cause to credit the allegations that Respondent Varela violated *N.J.S.A.* 18A:12-24(b) (in Count 1 and Count 2), and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(h) (in Count 1). The Commission dismissed all other allegations and voted, pursuant to *N.J.A.C.* 6A:28-10.7(c)(2), to transmit the matter docketed as **C17-12** to the Office of Administrative Law (OAL) on or about September 28, 2012.

On April 25, 2012, Alvaro Cores, then Principal of the Dr. Herbert N. Richardson Elementary School (Richardson School) in the District, also filed a Complaint against Israel Varela, and alleged violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), *N.J.S.A.* 18A:12-24.1(g), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j). At its meeting on September 25, 2012, the Commission adopted a decision finding probable cause to credit the allegations that Respondent Varela violated *N.J.S.A.* 18A:12-24(b) (in Count 3); *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) (in Count 1, Count 2, and Count 4); and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i) (in Count 3). The Commission dismissed all other allegations and voted, pursuant to *N.J.A.C.* 6A:28-10.7(c)(2), to transmit the matter docketed as **C18-12** to the OAL on or about September 28, 2012.

On May 24, 2012, Dr. Caffrey filed a Complaint against Kenneth Puccio, a member of the Board, and alleged violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24(g), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), and *N.J.S.A.* 18A:12-24.1(i). At its meeting on September 25, 2012, the Commission adopted a decision finding probable cause to credit the allegations that Respondent Puccio violated *N.J.S.A.*

18A:12-24(c) (in Count 1); *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) (in Count 1); and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i) (in Count 2). The Commission dismissed all other allegations and voted, pursuant to *N.J.A.C.* 6A:28-10.7(c)(2), to transmit the matter docketed as **C21-12** to the OAL on or about September 28, 2012.

At the OAL, the matters were consolidated, and hearings were conducted by Michael Antoniewicz, Administrative Law Judge (ALJ Antoniewicz), on August 7, 2015, August 14, 2015, September 11, 2015, November 12, 2015, April 30, 2016, September 1, 2017, April 6, 2018, and May 22, 2018. Following the completion of the hearings, but prior to the filing of briefs, ALJ Antoniewicz was appointed to the Superior Court. In accordance with *N.J.A.C.* 1:1-14.13, the matters were transferred to Jeff S. Masin, Administrative Law Judge (ALJ Masin) retired on recall, on October 30, 2018. After ALJ Masin was afforded time to review the transcript of the proceedings (with consent of the parties), the parties filed briefs and the record closed on December 27, 2018. ALJ Masin requested an extension to file his Initial Decision with the Commission, and same was granted until February 22, 2019.

On February 19, 2019, ALJ Masin issued his Initial Decision. After review of the record, ALJ Masin concluded that Respondent Varela violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(i) in connection with the visitor policy; Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in relation to the meetings with Hector Muniz; and Respondent Puccio violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he attended a meeting of the local American Federation of Teachers (AFT). Based on his findings of fact and legal conclusions, ALJ Masin recommended that Respondent Varela be censured, and that Respondent Puccio be suspended for sixty days or, in lieu of suspension (or of some portion thereof), Respondent Puccio be replaced as Board president by another member chosen by the county superintendent.

The Commission acknowledged receipt of ALJ Masin's Initial Decision on February 19, 2019; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was April 5, 2019. Prior to April 5, 2019, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until May 20, 2019. Respondents filed Exceptions in correspondence dated March 5, 2019, and Complainant filed Exceptions in correspondence dated March 6, 2019.

The Commission considered the full record in this matter, including the Exceptions filed by the parties, at its meeting on March 26, 2019. At a special meeting on May 2, 2019, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Masin's findings of fact; adopt the legal conclusion that Respondent Varela violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(i) in connection with the visitor policy; to adopt the legal conclusion that Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in relation to the meetings with Mr. Muniz; and to adopt the legal conclusion that Respondent Puccio violated *N.J.S.A.* 18A:12-

24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he attended a meeting of the local AFT. The Commission also voted to adopt the recommended penalty of censure for Respondent Varela, but voted to modify the recommended penalty of suspension for sixty (60) days for Respondent Puccio to suspension for one (1) year. Finally, the Commission voted to reject ALJ Masin's recommendation that, in lieu of suspension, Respondent Puccio should be removed as Board President.

II. Initial Decision

In his Initial Decision, ALJ Masin summarized the pertinent witness testimony, issued factual findings, and rendered legal conclusions as to the alleged conduct of both Respondent Varela and Respondent Puccio.

Respondent Varela

As to the "**Alleged Violations of the Visitor Policy**," ALJ Masin noted that Mr. Cores (the Complainant in C18-12), served as the Principal of the Richardson School from September 2011 to July 2012. *Initial Decision* at 5. Mr. Cores' employment contract was not renewed by the Board after July 2012 despite Dr. Caffrey's positive evaluation of his performance, and her recommendation that he be renewed. *Id.* Among the teaching staff at the Richardson School was Anna Varela, the spouse of Respondent Varela. *Id.* Respondent Varela operated an auto body shop located near the Richardson School, and entered the Richardson School regularly. *Id.* The District and the Richardson School each had policies/procedures regarding visitors to the school. *Id.* The District Policy was issued January 12, 2006, and the definition of "visitor" includes "members of the Board." *Id.* The District Policy requires that any "visitor" register in the school office, provides that a logbook be maintained, requires each visitor to enter his/her name and to detail the purpose of his/her visit. *Id.* The District Policy requires every "visitor" to be given an identification tag or badge, to be escorted to his/her destination (with limited exception), and to return to the school office before leaving the building. *Id.*

In September 2011, the Richardson School issued "School Visitor Procedures" (Procedures) at the request of Dr. Caffrey. *Initial Decision* at 5-6. The Procedures reflected the District's definition of "visitor," and included Board members. *Id.* at 6. The Procedures required that visitors enter the Richardson School by the main entry doorway, and specified that "Board members must have prior superintendent approval." *Id.* The Procedures further detailed that visitors were to be greeted by the security officer or a secretary, were to be instructed to sign in at the main office in visitor's logbook, were to note the purpose of the visit, and were to be provided with an identification tag and escorted in the building. *Id.* When the visit was complete, the visitor was to be escorted back to the main office, where he/she was to record their time out of the building. *Id.* As Principal of the Richardson School, and as reflected in his job description, one of Mr. Cores' primary job responsibilities and obligations was to safeguard the health and welfare of children and staff. *Initial Decision* at 6.

During his testimony, Respondent Varela readily admitted that he would come to the Richardson School to bring lunch to his spouse, and would also exchange keys with staff members whose cars he was repairing at his shop. *Initial Decision* at 6. Between October 2011

and April 2012, Mr. Cores compiled data showing fifteen (15) dates when Respondent Varela did sign in at the main office, and that on seven (7) of these occasions, he did not sign out as required. *Id.* at 6-7.

By its specific wording, the District's Policy, issued long before Dr. Caffrey became the Superintendent and Mr. Cores became the Principal of the Richardson School, applied to Board members visiting the school. *Initial Decision* at 14. The Procedures, which were issued while Dr. Caffrey was the Superintendent and Mr. Cores the Principal of the Richardson School, also clearly applied to "members of the Board." *Id.* Therefore, ALJ Masin found that Respondent Varela was certainly on notice that the written policies and procedures of the District and the school stated, unequivocally, that as a Board member he had the obligation when visiting the school to sign in, note the purpose of the visit, be escorted, and sign out when leaving. *Id.* Testimony from Mr. Cores, the security officer, and Respondent Varela's previous admissions and testimony demonstrate that he did not comply "with the policy *every time* he came to the Richardson School." *Id.* at 14-15 (emphasis added). ALJ Masin found that Respondent Varela came to the Richardson School for different reasons – as a husband (to visit his spouse), as a business man (to obtain or return keys to clients – i.e., District personnel), and as a Board member (to inspect conditions). *Id.* at 15.

While ALJ Masin noted that Respondent Varela's visits on some occasions were for benign reasons and presented no actual security concern, as a Board member, Respondent Varela had no right to ignore mandated security procedures. *Initial Decision* at 15. As stated by ALJ Masin, "it must not be overlooked that especially in this era, the need for compliance with such procedures is vital," and knowing "who is in the school, when and for what purpose is an altogether legitimate and substantial concern for those charged with protecting the health and safety of students entrusted to their care." *Id.* In addition, and regardless of past practice, ALJ Masin found that the credible evidence is that once Dr. Caffrey and Mr. Cores were in charge, they sought to have visitors, including Respondent Varela, comply with the visitor policies and procedures. *Id.* Nonetheless, multiple attempts, conversations, and instructions failed to obtain complete compliance from Respondent Varela. *Id.*

Based on the foregoing facts, namely Respondent Varela's repeated failure to comply with the visitor policies and procedures on multiple occasions despite multiple requests that he do so, ALJ Masin concluded that Respondent Varela violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(i) because he failed to support the school's personnel in their important task of assuring that, through the use and enforcement of written policy and procedure, they had a complete handle on what was going on in the building, who was there, when, and why. *Initial Decision* at 16. ALJ Masin further concluded that, by undermining the authority of the school's personnel charged with the day-to-day task of managing the building to assure its safety and orderly conduct, Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d). *Id.* However, ALJ Masin dismissed the alleged violation of *N.J.S.A.* 18A:12-24.1(e) because "there is no evidence that appears to support this charge in relation to the visitor policy." *Id.*

Regarding his "**Alleged Interference in the Hiring Process**," ALJ Masin noted that, in the fall of 2011, there was an opening for "a couple of bus driver positions." *Initial Decision* at 18. Two of the applicants were Eddie Suriel and Beverly Williams. *Id.* After going through the

process, Dr. Caffrey recommended that Ms. Williams be hired. *Id.* When Mr. Suriel learned that he had not been hired, he spoke with Dr. Caffrey to express his unhappiness with not being recommended for the position. *Id.* According to Dr. Caffrey, Mr. Suriel stated, "I know how this works. I'll get a Board member to tell you to hire me." *Id.*

Although the Board was scheduled to vote on the appointment of Ms. Williams at a Board meeting in December 2011, Respondent Varela and another former Board member (Samuel Lebreault (Lebreault)) expressed concerns about the appointment and indicated that they did not feel Ms. Williams was the best candidate. *Initial Decision* at 18-19. Despite Dr. Caffrey's insistence that Ms. Williams was the best candidate, the recommendation to appoint her (Ms. Williams) was tabled on a motion made by Respondent Varela, and seconded by Respondent Puccio. *Id.* at 19. Ultimately, Ms. Williams was hired at a Board meeting in early 2012, and Mr. Suriel was also hired in the spring or summer of 2012. *Id.*

The allegation is that Respondent Varela voted to table the appointment of Ms. Williams "specifically" to favor another candidate, namely Mr. Suriel. *Initial Decision* at 20. However, based on the facts, ALJ Masin found that the record does not support a finding that Respondent Varela's conduct regarding the vote to table the recommended hiring of Ms. Williams violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24.1(h). *Id.* at 20-22. In reaching this decision, ALJ Masin noted that there "is no inherent problem with a board member questioning a hiring recommendation made by the administrative officer," and it is "certainly within a board member's rights and responsibility to request additional information before voting on such a recommendation." *Id.* at 21. Notwithstanding this right, it must be done for legitimate, and not nefarious reasons. *Id.* In this regard, ALJ Masin noted that there is absolutely no evidence to demonstrate that Mr. Suriel ever acted on his "threat" by actually speaking to or otherwise communicating with any Board member and, more specifically, with Respondent Varela. *Id.* at 22. As a result, Dr. Caffrey "could do no more than speculate as to the alleged discriminatory character of [Respondent] Varela's conduct, and speculation is not evidence and is not a basis for finding that the motivation was illegitimate." *Id.* Therefore, the charges regarding the vote to table the recommended hiring of Ms. Williams are dismissed. *Id.*

By way of background for the "**Alleged Improper Interference Relating to the Meetings with Mr. Muniz,**" ALJ Masin noted that several employees at the Richardson School received Summative Memorandums in April 2012 for an unrelated incident. *Initial Decision* at 22. Following the issuance of these Memorandums, another unrelated incident - the sale of coquito in December 2011 - resurfaced. *Id.* It is alleged that Respondent Varela, acting alone and without Board permission, sought to encourage Mr. Muniz, a secretary at the Richardson School, to make a statement that employees, including himself (Mr. Muniz) and another secretary (Susan Nieves), were being blackmailed by Mr. Cores and Karen Moffatt, the Vice Principal of the Richardson School, "in order to keep the coquito incident hidden." *Id.* at 22-23.

As for the facts related to these allegations, both Mr. Muniz and Respondent Varela agree that they met and had a conversation – outside their respective homes - on April 21, 2012, and April 22, 2012. *Initial Decision* at 33. The two men also agree that the conversation involved comments about cooperating with the Board. *Id.* Respondent Varela agrees that before April 21, 2012, he already knew about the coquito incident, and also acknowledges he knew, based on

conversations with his spouse, about Ms. Nieves' complaints about blackmail. *Id.* At the time that these conversations occurred, Respondent Varela was certainly not well disposed towards either the superintendent or the principal of Richardson School. *Id.* It would not be at all surprising if Respondent Varela saw an opportunity to obtain evidence of wrongdoing on the part of these persons from an alleged victim of the blackmail. *Id.* Respondent Varela's own description of Mr. Muniz as a very young, scared, "ignorant" kid lends credence to the prospect that he, as an older person, known to Mr. Muniz for years, and an authority figure with a prominent position in the very district employing him, would attempt to convince Mr. Muniz to come forward with damaging information against Mr. Cores and Dr. Caffrey, while also seeking to induce such cooperation with talk of trust, caring and security for the cooperating witness. *Id.*

Whether Mr. Muniz actually heard the word "protection" about his job, or merely understood all the talk about not hurting people and trust, coming from a neighbor and Board member, as meaning that his job position would not suffer, ALJ Masin found that Respondent Varela, a Board member who was not charged with the day-to-day supervision of the District and its personnel, essentially became an investigator, trying to induce an individual to provide damaging evidence against persons towards whom he had clear, work-related animus. *Initial Decision* at 33-34. Although acknowledging that Mr. Muniz's credibility is not without flaw, ALJ Masin found that the preponderance of the evidence is that Mr. Muniz's version of the events, including that Respondent Varela spoke specifically about "blackmail," is the more convincing account. *Id.* at 34.

According to ALJ Masin, it is clear that it was not Respondent Varela's job as a Board member to take it upon himself to conduct an unauthorized, private investigation of personnel, nor to even suggest to a potential witness how the Board would treat him or his job situation. *Initial Decision* at 34. Thus, even under Respondent Varela's "benign" version of the conversations, he overstepped his boundaries. *Id.* According to ALJ Masin, he should have, at most, assured Mr. Muniz that he would discuss the allegations of blackmail and of other possible improper activity by senior administrators with the Board attorney so that properly authorized and legally appropriate decisions could be made on how to proceed to determine if any wrongdoing had occurred. *Id.* Beyond that he should have avoided further discussion, promises, inducements, encouragements and the like. *Id.*

Because Respondent Varela became involved in the day-to-day functions and responsibilities of school personnel, conducted a private, unauthorized investigation, made promises, and sought, without authorization, to obtain information in a private setting with purpose to undermine school personnel, ALJ Masin determined that Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j). *Initial Decision* at 34.

As a result of the legal conclusions reached regarding Respondent Varela's conduct (in Sections A, B, and C *infra*), and while noting that Respondent Varela is no longer a member of the Board, ALJ Masin recommended the penalty of censure. *Initial Decision* at 35.

Respondent Puccio

As for the "**February 22, 2012, Meeting**," Respondent Puccio addressed Dr. Caffrey after the conclusion of a Board personnel committee meeting, and mentioned his concern that two administrators - Dr. Morgan and Dr. Garcia - had approached his superior officer about his presence in their schools. *Initial Decision* at 39. Respondent Puccio and Dr. Caffrey differ over the intensity of Respondent Puccio's remarks, and their content. *Id.* Dr. Caffrey described him as irate, red in the face and screaming, claiming that he would "get" them, "if it's the last thing I do" and that is was "personal." *Id.* Respondent Puccio denies that he was so intense, denies that he demanded that they be fired, and denies that he wanted Dr. Caffrey to discipline them. *Id.* Both Dr. Caffrey and Respondent Puccio agree that following this event, shortly thereafter, whatever problem might have existed involving the principals and Respondent Puccio was worked out satisfactorily. *Id.*

As for the others alleged to have been present during the post-meeting encounter, the Board attorney denied any recollection of such an intense encounter, and noted that had one erupted, she would have stopped it. *Initial Decision* at 39. As to Respondent Puccio's suggestion that the principals' raising of the issue of confusion as to his role when in their schools to his police superior was an attempt to undermine him in regard to negotiations, there is no evidence in the record to support that supposition. *Id.* at 39-40.

The crux of this allegation is that Respondent Puccio's conduct was done to further his personal interest or perhaps to obtain a benefit for himself. *Initial Decision* at 40. However, ALJ Masin was "not convinced by a preponderance of the credible evidence that [Respondent] Puccio's conduct after the meeting was as intense and threatening as [Dr.] Caffrey claimed." *Id.* Although ALJ Masin acknowledges that Respondent Puccio was unhappy that the principals spoke to his superior rather than bring their concern to the attention of Dr. Caffrey, it was not out of line for Respondent Puccio to raise the issue of their action with Dr. Caffrey. *Id.* While it is possible, and even likely, that Respondent Puccio spoke loudly, ALJ Masin credits testimony from the Board attorney that if Respondent Puccio had been as forceful as claimed, she (the Board attorney) would have calmed the situation and, moreover, remembered it. *Id.*

Finding nothing improper in Respondent Puccio telling Dr. Caffrey that the principals appeared to have acted out of step with the proper procedure, ALJ Masin found that while Respondent Puccio was no doubt upset, he did not "threaten" to get them, or "demand" they be fired or disciplined. *Initial Decision* at 40. Therefore, ALJ Masin dismissed the charges related to the February 22, 2012, post-meeting encounter, namely the alleged violations of *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f). *Id.*

Regarding his "**Attendance at the AFT Meeting**," Respondent Puccio, along with Lebreault (then Vice President), attended a local AFT meeting on May 9, 2012, which was after the Board suspended Dr. Caffrey, and the Commissioner of Education (Commissioner) ordered her reinstatement to the position because of a flaw in the Board's voting process. *Initial Decision* at 40-41. It is alleged that, at this meeting, Respondent Puccio assisted the local AFT

President in obtaining a vote of "no confidence" in Dr. Caffrey from those (members of the association) who attended the meeting. *Id.* at 40.

Donna Chiera, the President of the local AFT as of May 9, 2012, testified that after Dr. Caffrey was reinstated by the Commissioner, it was decided that a meeting with the local AFT building representatives and officers would be scheduled. *Initial Decision* at 41. According to Ms. Chiera, only the building representatives received notice of the meeting. *Id.* Ms. Chiera testified that a Board member (Obdulia Gonzalez) contacted her and asked if Board members could attend the meeting, and the Board member was advised, after Ms. Chiera consulted with counsel, that Board members could talk to the group only after the business meeting ended. *Id.* Ms. Chiera also recommended to Gonzalez that she (Gonzalez) should check with the Board's attorney about whether attendance by Board members was permissible. *Id.* Ms. Chiera testified that, while at the meeting, Respondent Puccio expressed how committed he was to the District, and stated, he "was out there fighting for us. People were saying this was personal. Well, this was personal for him. I have skin in the game." *Id.* at 42.

Respondent Puccio testified that he thought the AFT had reached out to the Board, indicated that Lebreault told him (Respondent Puccio) that the Union had concerns it wanted to "air out," stated that Lebreault told him (Respondent Puccio) that the Board attorney had said they could attend the AFT meeting, testified that the majority of the Board wanted him and Lebreault to attend the meeting, but confirmed that "there was no official Board action to authorize attendance at the meeting." *Initial Decision* at 42.

In his discussion, ALJ Masin noted that Respondent Puccio admitted he attended the emergency local AFT meeting which was called, according to its then president, for the purpose of discussing the ongoing concerns of the members, or at least the leadership of the AFT, about Dr. Caffrey. *Initial Decision* at 44. The emergency local AFT meeting was called in the wake of Dr. Caffrey's suspension by the Board and reinstatement by the Commissioner, and there is no question that the AFT had significant issues with Dr. Caffrey's leadership. *Id.* It was also obvious that the Board, or at least its majority, had significant problems with Dr. Caffrey's leadership. *Id.* With this as the background for the meeting, ALJ Masin stated, "it is impossible not to recognize that [Respondent] Puccio, as well as Lebreault, knew exactly what that situation was when they chose to attend the meeting." *Id.*

In discussing the facts, ALJ Masin found it significant that no formal Board action had been proffered approving of their attendance, and found it even more significant that the Board attorney did not offer that she had been consulted by Lebreault or had indeed approved Respondent Puccio's and Lebreault's attendance at the emergency local AFT meeting. *Id.* at 44-45. As such, ALJ Masin found that there is no credible or competent evidence to support any claim that the Board or the Board's attorney had in fact authorized attendance. *Id.* In addition, Respondent Puccio met with the AFT leadership without any notice whatsoever to Dr. Caffrey, who at that time had been reinstated and was thus the person responsible for the day-to-day operation of the schools and the day-to-day interaction with the AFT and its members. *Id.* ALJ Masin also found that there is no evidence that, after the meeting, Respondent Puccio shared with Dr. Caffrey what he said at the meeting, or shared any other information or conversation that might have taken place regarding his/her employment. *Id.* In effect, ALJ Masin found that

Respondent Puccio, and also Lebreault, took it upon themselves to become involved in the administration of the schools. *Id.*

Although Respondent Puccio attempted to couch his actions as a benign attempt to display support for the teachers, "it was not appropriate for board members to meet privately with Union leadership in what could only be seen, given that context and the positions taken by [Respondent] Puccio and Lebreault in support of suspension, as a show of support for the Union and its own goals, opposed as they were to [Dr. Caffrey]." *Initial Decision* at 45. As such, ALJ Masin found that this was conduct beyond the scope of Respondent Puccio's duties as a Board member which had the potential to undermine Dr. Caffrey's authority as Superintendent - a position she held at the time of the meeting and, as far as anyone then knew, might continue to hold for some time. *Id.* ALJ Masin further found that Respondent Puccio attended the AFT meeting without any formal Board approval; without, based on the record, any proven informal consent; without informing Dr. Caffrey; and without any actual knowledge that the rest of the Board or its counsel had knowledge of his attendance. *Id.* at 46. ALJ Masin concluded that by facilitating this informal contact through an unauthorized, private meeting, Respondent Puccio failed to carry out his responsibility not to administer the schools and to work with his fellow Board members to see that the schools are well run. *Id.* ALJ Masin further concluded that Respondent Puccio acted beyond the scope of his duties in a manner that had the potential to compromise the Board, and that he involved himself in the day-to-day administration of the schools by placing himself in a compromising situation/position between the AFT (the local Union) and Dr. Caffrey (the Superintendent). *Id.* As such, ALJ Masin found that Respondent Puccio violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e). *Id.*

In light of the legal conclusions as set forth above, ALJ Masin agreed that "the circumstances involved, with the violations involving the Board member effectively providing the Union with support for its, and his, goal of ousting the superintendent, would warrant serious sanction," he also noted that the events occurred "nearly seven years ago" and, since that time, Respondent Puccio's service as a Board member has been characterized as exemplary. *Initial Decision* at 47. Therefore, ALJ Masin recommended a suspension of sixty (60) days, but in lieu of suspension, or of some portion thereof, ALJ Masin recommended that Respondent Puccio be replaced as Board President by another member of the Board that is chosen by the county superintendent. *Id.*

III. Exceptions

In their Exceptions, **Respondents** agree that ALJ Masin correctly analyzes the lack of first-hand personal knowledge and utter speculation on the part of the party's witnesses against Respondent Varela and Respondent Puccio. ALJ Masin indicated that "speculation is not evidence and is not a basis for finding that the [action] was illegitimate." However, Respondents argue that ALJ Masin relied upon that same speculative testimony when finding that Respondent Varela failed to sign in or out on occasion, regarding Respondent Varela's meeting with Mr. Muniz and when Respondent Puccio attended the AFT meeting. In this regard, the ALJ's determination should likewise be dismissed. Furthermore, the penalty of a sixty (60) day suspension for Respondent Puccio is unwarranted and Respondents contend that a reprimand or censure would be sufficient.

Respondents argue that there is no evidence that during his visits to the school, Respondent Varela gave staff any direct orders or became directly involved in the day-to-day activities of the school; therefore, a violation of *N.J.S.A.* 18A:12-24.1(d) (C18-12 Count 3) should be dismissed. Furthermore, Respondent Varela's failure to sign out on occasion was not found to be direct, confrontational or intimidating and, therefore, not a violation of *N.J.S.A.* 18A:12-24.1(i) (C18-12 Count 3) and should similarly be dismissed. Regarding Respondent Varela's meeting with Mr. Muniz, Respondent Varela did not make a personal promise to Mr. Muniz nor did he take personal action that could be considered undermining and the Commission failed to meet its burden of proof that the conversation between the two rose to the level of a violation of the Code (C18-12 Counts 1 and 2).

Regarding Respondent Puccio, Respondents argue that the ALJ's reliance on Gartland is misplaced and the recommended penalty is not consistent with other Commission decisions where a board member was found to have violated *N.J.S.A.* 18A:12-24.1(e). Respondents contend suspension cases generally involve more than taking action beyond the scope of authority, as was found with Respondent Puccio and, therefore, Respondent Puccio's conduct should be reduced to a reprimand or censure.

Respondent Varela and Respondent Puccio request that all claims against them be dismissed with prejudice because the Commission has failed to meet its burden of proof demonstrating that either Respondent has violated the Act as alleged.

In general, **Complainant** (the Commission) agrees with ALJ Masin's decision that Respondent Varela should be censured and Respondent Puccio should receive a sixty (60) day suspension. More specifically, regarding Respondent Puccio, Petitioner agrees that his actions "warrant serious sanction" because his intent to undermine the superintendent was explicit, and, therefore, recommended suspension, as a minimum sanction, but noted removal would be more appropriate. However, ALJ Masin recommended a sixty (60) day suspension and then suggested that in lieu of that, the Commissioner should consider demoting Respondent Puccio from his role as Board President, which raises two concerns: the duration of the suspension and the appropriateness of removing Respondent Puccio as Board President. Respondent Puccio's actions as stated above, had the intent to undermine the superintendent's authority which would have impacted her ability to properly administer the district. Therefore, the Commission should reconsider the ALJ's penalty against Respondent Puccio, and due to the severity of his actions removal from the Board would be a more appropriate sanction. Regarding the ALJ's recommendation that Respondent Puccio be demoted from his position as Board President, the Commission does not have the authority to order such a sanction. The Commission's authority is limited to the reprimand, censure, suspension or removal of a board member and, therefore, the ALJ's recommendation of a demotion should be rejected.

Finally, the evidence in the record was sufficient to support a finding that Respondent Varela inappropriately interfered with the hiring of a candidate and Dr. Caffrey's testimony was sufficient to support a finding that Respondent Puccio threatened job action against two principals for questioning his purpose in entering their schools. Despite ALJ Masin's finding that

Petitioner did not prove these claims and dismissing them, Petitioner requests that the ALJ's dismissal of these claims be reversed.

IV. Analysis

Upon careful and independent review of the extensive facts and evidence set forth in the record, the Commission adopts ALJ Masin's findings of fact with regard to the actions/conduct of both Respondent Varela and Respondent Puccio, as well as the legal conclusions set forth in the Initial Decision. More specifically, and regarding Respondent Varela, the Commission adopts the legal conclusion that, with regard to the "Alleged Violations of the Visitor Policy," Respondent Varela violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(i) because he failed to support the school's personnel in their important task of assuring that, through the use and enforcement of written policy and procedure, they had a complete handle on what was going on in the building, who was there, when, and why, and also violated *N.J.S.A.* 18A:12-24.1(d) because he undermined the authority of the school personnel charged with the day-to-day task of managing the building to assure its safety and orderly conduct; and adopts the legal conclusion that, regarding the "Alleged Improper Interference Relating to the Meetings with Mr. Muniz," Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) because he became involved in the day-to-day functions and responsibilities of school personnel, conducted a private, unauthorized investigation, made promises, and sought, without authorization, to obtain information in a private setting with the purpose to undermine school personnel.

The Commission additionally adopts the legal conclusion that, with respect to Respondent Varela's "Alleged Violations of the Visitor Policy," there was *insufficient* evidence to establish that he (Respondent Varela) violated *N.J.S.A.* 18A:12-24.1(e); and adopts the legal conclusion that, with regard to Respondent Varela's "Alleged Interference in the Hiring Process" of Ms. Williams, there was *insufficient* evidence to establish that he (Respondent Varela) violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24.1(h).

As for Respondent Puccio, the Commission adopts the legal conclusion that, with regard to his "Attendance at the AFT Meeting," Respondent Puccio violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) because, by attending an emergency local AFT meeting without authorization from the Board, the Board's attorney, and without the knowledge of the Superintendent, he (Respondent Puccio) engaged in conduct beyond the scope of his duties as a Board member which had the potential to undermine Dr. Caffrey's authority as Superintendent, and failed to carry out his responsibility not to administer the schools and to work with his fellow Board members to see that the schools are well run. The Commission also adopts the legal conclusion that, regarding the "February 22, 2012, Meeting," there was insufficient evidence to establish that he (Respondent Puccio) violated *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24.1(f).

V. Decision

The Commission determines to adopt the ALJ Masin's Initial Decision finding that Respondent Varela violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.*

18A:12-24.1(i) in connection with the visitor policy; Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in relation to the meetings with Mr. Muniz; and Respondent Puccio violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he attended the local AFT meeting.

VI. Penalty

Based upon the conclusion that Respondent Varela violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(i) in connection with the visitor policy, and violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in relation to the meetings with Mr. Muniz, and *only* because he is no longer a member of the Board, the Commission **concurs** with ALJ Masin that **censure** is the appropriate penalty. If Respondent Varela was still a member of the Board, and because on his flagrant (and repeated) disregard of the ethics rules governing his behavior, the Commission would have recommended a far greater penalty.

Regarding Respondent Puccio, and based upon the conclusion that he violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he attended the local AFT meeting, ALJ Masin recommended "a suspension of sixty days...but in lieu of suspension, or of some portion thereof...[Respondent] Puccio be replaced as Board president by another member chosen by the county superintendent." *Initial Decision* at 47. As an initial matter, the Commission notes that, pursuant to *N.J.S.A.* 18A:12-29(c), it may, following the finding of a violation of the Act, recommend to the Commissioner the "reprimand, censure, suspension, or removal of the school official found to have violated this act, or in the case of a board member, this act or the code of ethics." Based on its statutory authority for recommending an appropriate penalty to the Commissioner, the Commission does not have the authority, as recommended by ALJ Masin, to remove Respondent Puccio as President of the Board. As such, the Commission **rejects** this recommended penalty.

Although the Commission does not have the authority to unseat Respondent Puccio as Board President, it concurs with ALJ Masin that suspension is the appropriate penalty. However, the Commission **modifies** the recommended duration of suspension from sixty (60) days to **one (1) year**, because it does not believe that sixty (60) days is of sufficient duration to impress upon Respondent Puccio the seriousness of his violations.

As noted by Complainant, in an analogous case, *I/M/O Colleen Gartland and Carmine Picardo, West Essex Board of Education, C44-05 (March 28, 2006) (I/M/O Gartland and Picardo)*, the Commission recommended a one (1) month suspension for a seasoned Board member (Respondent Gartland) when she, along with another less-experienced Board member (Respondent Picardo), met with the local union – at the Union's invitation – to discuss enhancing educational opportunities in the school district. Based on its determination that Respondent Gartland and Respondent Picardo violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(d), the Commission recommended a one (1) month suspension for Respondent Gartland, and a censure for Respondent Picardo. The Commissioner concurred with the Commission's recommended penalties.

Unlike in *I/M/O Gartland and Picardo*, Respondent Puccio was not invited by the local AFT to attend its meeting, and Respondent Puccio did not discuss (generally) how to enhance or improve educational opportunities in the District. Instead, Respondent Puccio and then Board Vice-President (Lebreault) invited themselves to the emergency local AFT meeting in order to specifically discuss the employment of Dr. Caffrey, and did so without her knowledge. *Initial Decision* at 43-45. At the time that Respondent Puccio and Lebreault made this conscious decision, the majority of the Board also had "significant problems" with Dr. Caffrey's leadership. *Initial Decision at 44.* As noted by ALJ Masin, "it is impossible not to recognize that [Respondent Puccio], as well as Lebreault, knew exactly what that situation was when they chose to attend the [AFT] meeting." *Initial Decision* at 44. After this meeting occurred, Respondent Puccio also failed to share with Dr. Caffrey what he said at the meeting, or what others said about her or her employment. *Initial Decision* at 45.

Furthermore, and despite Respondent Puccio's representations, there was no evidence presented which established that the other members of the Board had approved of his (and Lebreault's) attendance at the local AFT meeting, and also no testimony from the Board's attorney that she had, as claimed, been consulted by Lebreault about his and Respondent Puccio's attendance at the local AFT meeting, and/or that she had approved of their attendance at the meeting. *Initial Decision* at 45. As stated by ALJ Masin, "there is no credible or competent evidence to support any claim that the Board or the Board's attorney had in fact authorized attendance." *Initial Decision* at 45.

In essence, Respondent Puccio's attendance at the local AFT meeting was far more than benign, and he consciously inserted himself into a hostile and volatile situation that involved the employment of Dr. Caffrey. While in this meeting, without Board or attorney authorization or approval, the record supports the finding that he was more than a passive listener. At the time Respondent Puccio attended this meeting, Dr. Caffrey was, without equivocation, serving in this capacity. *Initial Decision* at 45-46. ALJ Masin most aptly characterized Respondent Puccio and Lebreault's actions as, "lone wolf intruders in between the teaching staff and the chief administrator." *Initial Decision* at 46.

The Commission finds another matter, *I/M/O Julia Hankerson, Woodbine Board of Education, C36-02 (June 24, 2003) (I/M/O Hankerson)*, to be of some import to its recommended penalty in this case. In *I/M/O Hankerson*, the Commission found that Respondent violated (1) *N.J.S.A.* 18A:12-24.1(h) when she ignored the recommendation of the superintendent and allowed a business administrator to be hired without any recommendation; (2) *N.J.S.A.* 18A:12-24.1(c) when she gave orders to a District employee to perform tasks for her; (3) *N.J.S.A.* 18A:12-24.1(c) when she had Rice notices sent to employees proposing the termination of two employees without consulting the superintendent; (4) *N.J.S.A.* 18A:12-24.1(h) when she hired a technology specialist contrary to the superintendent's recommendation; (5) *N.J.S.A.* 18A:12-24.1(c) when she created the position of Behavior Specialist and had a candidate appointed to the position without recommendation from the superintendent; (6) *N.J.S.A.* 18A:12-24.1(d) when she interviewed and hired a teacher and a nurse for the 2002-03 school year without the superintendent's recommendation; (7) *N.J.S.A.* 18A:12-24.1(e) when she removed the superintendent from the agenda of the teacher in-service orientation and directed him to conduct interviews; and (8) *N.J.S.A.* 18A:12-24.1(g) when she advised the President of

the WEA and an administrator that the contract of the superintendent would not be renewed. *I/M/O Hankerson* at 15. Based on the multitude of violations committed by Respondent Hankerson, the Commission stated:

> ...the Commission...recommends that the Commissioner...impose a penalty of removal from her position as a Board member for these violations. The Commission finds that [Respondent] Hankerson continued to act in blatant disregard of the Code...even after she had been trained as to its provisions.... [Respondent] Hankerson's submission of false revised minutes...undermined her credibility. Further, the Commission heard testimony that the positions of employees who testified against her in the first hearing...were terminated.... Because the Commission finds [Respondent] Hankerson's conduct to be so egregious, if the Commission had the authority to do so, it would further recommend that [Respondent] Hankerson be barred from holding a position on a school board in the future.
>
> *I/M/O Hankerson* at 16.

Because the Commission finds that Respondent Puccio's actions were far more egregious than those in *I/M/O Gartland and Picardo*, but not as egregious as those in *I/M/O Hankerson*, the Commission recommends suspension for **one (1) year**. Although Respondent Puccio did not commit the series of violations committed by the Respondent in *I/M/O Hankerson*, the timing of his unsanctioned attendance at the local AFT meeting was a flagrant violation of the Code, and must receive serious sanction. The importance of the relationship between the Superintendent and teaching staff members, as well as the relationship between the Board and the Superintendent, cannot be overstated. As a result, there is never an appropriate time for a member of the Board to unilaterally align himself (in his capacity as a Board member) with the local education association in a conscious and deliberate effort to undermine the authority and employment of the Superintendent. If the Board, as the Superintendent's employer, feels that a Superintendent is no longer effective in his or her position, there are mechanisms in place to address these issues.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: May 3, 2019

Resolution Adopting Decision
In Connection With C17-12, C18-12, and C21-12 (Consolidated)

Whereas, pursuant to *N.J.A.C.* 6A:28-10.7(b), the School Ethics Commission (Commission) voted to separately transmit the above matters to the Office of Administrative Law (OAL) for plenary hearings; and

Whereas, while at the OAL, the above matters were consolidated; and

Whereas, Jeff S. Masin, Administrative Law Judge (ALJ Masin), issued his Initial Decision on February 19, 2019; and

Whereas, the issuance of ALJ Masin's Initial Decision followed multiple days of hearings and the submission of post hearing filings by the parties; and

Whereas, and for the reasons set forth in his Initial Decision, ALJ Masin found that Respondent Varela violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(i) in connection with the visitor policy; Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in relation to the meetings with Mr. Muniz; and Respondent Puccio violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he attended a meeting of the local American Federation of Teachers (AFT); and

Whereas, based on his findings of fact and legal conclusions, ALJ Masin recommended that Respondent Varela be censured, and that Respondent Puccio be suspended for sixty days or, in lieu of suspension (or of some portion thereof), Respondent Puccio be replaced as Board president by another member chosen by the county superintendent; and

Whereas, the Commission received an extension to file its Final Decision until May 20, 2019; and

Whereas, by correspondence dated March 5, 2019, Respondents filed Exceptions to ALJ Masin's Initial Decision; and

Whereas, by correspondence dated March 6, 2019, Complainant filed Exceptions to ALJ Masin's Initial Decision; and

Whereas, at its meeting on March 26, 2019, the Commission reviewed and discussed the record, including the Initial Decision, Respondents' Exceptions, and Complainant's Exceptions, and

Whereas, at its meeting on March 26, 2019, the Commission discussed adopting the findings of fact from the Initial Decision; adopting the legal conclusion that Respondent Varela violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(i) in connection with the visitor policy; adopting the legal conclusion that Respondent Varela violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-

24.1(j) in relation to the meetings with Mr. Muniz; and adopting the legal conclusion that Respondent Puccio violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he attended the local AFT meeting; adopting the recommended penalty of censure for Respondent Varela; and rejecting the recommended penalty of removing Respondent Puccio from his position as Board President; modifying the recommended penalty of suspension for sixty (60) days for Respondent Puccio to suspension for one (1) year; and rejecting the recommendation that, in lieu of suspension, Respondent Puccio should be removed as Board President; and

Whereas, at a special meeting on May 2, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from March 26, 2019; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision as a Final Decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on May 2, 2019.

Kathryn A. Whalen, Director
School Ethics Commission

OAL Dkt. No. EDU 05847-19
Agency Dkt. No. 84-4/19

New Jersey Commissioner of Education

Order on Emergent Relief

R.V., on behalf of minor children, D.C., Y.C., and R.O.,

Petitioner,

v.

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

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] In this matter, the petitioner submitted a residency petition challenging the Board's determination that the minor children were ineligible to attend school in the district. The petitioner admitted that she resides in North Plainfield, outside of the Middlesex School District, arguing instead that she does not want her children walking on a dangerous highway to school in North Plainfield. She further explained that given the distance she commutes for work, her mother and brother – who live in Middlesex – serve as emergency contacts while her children are in school. As the petitioner did not allege that she lived in the district, the Department did not accept her petition as a residency appeal, and instead required that she submit a regular petition. The petitioner did so, along with a motion for emergent relief seeking to keep her children in school during the pendency of the proceedings. The ALJ found that the petitioner was entitled to emergent relief.

[1] The Board filed exceptions to the Order on Emergent Relief. However, as *N.J.A.C.* 1:1-18.4 does not permit exceptions on an Order of Emergent Relief, the Commissioner will not consider the Board's submission.

Upon review, the Commissioner disagrees with the ALJ and finds that the petitioner has failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Specifically, the party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant 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 movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

In this matter, the petitioner cannot demonstrate that she has a likelihood of success on the merits. Pursuant to *N.J.S.A.* 18A:38-1, public school in New Jersey is free to people over 5 and under 20 years of age who are domiciled in a school district. The petitioner openly admitted in the petition and at oral argument that she lives in North Plainfield; therefore, she cannot meet her burden of demonstrating that she is domiciled in Middlesex. As the petitioner must demonstrate all four *Crowe* factors in order to warrant emergent relief, the Commissioner need not make a determination on the remaining three factors.

Accordingly, the recommended Order of the OAL is rejected, and the petitioner's application for emergent relief is denied. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

R.V., ON BEHALF OF,
MINOR CHILDREN, D.C., Y.C., AND R.O.,
Petitioner,
v.
BOARD OF EDUCATION, BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,
Respondent.

OAL DKT. NO. EDU 05847-19
AGENCY DKT. NO. 84-4/19

R.V., petitioner, pro se

Anthony P. Sciarrillo, Esq., and **Scott D. Zucker,** Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner R.V., on behalf of minor children, D.C., Y.C. and R.O., challenges the decision of respondent Board of Education of the Borough of Middlesex, Middlesex County (Board), that her children are not domiciled in the Borough of Middlesex school district (District) and, therefore, must be transferred to the North Plainfield school district, and to assess R.V. tuition for the period of time the children attended District schools but were not domiciled in the District, pursuant to N.J.S.A. 18A:38-1(b)(2). In the current proceeding, petitioner seeks an order for emergent relief from the Board's decision, permitting the children to remain in the District schools for the remainder of the 2018-2019 school year.

PROCEDURAL HISTORY

On April 3, 2019, petitioner filed a pro se residency appeal with the Office of Controversies and Disputes of the New Jersey Department of Education (Department). This appeal was returned to petitioner by the Department because her children do not live in the District. Accordingly, pursuant to the directions provided by the Department, petitioner filed petitions of appeal on April 22 and 29, 2019, along with a request for emergent relief. On April 29, 2019, the emergent matter along with the petition of appeal was transmitted to the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on May 8, 2019.[1] The motion for emergent relief is now ripe for consideration.

FACTUAL DISCUSSION

Most of the pertinent facts in this case are not in dispute. R.V. and her three children lived with R.V.'s mother within the District at the beginning of the 2018-2019 school year. Two of the three are general education students; D.C. is in the eighth grade and R.O. is in the first grade. The third child, Y.C., is in the sixth grade and receives special education services.

On or about November 2018, R.V. signed a lease on an apartment in North Plainfield. On or about January 29, 2019, a District staff member reported that R.O. stated that he no longer lived in the District and, as a result, Mathew Benderoth (Benderoth), residency investigator for the Borough of Middlesex, was assigned to investigate whether R.V.'s three children are residents of the Borough. Certification of Mathew J. Benderoth (May 6, 2019). Based on the surveillance he conducted at the family's address of record, a February 14, 2019, discussion with R.V., and an email R.V. sent to Benderoth on February 22, 2019, Benderoth concluded that the family no longer resided in the Borough of Middlesex. Id., Exs. A and B.

Following written notices to petitioner that her children were not eligible to attend the District schools due to her change of residency from Middlesex Borough to North Plainfield, the Board conducted a residency hearing on March 25, 2019. Certification of

[1] Following oral argument, the parties engaged in limited and unsuccessful settlement discussions.

Linda A. Madison, Ed.D. (Madison) (May 6, 2019), Exs. B, C and D. On March 28, 2019, the Board sent written notice to petitioner of its determination that her children are ineligible to attend the District schools. Id., Ex. F. In this letter, the Board stated that petitioner had twenty-one days (by April 18, 2019) to appeal the decision of the Board, and should she so appeal, her children would be permitted to remain in the District schools during the pendency of the appeal. Ibid.

Petitioner's first attempt to appeal the Board's decision, filed on April 3, 2019, was returned by the Department, as described above. Petitioner's appeal was accepted by the Department on April 29, 2019, and received by the Board on April 30, 2019. On April 29, 2019, the Board refused to allow petitioner's children to attend school; the respective schools contacted petitioner to pick up her children. She did so and as of May 8, 2019, the children had not been permitted to return to the District schools.[2]

Petitioner has not yet enrolled her children in the North Plainfield schools, nor has she formally dis-enrolled them from the District. Since April 29, 2019, the children have been spending school days with their grandmother.

The preceding is not in dispute; accordingly, I **FIND** the preceding as **FACTS.**

Based on the documentary evidence and oral arguments, I **FIND** that petitioner raised some dispute as to R.V.'s subsequent address(es) and the date on which the children no longer resided in the Borough of Middlesex. She disputes the January 2019, statements attributed to her son, R.O., about moving to a new apartment. She stated that on or about February 2019, she had moved her children from her mother's apartment to live with her brother in a separate apartment in the Borough of Middlesex. Yet, in an e-mail dated February 22, 2019, R.V. stated that her children were living in North Plainfield. See, Madison Cert., Ex. A. Finally, at oral argument, R.V. confirmed that she drives her children to school each day on her way to a job in the Borough of Middlesex.

[2] On May 8, 2019, Madison sent written notice to R.V. that her children would be permitted to attend school on May 9, 2019, pending this decision and/or a settlement. E-mail from Madison to R.V. (May 8, 2019, at 4:16 p.m.). R.V. chose not to send her children to school on May 9, 2019.

LEGAL ANALYSIS AND CONCLUSIONS

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:3-1.6(b), and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that petitioner has proved all of the following:

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.

Regarding the requirement that the petitioner must show that irreparable harm will result if emergent relief is not granted, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Initial Decision (June 15, 2009), modified, Acting Comm'r (June 15, 2009), http://njlaw.rutgers.edu/collections/oal/. Since money damages are not available in education cases, and compensatory education is the only relief available, the analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable. Howell Twp. Bd. of Educ. v. A.I. & J.I. ex rel. S.I., EDU 5433-12, Order Granting Emergent Relief (May 2, 2012).

In her petition of appeal, R.V. described the irreparable harm that could result should her children be forced to enroll in the North Plainfield schools. Should an emergency situation arise during the school day, R.V. posits that the children will be in danger because she works some distance from the schools in North Plainfield (but close to the Borough of Middlesex schools) and the children will be left on their own as R.V.'s mother and brother (her emergency contacts) live in Middlesex. Although I disagree that this speculative event satisfies the irreparable harm standard, I note that the action taken by the Board may in fact result in irreparable harm as the children are currently not in school.

In New Jersey, the obligation of each school district to provide free and appropriate public education generally extends only to those children domiciled within the district and, therefore:

> [I]f in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child . . . the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner.
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> [N.J.S.A. § 18A:38-1 (emphasis added).]

As petitioner stated, the Board "kicked the kids out" of school on April 29, 2019. Even if we concede that the Board acted appropriately given that it did not have notice of petitioner's appeal until the next day, the Board received notice of petitioner's appeal the next day and only after questioning at oral argument did the Board notify petitioner that her children are welcome back into their respective classrooms. The intent of the law is to prevent the exact situation that

has resulted here: three children, one of whom receives special education services, are not in school anywhere. The Board has ignored the procedure the Legislature established to protect children from losing academic ground during the course of a residency dispute.

I **CONCLUDE** that the action of the Board to refuse entry to D.C., Y.C. and R.O. during the pendency of petitioner's appeal is a violation of N.J.S.A. § 18A:38-1, will result in irreparable harm to D.C., Y.C. and R.O., and must be reversed immediately.

To grant a motion for emergent relief in advance of a plenary hearing, a judge also must be satisfied that "[t]he legal right underlying petitioner's claim is settled [and] that petitioner has a likelihood of prevailing on the merits of the underlying claims." N.J.A.C. 6A:3-1.6(b)(2), (3). As stated above, children have the right to a free and appropriate public education in the district in which they are domiciled. N.J.S.A. 18A:38-1(a). If, however, R.V. cannot produce evidence to prove that her children actually remained in the District, she will be responsible to pay "the resident tuition for the student prorated to the time of [each] student's ineligible attendance in the school district." N.J.S.A. 18A:38-1(b)(1).

Petitioner claims that she did not move the children to North Plainfield on a permanent basis ever and, therefore, never changed their permanent residence. She claims to have taken a lease on an apartment in North Plainfield in November 2018, and shortly thereafter began the process of moving her belongings from her mother's overcrowded apartment. Prior to taking this apartment, R.V. stated that she had to rent a storage unit and was therefore able to save on that expense. On or about February 2019, the landlord threatened R.V.'s mother with eviction and, therefore, R.V. moved her children to her brother's apartment, also in the Borough of Middlesex.

Despite this explanation given by petitioner at oral argument, the fact remains that she documented that her address is now in North Plainfield and that she is trying to save money so that she can rent her own place in the Borough of Middlesex. In her April 29, 2019, petition to the Department, R.V. stated that "we live on Route 22" in North Plainfield. Petitioner may provide evidence in the plenary hearing that her children remained in the Borough of Middlesex with family members during the entirety of the 2018-2019 school year

(to date), such as notices sent regarding a change of address to her brother's apartment, or that she has been homeless during this time; I am not able to conclude that petitioner has not demonstrated a likelihood of prevailing on the merits.

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief. The petitioner argues that her older son will suffer by missing out on the graduation ceremony planned for eighth graders, but the Board conceded at oral argument that D.C. would in fact be permitted to participated in the "promotion ceremony." Most significant is that R.V.'s daughter, Y.C., receives special education services under an Individual Education Program and, according to R.V., had recently begun to show progress.

Respondent spoke of the harm to the taxpayers of the Borough of Middlesex, who would essentially be funding the education of three children who do not live in the District. This is a strong argument; the taxpayers trust the Board to make fiscally responsible decisions, to keep costs as low as possible, and to ensure continued strong academic performance by the students.

It is not lost on me that R.V. has, at best, trouble keeping her story straight. In the end, though, her three children are most likely to suffer. Of course, as a parent R.V. wants her children in the strongest academic environment that she can find. But, she seems not to understand that academic performance is enhanced by a stable home environment. Moving multiple times during the school year from one overcrowded place to another, commuting long distances and being warned not to disclose their address to peers and teachers cannot be good for these children. However, given that the school year ends in just six weeks, and enrolling in a new district will introduce a whole new set of challenges to D.C., Y.C. and R.O., I **CONCLUDE** that the children will suffer greater harm should emergent relief not be granted than the Board will suffer if the requested relief is granted.

Therefore, I **CONCLUDE** that petitioner has shown that her children will be irreparably harmed by the continuing loss of academic instruction if emergent relief is not granted and that the legal rights underlying this claim are settled. I further **CONCLUDE** that there is an

APPENDIX

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Respondent's Letter Brief in Opposition to Petitioner's Application for Emergent Relief, dated May 6, 2019

R-2 Certification of Scott D. Zucker, Esq., dated May 9, 2019

open question as to whether petitioner will prevail on the merits. Finally, I **CONCLUDE** that when the equities and interests of the parties are balanced, the petitioner's children will suffer greater harm should emergent relief not be granted than the respondent will suffer if the requested relief is granted. I therefore **CONCLUDE** that petitioner's request for emergency relief must be **GRANTED.**

ORDER

Based upon the foregoing, it is hereby **ORDERED** that respondent shall permit D.C., Y.C., and R.O. to immediately rejoin their respective classrooms in the District schools pending a final decision by the Commissioner of the Department of Education on petitioner's underlying appeal of the Board's decision that her children are not eligible to attend the Borough of Middlesex schools, and assessing her tuition for each child from the date on which they moved from the Borough of Middlesex to North Plainfield.

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

May 9, 2019
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: May 9, 2019

Date Mailed to Parties: May 9, 2019
TMC/nd

155-19

New Jersey Commissioner of Education

Final Decision

M.S. and N.S., on behalf of minor child, J.S.,

Petitioners,

v.

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

Respondent,

and

J.M. and D.M., on behalf of minor child, J.M.,

Intervenors.

Synopsis

Petitioners challenged the finding of the respondent Board that their son, J.S., engaged in conduct against a fellow student, J.M., that violated the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* The Act prohibits harassment, intimidation and bullying (HIB) arising from certain defined motivations. Petitioners sought a determination that the Board's decision was arbitrary, capricious or unreasonable, contending that the conduct at issue was part of a longstanding and ongoing conflict between J.S. and J.M., and did not constitute an instance of bullying within the statutory definition of HIB. The respondent Board filed a motion for summary decision; opposing motions for summary decision were filed by the petitioners and the intervenors.

The ALJ found, *inter alia,* that: there are no material facts in dispute here, and the matter is ripe for summary decision; the record establishes that J.S. and J.M. have had conflicts with each other since the first grade; ongoing unresolved conflict between two students does not necessarily fall within the statutory definition of HIB; however, a backdrop of such ongoing conflict does not insulate the conduct under review from being properly determined to be in violation of the Act; in the instant matter, J.S. admitted that he called J.M. "weak", and student witnesses corroborated that J.S. also referred to J.M. as a "weakling," during an incident in seventh grade wherein J.S. tried to slam down the lid of J.M.'s Chromebook during class; such a comment, especially during a physical confrontation, could reasonably cause embarrassment to the recipient of the remarks. The ALJ concluded that the Board was not arbitrary, capricious or unreasonable in determining that J.S. engaged in conduct that violated the Act, nor were the sanctions imposed upon J.S. for his behavior inappropriate. Accordingly, the ALJ ordered that petitioners' appeal be denied.

Upon review, the Commissioner agreed with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner emphasized that overturning a Board's finding of HIB presents a high hurdle, requiring clear evidence that the Board acted indiscriminately or in bad faith in reaching its determination. Such was not the case here. 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.

June 18, 2019

155-19
OAL Dkt. No. EDU 08878-16
Agency Dkt. No. 151-5/16

New Jersey Commissioner of Education

Final Decision

M.S. and N.S., on behalf of minor child, J.S.,

Petitioners,

v.

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

Respondent,

and

J.M. and D.M., on behalf of minor child, J.M.,

Intervenors.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioners challenge the Board's determination that their son committed an act of harassment, intimidation and bullying (HIB), pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 et seq. This case stems from a complaint made by the parents of J.M. in January 2016, alleging that J.S. slammed J.M's Chromebook, pulled on his earbuds, called him a "weakling," and commented on J.M.'s athletic ability, using the phrase "you suck." Following an HIB investigation, the school district's Anti-Bullying Specialist issued a report substantiating the HIB allegation. The report found that J.S.'s actions constituted HIB because the conduct was: motivated by J.M.'s distinguishing characteristics of being weak and bad at sports; substantially disrupted or interfered with the orderly operation of the school or the

rights of other pupils; and caused J.M. to feel embarrassed. As a result, J.S. was given a one-day, in-school suspension and his schedule was adjusted to limit interaction with J.M. Thereafter, the Board affirmed the HIB findings. Petitioners appealed the Board's determination. Following motions for summary decision, the Administrative Law Judge (ALJ) found that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

As a preliminary matter, in cases where a challenge to the decision of a local board of education is brought before the Commissioner, such challenge is subject to a high standard of review based upon the deference which must be granted to a board's good faith determination of the issues presented by the facts of the case. It is well established that any "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). In order to prevail, the petitioners must establish that "the Board acted in bad faith, or in utter disregard of the circumstances before it." *G.H. and E.H., on behalf of K.H. v. Bd. of Educ. of the Borough of Franklin Lakes, Bergen County*, EDU 13204-13, Initial Decision (February 24, 2014), *adopted* Commissioner Decision No. 157-14 (April 10, 2014). Furthermore, "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration," such that the Commissioner will not substitute his opinion for that of the board, even if he would have come to a different conclusion. *Bayshore Sewerage Co. Dep't of Envtl. Prot.*, 122 *N.J. Super.* 184 (1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974). In the case at issue here, the ALJ noted: "[w]hile some finder of fact might conclude otherwise, where there is more than one reasonable way to understand a set of facts, it cannot be said that the choice of one reasonable interpretation over the other reasonable interpretation amounts to an unreasonable choice." (Initial Decision at 14)

Based on the foregoing, the Commissioner emphasizes that overturning a board of education's finding of HIB presents a high hurdle, requiring clear evidence that the board acted indiscriminately or in bad faith in reaching its determination. Here, the Commissioner concurs with the ALJ that the Board's determination was carefully considered, and that it was not arbitrary, capricious or unreasonable in finding that J.S.'s conduct constituted HIB. It was reasonable for the Board to conclude, on the evidence presented, that J.M. had the distinguishing characteristic of being weak, and J.S.'s comment that he was a "weakling" was motivated by that characteristic. Likewise, it was not unreasonable for the Board to find that J.M. was embarrassed by the comment.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons thoroughly set forth in the Initial Decision – and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8878-16
AGENCY DKT. NO. 151-5/16

M.S. and N.S. on behalf of minor child,
J.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HAINESPORT,
BURLINGTON COUNTY,
Respondent,
And,
J.M. and D.M., on behalf of minor child,
J.M.,
Intervenors.

Seth N. Broder, Esq., for petitioners (Broder Law Group, attorneys)

Sanmathi Dev, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Howard S. Mendelson, Esq., for intervenors (Davis & Mendelson, LLC, attorneys)

Record Closed: February 11, 2019 Decided: March 28, 2019

BEFORE **JEFF S. MASIN,** ALJ (Ret., on recall):

This contested case arises from a petition of appeal filed with the Commissioner of Education on May 24, 2016, by M.S. and N.S., the parents of J.S., a minor. The petitioners seek to overturn a determination made by the Hainesport Township Board of Education that their minor child had engaged in conduct against a fellow student, J.M., that violated the Anti-Bullying Bill of Rights, N.J.S.A. 18A:13-2 et seq. (Act), which prohibits harassment, intimidation and bullying (HIB) arising from certain defined motivations. The Commissioner transferred the matter to the Office of Administrative Law (OAL). Counsel for the Board of Education filed a motion to dismiss the petition for failure to name an indispensable party. On August 15, 2018, the day after this judge assumed responsibility for the case originally assigned to a different judge, this judge signed an Order granting intervention to intervening parents, J.M. and D.M., on behalf of their minor child J.M., and denying the Board's motion to dismiss. A Confidentiality Order wsas issued on October 23, 2018, with respect to the disclosure of student records and student information. Counsel for the Board then filed a motion for summary decision, as authorized by N.J.A.C. 1:1-12.5. The petitioner and intervenor have responded to the motion, each also seeking summary decision.

The essence of the petitioners' appeal is that the conduct that the Board found to violate the law was actually part of a longstanding and ongoing unresolved conflict between students J.S. and J.M. and did not constitute an instance of bullying falling within the statutory definition of HIB. It was not, as the statute requires, conduct motivated by a "distinguishing characteristic," actual or perceived. As such, no violation of the Act occurred and the Board's decision must be overturned, as it was arbitrary, capricious and unreasonable. In addition, as the facts underlying the Board's decision are not in dispute, summary decision is an appropriate means of resolving the contested case.

In January 2016, J.S., a seventh-grader, received a Disciplinary Referral based upon a teacher's statement that he had made "comments to another student calling him 'weak' and 'weakling' and made comments about the student's athletic ability." This Referral was the result of an email sent to the Assistant Principal, Christopher Butler, on January 5 by J.M.'s father. In that email, Mr. M. explained that his son had appeared bothered by something and he revealed to his parents that J.S. "was at it again." More specifically, that J.S. had slammed the

lid on J.M.'s Chromebook in Ms. Kraft's class that very day, had kept pulling on J.M.'s earbuds, had prevented J.M. from opening the lid of the Chromebook, pushing it down so that J.M. had to "let it down slowly so it wouldn't break," had called J.M. a "weakling" and "got other kids to do the same thing."[1] Further, J.M. had been telling other children about a football launcher he received for Christmas and J.S. told J.M. to "shut up no one cares, that's how you got your black eye, you can't catch. You suck." In fact, J.M. had the remnants of a black eye that his father said he had gotten accidently when elbowed by his brother. He further reported that J.S. kept making hand gestures at J.M. "and points at him and says 'boooy.'" He imitates J.M. "by acting like he is a person with mental disabilities." Mr. M. noted that while J.M. is trying to show restraint, he is bothered most by J.S's turning "the other kids against him." "This bullying everyday is starting to take a toll. It NEEDS to stop!"

Mr. Butler responded to the email, noting that he needed to investigate the incident to determine if it met the definition of HIB. According to the Board's brief, Mr. M. was "extremely disappointed by this response." He advised Butler that "This has been going on everyday for the past 7 years with this kid! . . . Everyone of the criterial has been met . . . ."

After receipt of the email and issuance of the Referral, a "full Level II" investigation was conducted by the District's Investigating Anti-Bullying Specialist Rose Wenz. According to her "Final Determination & Conclusion of the Level (2) Investigation Report to Superintendent," signed by Wenz, Christopher Butler and Superintendent Joseph Campisi, all on January 20, 2016, J.M. complained that on January 5, 2016, J.S. called J.M. "weak" and "weakling" and made comments about J.M.'s athletic ability, stating, "you suck." J.M. told his father about this and requested that his father call the school to report it. The child stated that he felt "embarrassed" by the comment that he was a "weakling," a comment made in front of other members of his class. The report of the investigation, which accepted that the comments were made, concluded that the comments made by J.S. were about an actual or perceived characteristic or other identifiable characteristic of J.M.; that the comment(s) had "substantially disrupted or interfered with the orderly operation of the school or the rights of other pupils; and that the act(s) had a physical or emotional harm to a pupil or the pupil's property, or had the effect of insulting the student and created a hostile educational environment for J.M." Thus,

[1]Elsewhere, Ms. Kraft is identified as a substitute teacher.

the conduct violated the Act. On January 20, 2016, Mr. Butler advised J.S.'s parents by mail of the substantiation of the charges and the consequence to be imposed. This involved a one-day in-school suspension for J.S. and an adjustment to his academic schedule "to limit interaction."

The petitioners' motion notes that Rose Wenz's Level I investigation concluded that she saw it as "possible" that the conduct being examined was "reasonably perceived as being motivated by either actual or perceived characteristic . . . or other characteristic." The moving papers offer portions of the recorded responses of students interviewed by Wenz and Butler. It notes that at the "first" appeal from the findings, the Board heard in closed session from N.S. of the history of the two students not getting along while at school and that they mutually participated in the ongoing conflict, citing to the Board an example from October 2015. According to the movants, J.M.'s parents were not in attendance at this first appeal. After the closed session, the Board, in open meeting, split 4-4 with 1 member absent, and could not affirm, reject or modify the HIB finding. The matter was then placed on the Board agenda for the next meeting, scheduled for February 25, 2016. Then, on January 30, 2016, Mr. M., parent of J.M., emailed to the then District Superintendent, Joseph Campisi, sharing with him a text from "Mrs. Richmond" from May 23, 2013 (fourth grade) in which she acknowledged that J.S. was causing problems with J.M. The parent, Mr. M., added, "As I have mentioned to you and to Mr. Butler, this harassment by [J.S.] has been going on since first grade."

At the February 25, 2016, Board meeting, J.M.'s parents spoke, as well as Ms. S. and Ms. Wenz. The petitioners assert that J.M.'s parents' statements appeared to have been "coached by someone with a working knowledge of HIB." After Mr. Butler explained the two boys' history of conflict and the various interventions implemented by the schools, N.S. noted that at times the boys have been able to get along. N.S. noted that while the incident had occurred, J.S. had reacted to J.M. searching the term "grandma shoes" on J.M.'s Chromebook to show examples of "grandma shoes" to J.S. The parents of J.M. argued that their child had been the target of ongoing HIB by J.S., with problems going back to first grade. Also, that J.S. had pushed so hard on the notebook lid so as to bend it, causing J.M. to fear that it would break. The Board then voted in open session to affirm the HIB finding by a vote of 5-4, with 2 members who had voted at the first appeal to reject the finding not present at the second appeal.

According to the petitioners, at the time of the alleged conduct, the two students were in seventh grade in the Hainesport Middle School. They had been first graders together at the Hainesport Elementary School, and it was there that they first engaged in a voluntary dispute mediation. Thus, as the petitioners argue, their disruptive interaction began quite early in their educational career. As a result of the mediation, they agreed that they would (1) stop making fun of each other and their clothing; (2) if they accidentally did something to each other, they would say they were sorry, (3) they would talk to each other if either had a problem or a question, and (4) they would agree to disagree, acknowledging that it was "O.K. to like different things." According to a Certification filed on January 24, 2019, as part of their motion for summary decision, M.S. and N.S., on behalf of J.S., contend that J.M. was, at the time of this alleged incident, of a "much larger physical stature and build than J.S." and "J.S. did not perceive, nor was he motivated to make any comments, based on J.M. having the distinguishing characteristics or being weak or bad at sports." They claim that due to the findings of the HIB investigation, J.S. had his student schedule adjusted and was required to meet with a school counselor. His homeroom teacher was changed, and his remaining course schedule was changed. He was also moved away from his peer group for the duration of the school year. After the petitioners requested a hearing before the school board to appeal the HIB determination, J.M. continued to taunt J.S. by staring at him and smirking, and "overall attempting to instigate additional conflicts."

Legal Principles

Before considering the evidence and the arguments, it may be helpful to note the legal context.

The Anti-Bullying Act, N.J.S.A. 18A:37-14 provides that

> "Harassment, intimidation and bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that

> takes place on school property, . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . . .

N.J.S.A. 18A:37-14 identifies the following as necessary for a gesture, act or communication to be deemed prohibited.

> a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> b) has the effect of insulting or demeaning any student or group of students; or
> c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

The Act made local school boards responsible for the supervision of HIB policy within the districts, but required that local policies conform, at a minimum, to all applicable statutes and case law.

It is important here to note that not all disputes between students, not all actions that may involve harassment, intimidation and bullying, necessarily come within the reach of the Act. The motivating element of the matter must be a "distinguishing characteristic, actual or perceived, such as identified in the Act." Some single incidents and long-standing disputes between students may not be based upon such prohibited reasons, and where that is the case, other legal or disciplinary remedies may lie, but the situation is not one that falls within the reach of the Act. L.B.T. ex rel K.T. v. Board of Education of the Freehold Regional School District, OAL Dkt. No. EDU 7894-12 (January 24, 3013), adopted, Comm'r (March 7, 2013). As the court noted in K.L. v. Evesham Township Board of Education, 423 N.J. Super. 337, 351 (App. Div. 2011), for purposes of HIB the offending conduct must be motivated by a distinguishing characteristic. The statutory definition of HIB "does not include all violent or aggressive conduct against a student," but it has consistently required that the perceived motivation be a distinguishing characteristic. 423 N.J. Super. at 350–51. The court also provided a summation of what does not constitute HIB:

> Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive

> conduct without identifiable motivation, does not come within the statutory definition of bullying.
>
> [Id. at 351.]

Before further considering the evidence before the Board and the arguments of the parties, it is also necessary to recall the legal standard under which such review takes place. As the petitioners recognize, the Commissioner of Education will not disturb the local school board decision unless it was arbitrary, capricious or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).; Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). Thus, if the overall assessment of the evidence that the Board had before it will support a reasonable outcome that matches the Board's, the Commissioner will affirm the Board's decision, even if the Commissioner might have ruled differently on the same evidence. Of course, the Board's decision must also conform with the standards set in case law for understanding the Act. But to successfully overturn the Board's decision, the petitioners must demonstrate that "the Board acted in bad faith, or in utter disregard, of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. Of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (adopted, Comm'r (April 10, 2014).

Finally, it must be noted that the only determination sustained by the Board was J.S.'s comment to J.M. that J.M. was "weak." "Specifically, the requirements of HIB were met. First, the conduct in question was reasonably perceived as being motivated by an actual or perceived characteristic—the characteristic of being weak." The summary of the Board hearing of February 25, 2016, notes that Mrs. S. admitted that her son called J.M. "a weakling." The summary does not specifically make a determination about any comment about J.M.'s athletic ability. It is the case that during the investigation students reported other comments made by J.S. about J.M., on other occasions. It is also the case that students, including J.S. and even J.M., reported comments made by J.M. about J.S. However, the only HIB complaint made and subsequently investigated by Wenz was about a specific incident involving a Chromebook on January 5, 2016, and the Board's determination was specifically about that event. Thus, while there is much comment in briefs and evidential material about other interactions between the boys, this information can only serve as some historical information, and cannot result in determinations about other possible HIB violations, or other disciplinary violations. To the

extent that the petitioners note the ongoing conflict between the students, that does not seem to be a disputed matter. The case, however, is about what occurred on January 5, and whether that incident, and that incident alone, involved any HIB violation. If other potential HIB events occurred involving these two students, such matters were not the subject of a complaint before the Board, nor are they before the Commissioner or this forum.

Thus, as noted, the thrust of petitioners' argument is that rather than the January 2016 incident having been motivated by some actual or perceived characteristic of J.M., it was simply the latest of a long-standing history of mutual disagreement between the two students. Indeed, the undisputed fact is that J.M. and J.S. have had issues with each other at least as far back as 2010, when they were in first grade. Indeed, Mr. M., in his response to Mr. Butler's stating that he needed to investigate the January incident, referred to what he said had been going on for "7 years with this kid!" According to the petitioners, "[T]he evidence is overwhelming demonstrable that the incidents in the present matter were all part of a longer on-going and unresolved conflict . . . and not instances of bullying that fall within the statutory language of conduct motivated by a distinguishing characteristic. . . . " While admitting that their son made comments about J.M., including "weak" and "weakling," "they were motivated by a longer on-going history of conflict between the students." Indeed, they note that students told the investigators that J.M. called J.S. "small," which they see as "an insult comparable to 'weakling.'" "Thus, J.S. did not perceive J.M. to be a weakling."

Review of the investigative materials supplied by the movant indicates that Rose Wenz discussed the alleged incident with J.M. on January 7, 2016. In a written statement, he said that J.S. "slamed [sic] my chromebook shut and kept pulling out my earbuds. [I.V.] and [A.S.] were doing it as well." He did not tell his teacher, but did tell his father to email Mr. Butler. He was also presented with a form questionnaire, which asked at No. 3., "[W]hen and where did the incident happen? (Please be clear if occurred was once or more than once)." Although the phrasing of the question is certainly unclear, J.M. understood it and wrote "Mrs. Higgins room since first grade at hainesport." As for the description of what "[E]xactly . . . was said or what was specifically done by the person . . . you believed harassed, intimidated, or bullied you," he wrote, "Slaming [sic] of the chromebook. He also called me a 'weakling.'" J.M. reported that he felt "imbarassed [sic] in that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender,

sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, front of other kids." Asked if the incident harmed his property, he said that "[H]e was bending the chromebook lid." And, as to whether the incident caused him "fear, physical or emotional harm," he repeated that "I felt embarrassed." J.M. also added that "I've been called names by him (gay, girl, weakling, Jewish) He calls me mentally challenged and does a thing with his hands." As to this latter quote, he did not provide any time frame for when these comments were made, other than the reference to "weakling" as the term used in the Chromebook incident of January 5.

Wenz first spoke to J.S. on January 7. He said that he pulled J.M.'s earbuds because "his music was to [sic] loud." He added, "we were messing around about [unclear from written statement] and he took it to [sic] hard. And we never called Jew boy never made fun of him for black eye never heard hitler prototype we picked each other 4 project he called me lil bill and I called him [unclear from written statement]." Also, "Never said anything about his cabability [sic] of playing sports." Wenz also spoke to J.S., on January 12, 2016. He said that he did "not feel like I did anything wrong, and he was bulling me and I fought back and I am not going to let someone bully me." He gave the names of students that he said might be witnesses to the "situation." He admitted that he did call J.M. "weak." He did this "because he told me I have grandma shoes, and trips me so I said things back and stood up for my selfe [sic]." He added, "[J.M.] picks on me and calls me grandma shoes, and trips me." Also, "[J.M.] tells [J.S.] he has grandma shoes he trips him during PE just prior to winter break. J[M.] just said he has grandmom shoes for no reason. He looked up grandmom shoes on his chromebook during math."

These represent the description of the alleged HIB incident from the complainant and the response from the alleged perpetrator. In addition to these, the investigation produced information gathered from other students. Student I.V., identified by J.M. as also involved in the events that day, told Ms. Wenz on January 7 that J.S. "called J.M. Caihou and little bill."[2] He also calls him "Hitler's prototype." [J.S.] and J.H. tried to turn off and take [J.M.]'s

[2] While the reference to "Caihou" is not explained, from personal knowledge, it appears to be to a character in an animated television program for young children, "Caillou." The reference to "little bill" is not explained, but again it appears to be to a character by that name in an animated television program for young children.

earbuds/chromebook. [J.S.] and [J.M.] sometimes throw paper and erasers at each other." He advised that his whole class had witnessed the Chromebook and earbuds incident. The comment about "Caihou" and "little bill", as well as "weakling," were made on "Monday" in math class; the "Hitler" comment in lunch "prior to break." On January 14, he told Wenz that he had never heard J.M. make fun of J.S.'s shoes or say that they were "grandmom" shoes.

D.S. told Wenz on January 11, that he heard both boys make fun of each other; "it isn't just one side." J.S. calls J.M. "weak, not good at sports, and make [sic] fun of him for playing flag football. [J.M.] makes fun of him in general. It is starting to pick up." He reported that this activity occurred "mainly at lunch and gym and homeroom." As for the "Hitler" comment, he had only heard that such a comment was made from someone else. He also noted that "[J.M.] says to [J.S.] 'you are small,' while J.S. 'makes more direct insults.'" He reported that J.S. "talks about [J.M.] to everyone at lunch table," commenting on how J.M. "thinks he's the best at sports but I'm better than him," and making fun of J.M. for wearing Eagles clothing.

J.H. denied seeing anyone touch J.M.'s Chromebook and offered that "during class everyone was turning people's chromebooks on and off." He noted that J.M.'s music was too loud and he was told to lower it. A.D. said J. and D. would pick on J.M. for being bad at volleyball, but he was not specific about when this occurred. Similarly, Ja.M. told Wentz that D. and J.S. told J.M. he was not athletic, but again he did not specify when this occurred.

On January 12, 2016, S.F. told Wenz of an incident in which J.S. told J.M. that he should not play Minecraft, as no one does that anymore. "[J.M.] took it like J.S. was making fun of him." She added, "[J.S.] and [J.M.] have always had problems with fighting." This student does not refer to the type of comments ("weak" "weakling" or such) that are the basis of the finding of a violation of the Act. Her reference appears to be to comments made on January 11, 2016, in Mrs. Hartsough's class, while that teacher was absent. She does report that J.M. "got red in the face" and that J.M. "always says to everyone that J.[S.] makes fun of him."

A number of these and other students confirmed that the two had a longstanding problem. E.F. said, "I know there were problems that occurred in the past," adding, "[J.S.] used to make fun of [J.M.] but didn't mean it, [J.M.] would take it the wrong way and slowly got angrier." D.R. said that the boys "go back and forth ongoing about things said or done in gym."

He quoted words used, such as "very sick" or "shut up." J.S. would say "You suck" and "you aren't athletic." J.M. would say, "Shut up" or "you suck." J.S. made comments about J.M.'s football launcher and "why don't you just have a catch with your dad." In response to the question about when and where "the incident" happened, he wrote "gym, lunch-Hitler's prototype," but he did not specifically state who used these words and Mr. Butler's note indicates that D.R. was not "there" and that others told him about this. He never heard any comment about "grandmom shoes." He also noted "mentally handicapped"—never between [J.S.] and [J.M.]" and that sometimes J.M. mocked J.S. if J.S. messes up in gym— he will say "Yeah, I'm the one who is bad." D.S. also noted that J.S. and J.M. each "make fun of each other" and J.M. tells J.S. that J.S. is "small."

Summary Decision

A party may move for summary decision as a means to resolve a contested case without the necessity of a hearing involving witnesses and testimony. Such a motion is made based upon the contention that the material facts necessary to determine the legal issues in the case are not in genuine dispute, and that the application of the law to those undisputed facts must necessarily result in a decision in favor of the moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). As the Brill Court stated, the "essence of the inquiry[,]" is, "whether the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." Brill, at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). To defeat the motion, the opposing party must demonstrate, by affidavits, the existence of genuine disputes as to the material facts. All reasonable inferences arising from the undisputed evidence must be accorded to the opponent of the motion. If all parties agree on the material facts, and if there are cross-motions for summary decision, then the applicable law determines if any party is entitled to a favorable decision. N.J.A.C. 1:1-12.5;

Discussion

The Board argues that the investigation by Ms. Wenz determined that J.S. had called J.M. "weak" and a "weakling," as well as referring to J.M.'s athletic ability by saying "you suck." "These facts supported the District's finding of an actual or perceived characteristic." Added to

this was the disruption caused by J.M. having to report the remarks to his father who then had to report them to the school district, thereby causing disruption in the orderly operation of the school or in J.M.'s rights and emotionally harming the "embarrassed" student. As for the story told by J.S. in his second interview about J.M. talking about "grandmom" shoes, the Board specifically noted that this claim was unsubstantiated and, while also deciding that it rejected Mrs. S.' argument that the conduct complained of resulted from a "conflict," found instead that the "problems between J.M. and J.S. arose from J.S's conduct." The Board found that the preponderance of the evidence supported that the comments were made by J.S., the motivation was based on the actual or perceived characteristic of J.M. as being "weak," and that they met the definition of HIB.[3] Based upon the evidence, the Board made a decision that was clearly neither arbitrary, capricious or unreasonable. The evidence was that the comments about weakness came in the context of J.S. pushing down on the lid of J.M.'s Chromebook, "while J.M. resisted the physical pressure." This comment about his lack of strength embarrassed J.M. The size difference between the larger J.M. and the smaller J.S. was irrelevant to the analysis of the motivating factor for J.S.'s comments. And the comment was not made in a "conflict" situation, as the claim about the "grandmom" shoes was not substantiated and even if it were made, the comments about "weakness" could not be connected to the use of that phrase or reference by J.M. The Board's decision was entirely within the realm of reasonableness, even if others might reasonably disagree.

In this case, I **FIND** that there is no doubt that the record establishes that J.S. and J.M. have had problems getting along with each other since first grade. It is true that such a long standing, unresolved conflict between two students may be accompanied by the sort of "harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation," identified in K.L. As the court said, this sort of conduct does not fall within the statutory definition of HIB. However, merely because two students have such an ongoing conflict does not mean that there may not be instances in which that conflict includes conduct that crosses the line into prohibited HIB. If particular comments or actions by one of the two against the other are "reasonably perceived as being motivated either by any actual or perceived characteristic, such as . . . a mental, physical or sensory disability, or by any other distinguishing

[3]Again, it is noted that the Board's summary mentions no finding about a lack of athletic ability.

characteristic, . . . ," the fact that such conduct occurs against a background of conflict that may not have historically included conduct reasonably perceived as motivated by such reasons does not insulate the conduct under review from being properly determined to be in violation of the Act. Indeed, even if past history might include such prohibited conduct, it is the specific matter under investigation following an HIB complaint that must be judged to determine if it involved such offensive conduct. And, the existence of evidence of possible past HIB actions by the victim of the conduct at issue does not excuse any current HIB conduct directed at that child. Here, J.S. admitted that he told J.M. that J.M. was weak. Although J.S. did not admit that he was pushing down on the lid of the Chromebook, J.M. explained that J.S was doing that and that J.S. slammed the lid down, while telling J.M. that he was "weak." Student I. confirmed an incident involving the Chromebook. He also heard the "weakling" comment. No one substantiated J.S.'s story about "grandmom" shoes, a story he only told during his second interview, but not during his first discussion with Ms. Wenz. Clearly, if the Board credited J.M.'s version of events, it could decide that during a struggle over the Chromebook, J.S. told J.M. that he was "weak," a "weakling," a comment that might quite reasonably embarrass the recipient of the comment. I **CONCLUDE** that such a comment, especially when made during a physical confrontation, however limited it might have been, could reasonably be seen as motivated by an actual or perceived physical characteristic. There is no basis here for concluding that the incident either did not occur or that the Board's decision to credit J.M.'s version of the facts was unreasonable. Given this, I **CONCLUDE** that it cannot be said that the Board's determination that J.S. violated the prohibition against HIB on January 5, 2016, was arbitrary, capricious or unreasonable. While the petitioners try to deflect from this conclusion by invoking the existence of historical conflict that arguably did not appear to involve such motivation(s), that fact alone does not establish the legal infirmity of the Board's conclusion as to this particular event. Thus the case differs from that in either R.A. o/b/o B.A. v. Board of Education of the Township of Hamilton, http://njlaw.rutgers.edu/collections/oal/html/initial/edu10485-15_1.html; adopted, Comm'r (June 22, 2016), or L.B.T. o/b/o K.T. v. Board of Education of the Freehold Regional School District, OAL Dkt. No. EDU 7894-12 (January 24, 2013), adopted, Comm'r (March 7, 2013), in each of which the Board had determined that the complained of conduct was part of ongoing conflicts and, most significantly, unlike here the comments complained of did not address distinguishing characteristics. The respective administrative law judges and the Commissioner

each deferred to these board determinations of the lack of motivations that fell within the Act's definition of HIB conduct.

While perhaps the petitioners and others might believe that the legislation takes an overbroad approach to the realities of some conflicts and interactions between immature students, the fact remains that the Legislature, seeking to address a pervasive problem of significant concern in the school environment, with additional important societal impacts, created a definition of prohibited conduct and the facts here reasonably support a conclusion that the conduct found to have occurred falls within the definition. While some finder of fact might conclude otherwise, where there is more than one reasonable way to understand a set of facts, it cannot be said that the choice of one reasonable interpretation over the other reasonable interpretation amounts to an unreasonable choice.

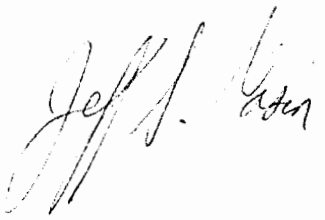
ORDER

IT IS HEREBY ORDERED that petitioners' appeal of the Board's decision that J.S. engaged in prohibited conduct in violation of the Anti-Bullying Bill of Rights is **DENIED**. The Board imposed sanctions which resulted in J.S. having his student schedule adjusted, a requirement that he meet with a school counselor, and a change in his homeroom teacher. These all were reasonable approaches to the situation created by J.S.'s conduct, and they are affirmed.

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

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

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



March 28, 2019
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 3-28-19

Date Mailed to Parties: 3-28-19

mph

LIST OF EXHIBITS:

For petitioners:

P-1 Mediation Agreement, March 23, 2010
P-2 Discipline Referral Form, incident date 1-7-16
P-3 Certification of M.S. and N.S., on behalf of J.S., dated January 24, 2019
P-4 HIB document dated 1-18-16, "To the Parents/Guardians of J.S."
P-5 HIB Level (1) Investigation, signed January 8, 2016
P-6 HIB Investigation Form, statement of J.S., dated 1-12-16
P-7 HIB statement of J.M., dated1-7-16
P-8 Student Incident Report, dated 1/7/16
P-9 Statement of I.V, dated 1-7-16
P-10 Statement of D.S., dated 1-11-16
P-11 Statement of S.F, dated 1-12-16
P-12 Statement of E.F., dated 1-14-16
P-13 Statement of D.R., dated1-14-16
P-14 Additional material regarding D.R.'s information
P-15 Final Determination & Conclusion of the Level (2) Investigation to Superintendent, signed 1-20-16
P-16 HIB document and letter to parents of J.S. from Christopher Butler, dated 1-2-16
P-17 Memorandum from Mr. Butler to N.S., dated 1-22-16
P-18 Email chain regarding hearing request by parents of J.S., dated 1-25-16
P-19 Board minutes for executive session held on 1-28-16
P-20 Board minutes for regular meeting held on 1-28-16
P-21 Letter to parents of J.M., dated 1-29-16
P-22 Email re: "requested HIB report"
P-23 Board Minutes for Executive Session held on 2-25-16
P-24 Two-page summary of "HIB hearing involving students J.S. and J.M.", executive session, 2-25-16
P-25 Board minutes for regular session held on 2-25-16
P-26 Letter to parents of J.M., dated 2-26-16

For respondent Board of Education:

A- Letter dated 5-24-16 from Seth N. Broder, Esq. to Commissioner of Education, c/o M. Kathleen Duncan, with attached Petition

B Letter dated 6-13-16 from Sanmathi Dev, Esq. to M. Kathleen Duncan, with attached Notice of Motion to Dismiss Petition of Appeal

C Acknowledgement of Filing, dated 6-16-16

D Letter from parents of J.S. to Honorable Elia A. Pelios, ALJ

E Letter dated 9-9-16 from Sanmathi Dev, Esq. to Judge Pelios

F Letter dated 9-13-16 from Seth N. Broder, Esq. to Judge Pelios

G Order Granting Intervention and Denying Motion to Dismiss, dated 8-15-18

H Letter dated 9-12-18 from Sanmathi Dev, Esq. to Judge Jeff S. Masin

I Letter dated 10-23-18, with attached Confidentiality Order

J Email chain including J.M., father of J.M.'s report of alleged HIB incident dated 1-5-16 and reply

K List of teacher assignments and multiple documents detailing HIB investigation

L Memo to Mrs. S. regarding J.S.'s updated schedule

M Board minutes of regular meeting held 1-28-16

N Letter to parents of J.M., dated 1-29-16

O Email from Dr. Joseph Campisi to "All" re "Memo from HIB hearing (January 28, 2016" with attached memo

P Board minutes of regular meeting held on 2-25-16

Q Email chain starting on 2-26-16 from J.M., father of J.M.

R Email from J.M. and D.M. to Dr. Campisi, 2-26-16

For Intervenors

I-1 Intervenors' Certification, dated 2-4-19, with attached

- A: Email from D., mother of J.M. to Ms. S., with handwritten comments
- B: Email from J.M., father, to Dr. Campisi, 1-30-16

I-2 Intervenors' Statement of Undisputed Facts with attached exhibits

- A: Petition of J.S., a minor child by his parents, M.S. and N.S. v. Hainesport Twp. Bd of Educ., dated 5-24-16

B: Email of J.M. to Christopher Butler, 1-5-16

C: Letter to parents of J.M., dated 1-8-16

D: Memo to Anti-Bullying Specialist to Initiate HIB Complaint and Investigation Process, 1-7-16 and additional HIB investigation materials

E: Additional HIB investigation documents

F: HIB document dated 1-20-16 addressed to parents of J.S.

G: Letter dated 1-29-16 to parents of J.S.

H: Email re: "HIB Notification Letter after Board Meeting, 1-17-16

I: Summary of "HIB Hearing Involving Students J.S. and J.M., Executive Session," 2-25-16

J: Letter to parents of J.M., 2-26-16

K: Email sent 12/22/15 from J.M. father, to Christopher Butler, re: "Lunchbox"

156-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Englewood Cliffs, Bergen County, and New Jersey State Department of Education,

Respondents.

Synopsis

The dispute herein concerns the payment of tuition for students from the Englewood Cliffs School District who attend the Academies@Englewood (Academies), a magnet school program that began in 2002 and is based at Dwight Morrow High School (Dwight Morrow), the Englewood Board of Education's (Englewood) only public high school. Since 1965, students from Englewood Cliffs have attended high school in Englewood under a send-receive agreement between Englewood and Englewood Cliffs – which does not operate a high school of its own. From 2002 until 2013, up to twenty-five Englewood Cliffs students attended the Academies each year. During that period of time, Englewood reported these pupils as "choice students" on its Application for State School Aid; therefore, the New Jersey State Department of Education (Department), and not Englewood Cliffs, paid tuition to Englewood for the education of these students. The Department recognized this anomaly in 2013, instructed Englewood to report the students in question as "received students" under the send-receive relationship going forward, and moved to stop providing Choice aid to Englewood for the Englewood Cliffs students who attend Academies. The Department filed a motion for summary decision in 2016, which was held in abeyance pending resolution of discovery matters; Englewood Cliffs filed opposition to the motion in 2018.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; the fundamental dispute here is whether Englewood Cliffs students attending the Academies are "choice students" entitled to state aid under the Interdistrict Public School Choice Program; the purpose of the school choice program is to allow students to be educated in a district they otherwise would not be entitled to attend for free; here, Englewood Cliffs students are already entitled to attend Dwight Morrow for free under the send-receive agreement; the Department's determination that Englewood Cliffs students attending the Academies are not "choice students" and therefore not entitled to Choice aid is correct; and Englewood Cliffs' arguments that 1) the Supreme Court decision in *Board of Education of Englewood Cliffs v. Board of Education of Tenafly*, 170 *N.J.* 323 (2002) obligates the State to pay for Englewood Cliffs students to attend the Academies, and 2) that the Department's determination that the subject students are not "choice students" amounts to unlawful rulemaking under the Administrative Procedure Act, are without merit. Accordingly, the ALJ granted the Department's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with prejudice.

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

June 18, 2019

OAL Dkt. No. EDU 16167-15
Agency Dkt. No. 345-11/14

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Englewood Cliffs, Bergen County, and New Jersey State Department of Education,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Borough of Englewood Cliffs (Englewood Cliffs), and the Department of Education's (Department) reply thereto have been reviewed and considered. The dispute in this matter concerns the payment of tuition for Englewood Cliffs students attending the Academies@Englewood (Academies), a magnet school program based at Dwight Morrow High School (Dwight Morrow) in Englewood. The Administrative Law Judge (ALJ) found that Englewood Cliffs students attending the Academies are not Choice students; therefore, Englewood Cliffs is required to pay tuition for those students pursuant to the pre-existing sending/receiving agreement between the two districts.

As a preliminary matter, the Commissioner notes that the Initial Decision addresses the Department's arguments that the matter is moot in light of the Department's decision to release Choice aid for Englewood Cliffs students attending the Academies for the 2013-14, 2014-15 and 2015-16 school years and that, to the extent a viable claim might remain despite the payment of

Choice Aid for those years, it is procedurally defective because it is essentially a Petition for a Declaratory Ruling that was not filed as such. The Department did not contest the ALJ's conclusions on these issues in its reply to Englewood Cliffs' exceptions. The Commissioner agrees with the ALJ that the matter is not moot due to the recurring need to determine who will pay for Englewood Cliffs students to attend the Academies. The Commissioner also agrees that, given that the dispositive issue has been squarely presented and adequately briefed, and the lack of any reasonable prospect that either party will change its position if Englewood Cliffs is required to refile this matter as a Petition for Declaratory Ruling, the matter should proceed to a decision based on the record as it stands.

Englewood Cliffs has filed exceptions to the ALJ's determination, which largely repeat arguments made in its filings before the ALJ. First, Englewood Cliffs argues that whether the Department provided Choice Aid for Englewood Cliffs students prior to 2013 intentionally or inadvertently is a material dispute of fact that the ALJ incorrectly resolved without a hearing. Englewood Cliffs contends that the Department directed the districts to report these students as Choice students[1] and that, accordingly, the ALJ should not have accepted the Department's

[1] On this point, Englewood Cliffs' exceptions cite to "Cross-Petition Ex. D." This exhibit includes an email from the Department to Englewood Cliffs, dated December 17, 2013, stating, "Since Englewood Cliffs and Englewood City have a formal send/receive relationship, Englewood Cliffs high school students attending Englewood City must be reported by Englewood Cliffs as sent to Englewood City. Englewood City must report these students as received from Englewood Cliffs. The students should not be reported as Choice students." Therefore, this exhibit does not support Englewood Cliffs' argument. However, Englewood Cliffs' brief in opposition to the Department's motion for summary decision, which makes this same argument, cites to a different document: Exhibit B to the Cross-Petition, which includes an email from Englewood to the Department, dated October 9, 2013, stating, "Previously, NJSMART has directed me to code the Englewood Cliffs residents in our Choice academy as Choice students," and an October 10, 2013 email response from the Department to Englewood, stating, "While we review this question, please report these students the same way that you've reported them in the past. Please follow NJSMART instructions." The Commissioner presumes, for the sake of argument, that Englewood Cliffs' exceptions intended to refer to Exhibit B rather than Exhibit D, but disagrees with Englewood Cliffs that this document proves prior instructions by the Department regarding the reporting of Englewood Cliffs students attending the Academies, as the description of the alleged instructions comes from Englewood staff and no other document is attached or referenced to show actual instructions from the Department. Moreover, regardless of any alleged prior instructions, this matter presents a purely legal question and the fact of the Department's prior instructions is irrelevant to the resolution of that question.

representation that it only learned of the practice of classifying the students as Choice students during a review of the Choice Program in the 2013-2014 school year.

Next, Englewood Cliffs argues that the applicable statutes and regulations provide for Choice Aid in these circumstances, citing to *N.J.A.C.* 6A:12-1.2(d), which provides, "District boards of education currently in a sending/receiving relationship are eligible to participate in the Choice Program unless otherwise legally prohibited," and *N.J.A.C.* 6A12-1.2(a), which provides, "A Choice district may accept non-resident students into an educational program in the Choice district at the expense of the State." Englewood Cliffs argues that these regulations mean it is eligible to participate in the Choice Program, and that the Choice district (Englewood) may accept non-resident students (from Englewood Cliffs) into a program in the Choice district (the Academies) at the expense of the Department. Englewood Cliffs further claims that because there is a competitive admissions process for the Academies, students are not admitted as a matter of right, and thus Englewood Cliffs cannot designate the Academies as the high school for its students.

Englewood Cliffs argues that the Department has an independent obligation to fund Englewood Cliffs students with Choice Aid under the New Jersey Supreme Court's decision in *Board of Education of Englewood Cliffs v. Board of Education of Englewood*, 170 *N.J.* 323 (2002). In particular, Englewood Cliffs relies on the concurrence in that case, which indicates that the State Board of Education bears the primary responsibility for providing financing to alleviate racial imbalance, *id.* at 345, as well as the Department's subsequent provision of funding to implement programs to address racial imbalance in Englewood, to conclude that the Department has assumed the obligation to finance the operation of the Academies.

Finally, Englewood Cliffs argues that the Department has violated the requirements of the Administrative Procedure Act. Specifically, Englewood Cliffs disputes the ALJ's findings regarding three prongs of the standard for determining whether administrative rulemaking is required, as set forth in *Metromedia, Inc. v. Director, Division of Taxation*, 97 *N.J.* 313 (1984). First,

Englewood Cliffs argues that the ALJ incorrectly found that the Department's action impacted a narrow and select group, because the action – although only applied in this matter to Englewood and Englewood Cliffs – could apply to any district in the Choice Program or in a sending/receiving relationship. Second, Englewood Cliffs argues that the ALJ incorrectly found that the action was clearly and obviously inferable from the enabling statutory authorization, because the language of the enabling statutes and regulations provides for Choice aid in these circumstances. Third, Englewood Cliffs notes that the ALJ found that the question of whether the action was a material and significant change from a past agency position was "a mixed bag," but argues that this factor should weigh in favor of requiring rulemaking because the Department allowed these students to be classified as Choice students for ten years.

In its reply, the Department argues that whether it made a mistake by providing Choice Aid in the past is not a material fact because the matter to be resolved is only the ongoing status of Englewood Cliffs students who attend the Academies. The Department further contends that Englewood Cliffs used the Choice Program improperly as a matter of law, and that the Department acted appropriately to correct it. As such, the Department contends that this matter was appropriately resolved by summary decision.

The Department argues that Englewood Cliffs students are not Choice students because they are entitled to go to Dwight Morrow, including the Academies, for free based on the sending/receiving agreement between Englewood and Englewood Cliffs. The Department notes that the Academies is "an academic program of Dwight Morrow High School," as indicated on the Academies' own website. Furthermore, the website treats Englewood and Englewood Cliffs students identically in its description and admission procedures, stating that the "Interdistrict Public School Choice Program allows students who live outside Englewood and Englewood Cliffs to apply" to the Academies, and that "Englewood and Englewood Cliffs residents are exempt" from the requirement that applicants must have been enrolled in a public school for at least one year prior to enrollment at

the Academies. In other words, the Department argues, Englewood Cliffs students admitted to the Academies are effectively Englewood resident students attending a program at their resident high school and are not converted to Choice students merely because the program has admissions criteria. The Department further notes that the Supreme Court's decision in *Englewood, supra*, does not obligate the Department to fund the Academies, and argues that other legislative appropriations to support integration efforts in Englewood are entirely separate from appropriations for the Choice Program.

Lastly, the Department maintains that it has not violated the Administrative Procedures Act because its correction of Englewood Cliffs' reporting error is a directive expressly provided by or obviously inferable from the enabling statutory authorization. The Department argues that it is obvious from the language and design of the Choice Program that Choice Aid is not available for students who are attending their designated high school. The Department further contends that Englewood Cliffs has not proven a contrary "clear past agency position" and that correcting statutory noncompliance of which the Department was previously unaware does not constitute a material change in position.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ's findings and determination of this matter. The case presents the purely legal question of whether Englewood Cliffs students attending the Academies are entitled to Choice Aid pursuant to the applicable statutes and regulations; therefore, the ALJ's disposition of this case via summary decision was proper.

The Commissioner is also in accord with the ALJ's determination that Englewood Cliffs students attending the Academies are not Choice students. While *N.J.A.C.* 6A:12-1.2(d) provides that districts participating in a sending/receiving relationship may also participate in the Choice Program, this provision should not be strained beyond its plain meaning: that districts such as Englewood may receive students from Englewood Cliffs through the established sending/receiving

relationship while also enrolling Choice students from other districts, just as Englewood Cliffs students may attend school in Englewood through the sending/receiving relationship or another participating district through the Choice Program. The regulatory permission to participate in both types of relationships does not in any way suggest that the Choice Program relieves a district of its obligation to pay tuition under a sending/receiving agreement simply because the receiving district also accepts Choice students from other districts. Moreover, pursuant to *N.J.S.A.* 18A:36B-20(a) and *N.J.A.C.* 6A:12-1.3, for purposes of the Choice Program, the "sending district" is defined as the district or school that the student "is required by law to attend." Englewood Cliffs students are required by law to attend high school in Englewood, making Englewood the sending district for Englewood Cliffs students for purposes of the Choice Program. It is illogical, and inconsistent with the purpose of the Choice Program, for Englewood to be both the Choice sending district and the Choice receiving district. Just as Englewood cannot report Englewood students attending the Academies as Choice students – because they are resident students attending a program within their resident high school – Englewood Cliffs cannot report students attending the Academies as Choice students, because they are effectively resident students attending a program within their designated high school.[2]

The Commissioner agrees with the ALJ's conclusion that the Supreme Court's decision in *Englewood*, *supra*, does not obligate the State to provide Choice Aid to Englewood Cliffs students attending the Academies. The majority opinion specifically notes that "no issue concerning funding of the proposed academy partnership is before the Court." *Englewood*, *supra*, at 344. As such, the decision cannot be the law of the case for this matter. The concurrence relied on by Englewood Cliffs for the proposition that the State bears primarily responsibility for providing

[2] This conclusion does not, however, mean that Englewood may not apply admissions criteria to Englewood Cliffs students applying to the Academies. It merely means that Englewood Cliffs students are in the same position as Englewood students for purposes of the Choice Program: both are ineligible to receive Choice Aid when attending the Academies.

financing holds limited weight compared to the majority opinion, and is balanced by a second concurrence that objects to any conclusion that the State Board's statements in previous decisions about its "power and responsibility to direct such measures as are necessary to remedy segregation in the schools [are] pronouncements on responsibility for the cost of such remedial actions." *Id.* at 345. Moreover, the fact that the State has provided other types of funding for the Academies does not establish any obligation to provide Choice Aid for Englewood Cliffs students attending the Academies

The Commissioner also agrees with the ALJ that the Department's decision to correct the reporting of Englewood Cliffs students attending the Academies did not require formal rulemaking. *N.J.S.A.* 18A:36B-20(a) and *N.J.A.C.* 6A:12-1.3 very clearly define a sending district, for purposes of the Choice Program, as the district that the student "is required by law to attend." Englewood Cliffs has designated Englewood as the district that Englewood Cliffs students are required to attend for high school and, as such, Englewood is their "sending district" for purposes of the Choice Program. To read the statutes and regulations of the Choice Program to allow Englewood to be both the Choice sending district and the Choice receiving district for Englewood Cliffs students attending the Academies, such that it could receive Choice Aid from the Department for those students, would be an absurd result, and one inconsistent with the goal of the Choice Program: to increase options for students to attend schools other than the ones that they would be entitled to attend for free. Englewood Cliffs' obligation to pay for its students to attend the Academies pursuant to the sending/receiving agreement is thus clearly and directly inferable from the enabling statute and regulations. Furthermore, the New Jersey Supreme Court has held that it is not a material and significant change in administrative policy for an agency to enforce a law that has not previously been enforced. *Airwork Service Division v. Director, Division of Taxation*, 97 *N.J.* 290, 200-01 (1984). While Englewood Cliffs received the benefit

of its reporting error for fourteen years, the Department is not required to continue to allow that error.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter; summary decision is granted in favor of the Department, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/19
Date of Mailing: 6/19/19

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 16167-15

AGENCY DKT. NO. 345-11/14

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Mark Tabakin, Esq., petitioner, (Weiner Lesniak, LLP, attorneys)

Stephen R. Fogarty, Esq., for respondent, Englewood Cliffs Board of Education (Fogarty and Hara, attorneys)

Jennifer L. Cavin, Deputy Attorney General, for respondent, New Jersey State Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 17, 2018 Decided: April 2, 2019

BEFORE **JEFFREY A. GERSON**, ALJ (Ret., on recall):

BACKGROUND

Englewood School District operates one public high school: Dwight Morrow High School. It educates students from Englewood and since 1965, it has been the designated high school for students from Englewood Cliffs School District, which chooses not to operate its own. Under this send-receive agreement, Englewood Cliffs students are entitled to attend Dwight Morrow and Englewood Cliffs is obligated to pay tuition to Englewood for each Englewood Cliffs student that chooses to attend. In 2002, a magnet school program called Academies@Englewood opened in Dwight Morrow. Students from Englewood, Englewood Cliffs, and any other school district in the State can apply for admission. Interested students must submit an application and sit for an entrance exam and interview.

Through a new initiative called the Interdistrict Public School Choice Program, the State agreed to fund the education of out-of-district students that attended Academies@Englewood. These students are "choice students." To receive state funding, school districts must submit an Application for State School Aid. The district must, among other things, report the number of "choice students" being educated in its district.

From 2002-2013, Englewood Cliffs students (up to twenty-five each year) attended Academies@Englewood. Englewood reported these students as "choice students" and thus the State, not Englewood Cliffs, paid the tuition to Englewood for their education.

In 2013, the New Jersey Department of Education (the Department) reviewed the school funding it had distributed for the 2013-14 school year. It discovered that Englewood had been reporting Englewood Cliffs students attending Academies@Englewood as "choice students." Believing this was an error, the Department instructed Englewood to report them as "received students" because, in its view, they attended Dwight Morrow pursuant to the send-receive agreement with Englewood Cliffs.

The Department withheld $414,225 in aid it was scheduled to release to Englewood for the 2013-14 school year. For the 2014-15 and 2015-16 school years, it did not provide funding to Englewood for the Englewood Cliffs students that attended Academies@Englewood. This litigation followed.

PROCEDURAL HISTORY

On November 25, 2014, Englewood filed a Petition of Appeal with the Commissioner of Education. It asked that the reduction in the school choice aid for the 2013-14 school year be reversed. It also requested an order declaring that Englewood Cliffs students attending Academies@Englewood be designated as "choice students." In the alternative, it asked that Englewood Cliffs be required to pay tuition for its students under the send-receive agreement.

On December 5, 2014, Englewood Cliffs filed an Answer and a Cross-Petition against the Department. In its Cross-Petition, it sought an order declaring that Englewood Cliffs students attending Academies@Englewood be declared as "choice students" and that the State is obligated to fund the cost of their education. In the alternative, it requested an order to prevent Englewood from seeking tuition reimbursement.

On October 5, 2015, the Department filed Answers to the Petition and Cross-Petition. The matter was thereafter transmitted to the Office of Administrative Law as a contested case and assigned to Hon. Michael Antoniewicz.

On October 7, 2015, the Department informed Englewood that it was prepared to release $1,242,675 in choice aid for students it educated from Englewood Cliffs for the 2013-14, 2014-15, 2015-16 school years. It reiterated its position, however, that Englewood is not eligible for school choice aid for Englewood Cliffs students that attend its schools effective July 1, 2016.

On November 30, 2015, Englewood withdrew its Petition of Appeal. Englewood Cliffs continued to pursue its Cross-Petition against the Department. On March 29, 2016, the Department filed a Motion for Summary Decision. That motion was held in abeyance for some time pending the resolution of outstanding discovery matters. On February 14, 2018, Englewood Cliffs filed it opposition. On April 30, 2018, the Department filed its reply brief. This matter was reassigned to the undersigned on September 17, 2018.

LEGAL DISCUSSION

The legal issue presented here is whether Englewood Cliffs students attending Academies@Englewood at Dwight Morrow High School are "choice students" entitled to State aid under the Interdistrict Public School Choice Program.

Before reaching the merits, however, the Department argues two procedural grounds on which to dismiss this case.

First, it argues that Englewood Cliff's Cross-Petition is moot in light of the decision to release school choice aid to Englewood for the 2013-14, 2014-15, and 2015-16 school years. "An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrections, 382 N.J. Super. 254, 258-59 (App. Div. 2006). "It is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." Cinque v. N.J. Dep't of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993).

Englewood Cliffs agrees that any request for monetary relief for those school years are indeed moot. Yet there remains the fundamental dispute whether students from Englewood Cliffs attending Academies@Englewood are "choice students." If they are, the State must pay for their education. If not, Englewood Cliffs has that obligation. Because the parties do not agree on the answer, there is a controversy, the resolution of which will determine who must pay for these students to attend

Academies@Englewood going forward. Therefore, as Englewood Cliffs contends this case is not moot.

This leads directly to the Department's second ground for dismissal. It argues that to the extent Englewood Cliffs has a viable claim, it is for declaratory relief and as such, its Cross-Petition is procedurally defective because it was not filed with the Commissioner as a Petition for Declaratory Ruling. See N.J.A.C. 6A:3-2.1.

Englewood Cliffs fights the characterization that it seeks declaratory relief. Yet in the requested relief section of its Cross-Petition, it uses the verb "declaring" no less than three time. In any event, even if the Department is correct that the Cross-Petition is procedurally defective, any defects should be excused. See N.J.A.C. 6A:3-1.16 (providing that the rules "may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.").

This case has been pending since 2015. The dispositive issue is squarely presented in this case; it has been adequately briefed; there are no material issues of fact; and there is no reasonable prospect that either party will change its position if the Cross-Petition is dismissed and restyled as a Petition for Declaratory Ruling.

Interdistrict Public School Choice

The Interdistrict Pubic School Choice Program of 1999 and 2010 transformed public education in the State of New Jersey by expanding children's access to a free public education in schools outside of their designated school districts.

In general, before this school choice program, children were entitled to a free public education in one of two places: either in the schools located in the school district in which they were domiciled; or, if their school district lacked the necessary educational facilities, the out-of-district schools designated through a send-receive agreement. See N.J.S.A. 18A:38-1; N.J.S.A. 18A:38-11.

Parents did have other options for their children's education. Short of moving into a different school district, they could enroll them in a private school or in a public school that accepted non-resident students. Neither option, however, was free. N.J.S.A. 18A:38-3. Parents that could not afford to pay tuition or move, therefore, had little to no choice where their children were educated.

Recognizing the need "to increase options and flexibility for parents and students in selecting a school that best meets the needs of each student," the Legislature empowered the Commissioner of Education to establish the Interdistrict Public School Choice Program – first as a Pilot Program in 1999 and later on a permanent basis in 2010. N.J.A.C. 6A:12-1.1; N.J.S.A. 18A:36B-16.

This school choice program allows students to attend certain public schools outside their designated school district at the State's expense. N.J.A.C. 6A:12-1.2(a). To be eligible for this program, school districts must apply to become a "choice district." N.J.A.C. 6A:12-1.2(b). If approved, choice districts can "enroll students across districts lines in designated schools of the choice district." N.J.S.A. 18A:36B-16. These out-of-district students that are accepted into a choice district are called "choice students" and their education is funded entirely by State aid. N.J.A.C. 6A:12-1.3; N.J.A.C. 6A:12-9.1.

In addition to increasing choice for students and parents, this program promotes the added virtues of "improving efficiency through a voluntary redistribution of students from overcrowded to under-enrolled school districts" and "creating healthy competition among school districts." N.J.A.C. 6A:12-1.1.

Englewood School District was one of the 21 original choice districts; today there are 125 throughout the State. See, N.J. Dep't of Educ., Interdistrict School Choice Program, https://www.state.nj.us/education/choice/ (last visited Mar. 14, 2019). Its status as a choice district allows Englewood to accept students from outside the district to attend Academies@Englewood at Dwight Morrow High School.

Students from Englewood Cliffs have attended Academies@Englewood since the program first started in 2002. The question is whether this program relieve Englewood Cliffs' of its obligation under the send-receive agreement to fund the education of its students attending Dwight Morrow.

Neither the enabling statute, N.J.S.A. 18A:36B-16, or the regulations, N.J.A.C. 6A:12 et seq., answer the question in explicit terms. There is but one mention of send-receive agreements. N.J.A.C. 6A:12-1.2(d) says that "[d]istrict boards of education currently in a sending/receiving relationship are eligible to participate in the choice program unless otherwise legally prohibited." This regulation, however, does nothing more than make Englewood eligible to be a choice district notwithstanding its send-receive agreement with Englewood Cliffs.

When one looks to the purpose of the school choice program, however, it becomes clear that it was not meant to cover the students at issue in this case. This program, as mentioned, was designed to open up school districts by allowing students to be educated in a district they otherwise would not be entitled to attend for free. This goal is in no way advanced if the State pays for Englewood Cliffs students to be educated at Academies@Englewood because Dwight Morrow is their designated high school under a send-receive agreement with Englewood. In other words, even before this program, these students were entitled to attend the school of their choice for free.

Englewood Cliffs argues that although Academies@Englewood is operated within Dwight Morrow, it has a competitive admissions process and therefore its students are not guaranteed admission. That may be true, but it is also true for students from Englewood. No one argues that Englewood students attending Academies@Englewood are "choice students." It would be anomalous to treat these students differently because the send-receive agreement puts Englewood students and Englewood Cliffs students in the same position with respect to public high school education: each is entitled to attend Dwight Morrow.

Indeed, on its website, Academies@Englewood consistently makes this distinction between Englewood and Englewood Cliffs students on the one hand, and students from other districts on the other. See e.g., Academies@Englewood, Admissions, www.academies-englewood.org/Admissions.html, (last visited Mar. 14, 2019) ("The Academies@Englewood serves the children of Englewood and Englewood Cliffs as well as students from over 30 Bergen County districts and districts outside Bergen County."); ("The Interdistrict Public School Choice Program allows students who live outside Englewood and Englewood Cliffs to apply to Academies@Englewood."); ("Englewood and Englewood Cliffs residents are exempt from this requirement."); see also Academies@Englewood, Frequently Asked Questions, www.academies-englewood.org/2023/Frequently_Asked_Questions_2023.pdf, (last visited Mar. 14, 2019) ("Approximately 135 seats will be filled. Approximately half will be from Englewood/Englewood Cliffs; the other half from out-of-Englewood.").

For all these reasons, the Department's determination that Englewood Cliffs students attending Academies@Englewood are not "choice students" and therefore not entitled to State aid is correct.

Englewood Cliffs offers two additional reasons why the State should pay for these students' education. First, it argues that notwithstanding the school choice program, the Department has an independent obligation to fund its students attending Academies@Englewood under the Supreme Court's decision in Bd. of Educ. of

Englewood Cliffs v. Bd. of Educ. of Tenafly, 170 N.J. 323 (2002). Second, it argues that the Department's determination is invalid because it failed to follow the formal rulemaking procedures required by the Administrative Procedure Act, N.J.S.A. 52-14B-1 to -15. Neither argument, is correct.

Segregation Remediation at Dwight Morrow

First, Englewood Cliffs argues that the Supreme Court's decision in Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Tenafly, 170 N.J. 323 (2002) (Englewood II) obligates the State to pay for its students to attend Academies@Englewood. Some background information on the long-running legal dispute between Englewood, Englewood Cliffs, and the State Board of Education, is necessary to analyze and ultimately, reject this claim.

In 1965, Englewood and Englewood Cliffs entered into a send-receive relationship under which Englewood Cliffs agreed to pay tuition to Englewood for each of its students that chose to attend Dwight Morrow High School. It did not take long for Englewood Cliffs to regret this decision. School districts, however, cannot unilaterally "sever" a send-receive relationship; it must be approved by the Commissioner of Education. See N.J.S.A. 18A:38-13. In 1977 and 1985, Englewood Cliffs petitioned the Commissioner to sever the relationship. Englewood II, 170 N.J. at 327, 329. It withdrew the first petition and the second petition was denied. Id. at 327-29.

During this period, white families from Englewood and Englewood Cliffs increasingly avoided sending their children to Dwight Morrow. Id. at 330-31. Parents either enrolled their children in private schools or in other districts, most notably Tenafly School District, that accepted non-residents students on a tuition basis. Ibid. Some suspected that parents avoided Dwight Morrow for racial reasons; others thought it was because of the quality of education. Id. at 331. Either way, it caused Dwight Morrow's student population to suffer from severe racial imbalance. Id. at 332-33.

To help remedy this segregation problem, the State Board of Education enjoined Tenafly and all other school districts from admitting students from Englewood and Englewood Cliffs on a tuition basis or otherwise. Id. at 333. This injunction remained in force until 2003. There were also efforts to bring magnet and specialty programs to Dwight Morrow to increase the quality of education and thus make the school more attractive for students and parents. Id. at 335-35.

In Englewood II, the Supreme Court granted a petition for certification to resolve this question: what is "the appropriate allocation of specific responsibilities between the Commissioner of Education and the Englewood School District in relation to the development and implementation of a voluntary plan that is designed to achieve an appropriate racial balance and educational quality at Dwight Morrow High School by means of magnet and specialty schools." Id. at 325.

In answering this question, the Court held that "the Commissioner and State Board retain the ultimate responsibility for developing and directing implementation of a plan to redress the racial imbalance at Dwight Morrow." Id. at 343.

More importantly the court went on to discuss what was then an emerging partnership between Englewood and Bergen County Technical School, in which Bergen Tech would offer some of its academic programs at Dwight Morrow, with the goal "to significantly diminish the racial imbalance". Id. at 338-39. Though not mentioned in the Court's opinion, this partnership produced Academies@Englewood in September 2002. The court did not address the potential funding needs for Academies@Englewood. Indeed, it noted that "no issue concerning funding of the proposed academy partnership is before the Court." Id. at 344. The Court did, however, make some observations. It recognized that the State had already "accepted responsibility to fund initial start-up costs in the amount of $ 385,000." Id. at 344. "The amount of long-term funding required," the Court predicted, "obviously will depend on the specific costs to be incurred, the amount of Federal and other public and private grant money available, and the tuition revenues to be realized." Ibid.

In concluding, the court invoked optimism. It said that the "proposed academy partnership" appeared "both feasible and affordable" and "we are confident that the parties will not permit so promising a resolution of Dwight Morrow's racial imbalance to fail because of disagreement over a fair allocation of funding responsibility." Id. at 344.

Writing for himself, Justice Stein concurred in a brief opinion to address funding obligations for the proposed academy. He wrote that although the issue was not presented in the case, it was his "clear understanding" that the State Board had acknowledged that it "bears primary responsibility for providing or procuring financing for any plan designed to alleviate racial imbalance at Dwight Morrow." Id. at 345 (Stein, J., concurring).

Justice LaVecchia, also in a solo concurrence, registered her disagreement. In her view, previous statements by the State Board that it had the "power and responsibility to direct such measures as are necessary to remedy segregation in the schools" did not amount to "pronouncements on responsibility for the cost of such remedial actions." Id. at 345 (LaVecchia, J., concurring).

In the years since, the State has invested 23.3 million dollars in Academies@Englewood and the Integration Plan in Englewood. Motion for Summary Decision, p. 8. There is simply nothing in the Court's opinion, however, that obligates the State to fund Englewood Cliffs students attending Academies@Englewood.

Administrative Procedure Act

Second, Englewood Cliffs contends that the Department's determination that its students attending Academies@Englewood are not "choice students" amounts to unlawful rulemaking under the Administrative Procedure Act, N.J.S.A. 52-14B-1 to -15.

In Metromedia Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984), the Supreme Court distilled from precedent a six-factor test to determine when an agency must comply with the rulemaking procedure of the Administrative Procedure Act. According

to the Court, "an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process." Id. at 331. These features include whether the determination:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
> (3) is designed to operate only in future cases, that is, prospectively;
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
> (5) reflects an administrative policy that
> (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or
> (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

[Id. at 331-32].

"These relevant factors can," the Court explained, "either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication." Id. at 332. The Court did acknowledge, however, that "in many cases the question of whether the agency determination is a

rule or an adjudication is a close one." Id. at 332. The challenger, here Englewood Cliffs, bears the burden of proving that an agency action falls on the wrong side of that line. In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 133 (App. Div. 2013) (noting that "agency action is presumed valid and a challenger bears the burden of rebutting that presumption.").

On balance, the Metromedia factors weigh in favor of a finding that the Department did not engage in unlawful rulemaking because its determination that certain students are not eligible for State funding is limited to "a narrow select group," and its interpretation is "clearly and obviously inferable from the enabling statutory authorization" without amounting to "a material and significant change from a clear, past agency position." Id. at 331-32.

To start, Metromedia factor (1) is not implicated in this case. The Department's decision not to fund certain students under the school choice program applies only to "a narrow select group," not "a large segment of the regulated or general public." Id. at 331. Its decision, at this time, is limited to Englewood Cliffs students that attend Academies@Englewood at Dwight Morrow. Historically, there are no more than 25 such students each year.

Presumably, and this speaks to Metromedia factor (2), the Department intends to apply this decision "generally and uniformly to all similarly situated persons." Id. at 331. That is, the Department is likely to maintain its position that the State is not obligated to fund students that attend school in a "choice district" that is also their designated district under a send-receive agreement. On this record, it is not clear how many other students fit that description; though, if the numbers were considerable, the parties would have represented as much.

Metromedia factors (3) and (6) are the most easily satisfied. The Department's decision applies "prospectively" only. Id. at 331. It has not sought, and it has not indicated that it will seek reimbursement from Englewood Cliffs in the amount it paid to have its students educated at Academies@Englewood. In addition, it cannot be

disputed that the Department's determination "reflects a decision on administrative regulatory policy in the nature of the interpretation of law." Id. at 331-32.

In contrast, Metromedia factor (4) is not present here because the Department's "directive" is "clearly and obviously inferable from the enabling statutory authorization." Id. at 331. The school choice program, as previously explained, was enacted to allow students to attend school in a district they otherwise would not be entitled to attend for free because of their domicile. The goal of this program -- to encourage students to attend free of charge the school best suited for their needs regardless of where it is located -- is in no way promoted if the State pays for Englewood Cliffs students to attend a high school they are entitled to attend by virtue of a send-receive agreement. More to the point, there is nothing in the school choice program to suggest that it was meant to displace a sending district's funding obligations under a send-receive agreement.

Finally, Metromedia factor (5) is a mixed bag because, although the Department's position "was not previously expressed in any official and explicit agency determination, adjudication or rule," it also did not represent "a material and significant change from a clear, past agency position." Id. at 331. It is true that the Department unknowingly paid for Englewood Cliffs students to attend Academies@Englewood from 2002-2013, but that does not constitute "a clear, past agency position." Ibid. It was an oversight that the Department is free to correct.

For these reasons, the Department did not need to engage in formal rulemaking under Metromedia to make its determination.

CONCLUSION

The Department's Motion for Summary Decision is **GRANTED** and this matter is **DISMISSED**.

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

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

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

April 2, 2019

DATE

JEFFREY A. GERSON, ALJ/Ret., on recall)

Date Received at Agency: April 2, 2019

Date Mailed to Parties: April 3, 2019

sej

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Between:

THE SCHOOL DISTRICT OF THE CITY OF NEWARK

"Petitioner

OPINION
AND
AWARD

and

EMMANUEL IKHELOA

"Respondent"

Agency Docket No. 213-8/18
[Emmanuel Ikheloa]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
Stephanie D. Edelson, Esq.
Fiona Cousland, Esq.
Riker Danzig Scherer
Hyland Perretti, LLP

For the Respondent
Paul W. Tyshchenko, Esq.
Caruso Smith Picini, P.C.

PROCEDURAL HISTORY

On July 30, 2018, the School District of the City of Newark [District or Petitioner] served high school math teacher Emmanuel Ikheloa [Ikheloa or Respondent] with a Notice of Tenure Charges pursuant to *N.J.S.A.*18A:6-11 and 18A:6-17.3. The Charges alleged Inefficiency: that the Respondent had been rated partially effective in his 2016-2017 annual summative evaluation; and ineffective in his 2017-2018 annual summative evaluation.

In its Notice of Tenure Charges the District, through Superintendent Roger Leon, alleged that based upon Ikheloa's Annual Summative Ratings for the 2016-2017 and the 2017-2018 school years Ikheloa had failed to effectively perform the duties of a teacher. The Petitioner alleged, for example; that Respondent failed to: use individual standard-aligned lessons to build on previous lessons; clearly and accurately communicate content and instructions effectively; tailor instruction to move all students toward mastery; anticipate and respond to student reactions and misunderstandings; and more.

The Respondent apparently filed an initial response to the Charge on August 19, 2018 and filed an Answer on or about September 18, 2018 denying the Charges. Respondent argued, for example, that he was a successful mathematics teacher for the District with a sustained track record of effectiveness since he was hired in September 2004; that is, allegedly until the Petitioner compelled him-against his wishes-to teach in a field outside of his expertise and allegedly without adequate support from the District. The Respondent noted that beginning in the 2017-2018 school year he was assigned to teach special education math, but he indicated he only had a certificate of eligibility in special education, he did not hold a standard certification in special needs education.

On August 21, 2018, the Petitioner, having considered the Charge, supporting evidence and the Respondent's initial response, concluded that the Charge, if credited, was sufficient to warrant Respondent's dismissal or reduction of salary. The District, therefore, certified the Charge to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-17.3.

On September 25, 2018, the Department of Education, Bureau of Controversies and Disputes [Bureau] determined that the Charge, if true, was sufficient to warrant dismissal or reduction in salary and it referred the matter to me as the Arbitrator pursuant to *N.J.S.A.* 18A:6-16.

Based upon *N.J.S.A.* 18A:6-14, Ikheloa was suspended without pay effective August 28, 2018. The Respondent filed a Motion to Dismiss the Charges with me on October 22, 2018. The District filed its responsive brief to the Motion on November 5, 2018. On November 6, 2018 I issued a letter decision dismissing that Motion finding that there were several material facts in dispute that could only be resolved through a hearing.

A hearing was scheduled to commence on November 14, 2018, but the parties spent that day engaged in settlement discussions. Subsequently, when a resolution of the charges could not be reached, hearings were held on December 4, 2018; January 16 and 17; and March 1, 7 and 28, 2019 in Newark, New Jersey. The parties had the opportunity to examine and cross-examine witnesses, introduce documentary evidence and argue orally at the hearing. Testimony was received from Larry Ramkissoon, currently Special Assistant to the Superintendent but formerly Principal at West Side High School; Henry Ogele, Vice Principal at West Side High School; Yakima Johnson, Vice Principal at Malcolm Shabazz High School; Errol Douglas, Special Education Teacher; Emmanuel

Ikheloa, Respondent Grievant; and Yolanda Mendez, Acting Executive Director for Human Relations. After Ikheloa served a 120 day suspension as provided for by *N.J.S.A.* 18A:6-14, he was, at least temporarily, reemployed by the District. Both parties filed post-hearing briefs on May 6, 2019

ISSUE

Has the District established the inefficiency charges against the Respondent?
If so, do those charges warrant the Respondent's dismissal?
If not, what shall the remedy be?

RELEVANT STATUTORY PROVISIONS

N.J.S.A. 18A:6-17.2 Considerations for Arbitrator in Rendering Decision

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan.;
(2) there is a mistake of fact in the evaluastion;
(3) the charges would not have been brought but for the considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or
(4) the district's actions were arbitrary and capricious,

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

N.J.S.A. 18A:6-17.3 Evaluation Process, Determination of Charges
[In pertinent part]

25. a. Notwithstanding the provisions of *N.J.S.A.* 18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:
(1) the Superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially ineffective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation.

In accordance with the above statutory provisions, in considering tenure charges in an inefficiency case, an arbitrator may only consider the four items enumerated in *N.J.S.A.* 18A:6-17.2 (23. a) above. In such cases an arbitrator may not consider the quality of a teacher's classroom performance, *N.J.S.A.* 18A:6-17.2 (23. c). The teacher (a Respondent to such tenure charges) may raise any or all of the four items in *N.J.S.A.* 18A:6-17.2 (23 a.) above as a defense(s) to the tenure charges.

If the teacher proves that any of the four provisions in subsection 23 a. above apply in his/her case, the arbitrator must then determine whether having proved such provision(s) it (they) materially affected the outcome of the evaluation. If the arbitrator determines that a teacher's evaluation was materially affected by having proved such a provision, the arbitrator will need to determine an appropriate remedy for the teacher/Respondent. But if the arbitrator finds that such a provision(s) - even if proved - did not materially affect the outcome of an evaluation, the charges must be sustained and the teacher dismissed: *N.J.S.A.* 18A:6-17.2 (23. b).

BACKGROUND

The District created a guidebook for teacher evaluations known as the "Framework for Effective Teaching" for 2016-2017 [Exhibit P-23] and for 2017-2018

[Exhibit P-24] [Framework]. Ramkissoon noted that there were no significant differences between P-23 and P24. He explained that the Framework contains teacher performance competencies. Competency 1 includes Lesson Design and Focus; Competency 2 includes Rigor and Inclusiveness; Competency 3 includes Culture of Achievement; Competency 4 includes Student Progress towards Mastery; and, Competency 5 includes Commitment to Personal and Collective Excellence. Those guidebooks are distributed to the teachers by the Newark Teachers Union.

Each Competency contains three to four indicators. Competency 1, for example, contains lesson sequence; lesson components; pacing and momentum; and, clarity. Competency 2 contains tailored instruction; questions and tasks; responsiveness; and, precision and evidence. Competency 3 contains enthusiasm for learning; persistence; community; and, attention. Competency 4 contains check for understanding; feedback; and, demonstration of learning. Competency 5 is not structured like other Competencies.

Although a teacher will be rated on each Competency during each observation evaluation he/she may not necessarily be rated on each indicator during each observation. Teacher Competency is rated as highly effective; effective; partially effective and ineffective with each rating receiving a point value. A teacher's overall point score for each observation or evaluation determines the teacher's rating for that observation/evaluation.

Based upon a teacher's preceding year performance each teacher participates in the creation of a professional development plan with their supervisor for the following new school year which contains the teacher's goals for the new year. Teachers who received a highly effective or effective rating for the previous year develop an

individualized professional development plan [IPDP] with their administrator that sets forth their goals for the new year. Teachers who received a partially effective or ineffective rating for the previous year must develop a corrective action plan [CAP] with their supervisor which includes the goals, extra support and other items the teacher needs to improve his/her competency in the new year. Based upon *N.J.S.A.* 18A:6-17.3 (25.a(1)) a teacher receiving a partially ineffective or an ineffective annual evaluation and the following year receives an ineffective annual evaluation must be dismissed.

The record shows that Ikheloa taught math at Wes Side High School in Newark during the 2013-2014; 2014-2015; and, the 2015-2016 school years and was rated effective in 2013-2014, partially effective in 2014-2015; and effective in 2015-2016.[1] Based upon his 2015-2016 evaluation Ikheloa and West Side Vice Principle Ogele collaborated on the creation of Ikheloa's IPDP for 2016-2017 [Exhibit P-2]. That IPDP, P-2, identified certain Action Steps or strategies that Ikheloa needed to do. They included:

> Teacher will utilize open-ended questions from Agile Mind (Constructed Response) to implement "Rich Task" in his lessons.
> Teacher will script out high level questions involving application, analysis and synthesis prior to the lesson and use that during "Habits of Discussion"/Whole Group Session in the class.
> Teacher will analyze data from Mid-Unit & End of Unit Assessment to plan Corrective Action Plan,
> Teacher will submit End of Unit spreadsheet and Corrective Action Plan to Supervisor

Ramkissoon was the Principle of West Side High School in 2016-2017. He conducted an announced observation of Ikheloa on October 25, 2016 [Exhibit P-3].

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[1] · There is some evidence that at the end of 2014-2015, despite apparently having originally received an effective rating for that year, Ikheloa said he was told he really received a partially effective rating for that year and he was required to be placed on a CAP for 2015-2016. Whether accurate or not, that information is irrelevant in this case.

Although that observation was rated effective overall, Ramkissoon rated Ikheloa partially effective in the factors for Pacing and Momentum; Responsiveness; Precision & Evidence; Attention; and, Feedback.

Ogele conducted a second formal observation of Ikheloa (for 2016-2017) on January 4, 2017 [Exhibit P-4]. Ikheloa received an overall partially effective rating for that observation because he received a partially effective rating for Competencies 1, 2 and 4 and an ineffective rating in Competency 3. Ogele found, for example, that only 5 of 18 students were able to complete the independent practice task; Ikheloa spent too much or too little time on some lesson components; he did not recognize or properly respond to student misunderstandings or reactions; few students demonstrated enthusiasm; and students did not demonstrate mastery of the lessons objectives.

Ogele conducted Ikheloa's mid-year summary evaluation on February 13, 2017 [Exhibit P-5] and gave Ikheloa an overall partially effective rating. Ogele testified that Ikheloa struggled with nearly all the indicators in Competency 2 and with all of the indicators in Competencies 3 and 4.

On May 1, 2017, Vice Principal Cook conducted a formal observation of Ikheloa and overall rated him ineffective [Exhibit P-7]. Cook found Ikheloa's pace either too slow or too fast; that students had no clear understanding what to do; that Ikheloa did not adjust his teaching strategies; and that there was little evidence of student progress.

Ogele conducted Ikheloa's annual summative evaluation on May 30, 2017 rating him partially effective for the 2016-2017 school year [Exhibit P-8]. Ogele testified that Ikheloa struggled with several factors in Competencies 2, 3 and 4 including tailored

instruction; questions and tasks; responsiveness; precision in evidence; depth of knowledge; enthusiasm; and persistence.

Ikheloa testified that when Ogele initially issued his (Ikheloa's) 2016-2017 end of year summative evaluation Ogele rated him ineffective. Ikheloa believed that Ogele had miscalculated that evaluation and that he (Ogele) had not properly considered Ikheloa's professionalism. After meeting with Ikheloa, Ogele changed Ikheloa's annual summative evaluation for 2016-2017 to partially effective. Ikheloa did not believe he received sufficient support from Ogele during the 2016-2017 school year and he (Ikheloa) accused Ogele of not being fair to him. Ikheloa said their relationship did not change or improve going into 2017-2018. He believed Ogele felt uncomfortable toward him (Ikheloa) because of the change in his 2016-2017 summative evaluation. Ogele denied any animosity or ill will toward Ikheloa over changing his 2016-2017 summative evaluation.

Ramkissoon testified that during 2016-2017 professional learning community supports and a math coach were available for Ikheloa, but Ramkissoon was not certain that Ikheloa took advantage of those supports that year.

In late May or early June 2017 Ikheloa was notified that his teaching position had been eliminated for 2017-2018. But on June 7, 2017 Ramkissoon notified Ikheloa of a vacancy for a Teacher of Special Education in math. Since Ramkissoon knew that Ikheloa was certified in math and physics and had a certificate of eligibility for special needs education he sought Ikheloa's interest in the position. Later that day (6/17/17) Ikheloa responded and accepted the position with the following email to Ramkissoon:

> Mr. Ramkissoon,
> I will be humbled and delighted to be given the opportunity to serve our children in the capacity of a special need teacher. Thank you for the offer or anticipated offer.

> I will enroll with a college, at the earliest opportunity – most likely in September if it is still possible due to admissions deadlines, to complete the required courses in order to obtain the standard certificate.
> Thank you again and God Bless
> E. Ikheloa [Exhibit R-5]

The District had a need for a math teacher to teach two courses: Advanced Algebra with Financial Applications, and Geometry, and both courses included some special needs students with individualized education programs (IEP's). Ramkissoon noted that a certified math teacher could teach such classes with students with IEP's, without a special education certification, and knowing that Ikheloa was certified in math and had his certificate of eligibility in special needs education Ramkissoon thought Ikheloa was a good fit to teach those classes.

Although Ikheloa accepted that teaching assignment as evidenced by R-5 above, he believed that Ramkissoon's offer to accept that position was conditioned upon Ikheloa taking classes to obtain his special education certification. Ikheloa was willing to take such classes not just because he thought his acceptance of the position was conditioned on that, but also because he seemed to prefer having a special education certification if he was teaching special needs students.

Based upon the above Ikheloa applied for admission to Rutgers University to attend a program that would result in his obtaining a special education certification. As part of that application process Ikheloa asked Ramkissoon for a letter of recommendation which Ramkissoon provided [Exhibit R-10]. That letter states:

> Mr. Ikheloa has accepted our school assignment in the fall to provide instruction to our special need students population based on his current Teachers of Special Education (COE – Certificate of Eligibility). Mr. Ikheloa has also agreed to take the required non-credit courses towards obtaining the standard NJ teacher of special education certificate. He has indicated his preference to take these courses with your University starting in the fall of 2017, I recommend

> him to be accepted into this program. Please let me know if there are any additional requirements.

On or about August 16, 2017, Ikheloa sent an email letter to Ramkissoon [Exhibit R-11] informing him of his (Ikheloa's) acceptance to Rutgers and notifying Ramkissoon that the expected cost to complete the program was $21,000. Although there is no evidence that Ramkissoon or anyone else offered to or promised Ikheloa that the District would pay Ikheloa's cost for the program, Ikheloa appeared to believe that the District would assume the tuition costs. After talking with the District's Human Resource Department Ikheloa was unsure of the District's willingness to assume those costs thus he included the following statements to Ramkissoon in R-11.

> If you conclude, after consulting with the Human Resources that the burden of paying for this program will be on me, I will therefore request to excuse myself from the position you had offered me that was conditional on this SN standard certification.
>
> Consequently, you would request returning me to the TWA poll to be deployed by the district to another school in need of my current certifications.
>
> As you can recall, I am still entitled to a job with the district on my Mathematics and Physics standard certification the district had financed through the alternate route and PSI programs for me to obtain.

Ramkissoon acknowledged that Ikheloa had asked him (Ramkissoon) if the District would pay the tuition costs for the program and he (Ramkissoon) told Ikheloa the District would not assume that responsibility. Ikheloa acknowledged that Ramkissoon never promised the District would pay for his tuition.

As a result, Ikheloa told Ramkissoon he (Ikheloa) would prefer not to accept the position that was offered, and that he preferred to go into the EWPS – a pool of "employees without permanent site" – and be placed at a math opening at another school.

Ramkissoon responded that it was too late to make that change because the transfer period was over and he (Ikheloa) could not be moved into the EWPS. Ikheloa acknowledged that whether or not he began taking courses in the fall of 2017 to obtain his special education certification he would not have completed the program to obtain that certification during the 2017-2018 school year. Ikheloa acknowledged it would have taken him two or three years to obtain that certification.

For 2017-2018 Ikheloa was assigned to teach two classes of Algebra with Financial Applications with 10 students in each class [Exhibits R-2 and R-3], and one class of Geometry with 17 students [Exhibit R-4]. Ramkissoon explained that approximately 30% of the students at West Side High School were special needs students in 2017-2018. He explained that an inclusion class is one that includes some students with special needs who have IEP's, and some students without special needs; and a self-contained class is one with all special needs students who have IEP's. Ramkissoon noted that one of Ikheloa's Algebra classes was an inclusion class and that his Geometry class was also an inclusion class. Ramkissoon testified that there were no special education self contained math classes at West Side that year. Both Ramkissoon and Vice Principal Johnson testified that Ikheloa was not required to possess a special needs certification to teach a class that included special needs students.

Johnson noted that the "N" designation on the Geometry class roster, R-4, indicated that special needs students were included in that class, but she felt certain that general education students were also included in that class. Ikheloa testified that he believed his Geometry class was self-contained with all students having IEP's in part due to the "N" designation on R-4. But Ikheloa did not claim that his Algebra class listed in

R-2 was self-contained even though that roster also contained an "N" designation. The roster in Ikheloa's other Algebra class, R-3, did not contain an "N" designation.

Ramkissoon noted that the District has many special education teachers that in the high schools will support math and English classes. But he emphasized that not every math class that includes students with IEP's require the inclusion of a special education teacher. He said that such teachers are not required for inclusion in a math class unless that is a specific support requirement in a student's IEP. Ramkissoon noted that special education teacher Errol Douglas, was assigned to co-teach with Ikheloa in the Geometry class.

Douglas testified that he co-taught with Ikheloa for his full Geometry class in 2017-2018, and co-taught with Ikheloa for half the time in his (Ikheloa's) inclusion Algebra class listed in R-2. Douglas was not certain whether Ikheloa's Geometry class was self-contained, but he indicated that nearly all the students had special needs.

The record shows that a special needs student's IEP usually contains a grade scale adjustment which is intended to enable the student to score better despite his/her disability. Douglas said that Johnson told him that if an IEP did not contain such an adjustment - a 75% adjustment - should be used. Johnson denied telling any teacher to use a 75% *defacto* grade scale adjustment unless it was specifically contained within a student's IEP.

Due to Ikheloa's partially effective evaluation for the 2016-2017 school year, he needed a CAP for the 2017-2018 school year. The CAP and its content are intended to provide support for a teacher, and is developed through a collaborative process between the teacher and his/her supervisor.

Ogele held at least three meetings with Ikheloa to develop his CAP beginning on October 10, 2017. They talked about the standards Ikheloa wanted to focus on to move students towards mastery; the goals Ikheloa had for the students; the professional plan he had to achieve those goals; the action steps Ogele would implement to help Ikheloa achieve those goals; and the metrics to be used to make sure Ikheloa was progressing towards those goals. Ogele testified that Ikheloa identified the standards and set the goals for the students.

Ikheloa's CAP was completed and signed by him and Ogele on November 6, 2017 [Exhibit P-9]. The "Goal" section Ikheloa created included that at least 70% of the students would be proficient on the standards noted in the CAP. The "Action" steps required of Ogele to support Ikheloa included providing Ikheloa the opportunity to peer-observe the practices of an effective teacher; provide him the opportunity to engage in common planning time with a coach, ensure that he participates in Professional Learning Communities which were meetings with other math teachers to discuss how to achieve goals; provide feedback to Ikheloa after his observations; and other supports.

Subsequent to P-9, Ikheloa notified Ogele that he (Ikheloa) wanted to change his goal to state "that at least 100% of my students will score at least 80% on the standards". Ikheloa and Ogele signed Ikheloa's revised CAP on December 12, 2017 [Exhibit P-10].

In accordance with his CAP, Ikheloa was provided with many supports in order to achieve success in 2017-2018. The average teacher at West Side had 5 teaching blocks over every two days. Ikheloa, however, only had 4 blocks. In addition to special education teacher Douglas being assigned as a co-teacher to his Geometry classes, and Ikheloa's required attendance at the professional learning community meetings held

throughout the year [Exhibit P-18], and teacher aides assigned to certain students throughout the year, Ikheloa also received the following supports: Ikheloa was provided with a math coach, Priyank Bhatt, and a math interventionist, Jerome Hancock, both of whom assisted Ikheloa with co-planning lesson designs; co-modeling class presentations; peer coaching which included Bhatt or Hancock observing Ikheloa teaching then debriefing him, or Ikheloa observing Bhatt or Hancock teach his (Ikheloa's) class and then debriefing with Bhatt or Hancock.

Ikheloa was also taught about Pastore's Perch which is a teacher's most efficient physical placement in the classroom to get and hold student attention; he was given the opportunity to watch videos of effective teachers teaching classes; he received feedback from Ogele; he had support from Vice Principal Yakima Johnson, the Child Study Team Supervisor who worked with the special education students; and, he had access to his students IEP's through Mr. Douglas.

Ikheloa was observed four times during the 2017-2018 school year and received a mid-year and an annual evaluation. On October 18, 2017, Ogele conducted an unannounced observation of Ikheloa teaching his Geometry class and he received an ineffective rating [Exhibit P-11]. Ogele found Ikheloa ineffective in Competencies 2, 3 and 4 finding Ikheloa did not tailor strategies to lead students towards mastery; students did not demonstrate enthusiasm for the material; and, students scored low in lesson objectives.

On January 17, 2018, Vice Principal Yakima Johnson conducted an announced observation of Ikheloa teaching one of his Advanced Algebra classes and he received a partially effective rating [Exhibit R-12]. She found that Ikheloa did not give clear

instructions; classroom values were not consistently enforced; and students failed to master the objective.

On January 31, 2018 Ogele conducted Ikheloa's mid-year evaluation and rated him partially effective [Exhibit P-13]. Ogele noted that students were rarely mastering the lesson objectives; Ikheloa's communication with students was inconsistent; and, Ikheloa had failed to provide student assignments of the standards.

On March 13, 2018, Ogele conducted an unannounced observation of Ikheloa teaching one of his Algebra classes and he received a partially effective rating [Exhibit P-14]. Obele noted that Ikheloa's instructions were sometimes unclear; he had spent too much time on one task; and, he did not require students justify their responses.

On April 17, 2018 both Ogele and Administrator Nadirah Mateen conducted unannounced observations of Ikheloa teaching one of his Algebra classes. Both Ogele and Mateen rated Ikheloa ineffective [Exhibits P-15 and P-16, respectively]. Ogele noted that Ikheloa's instructions were unclear; he did not move the students to mastery; students had no clear understanding of what to do in the beginning of the lesson; Ikheloa did not demand supporting evidence; few students demonstrated enthusiasm; and, there was no evidence the students mastered the objective. Mateen made many of the same findings.

On May 14, 2018 Ogele conducted Ikheloa's Annual Summative Evaluation and rated Ikheloa ineffective for the 2017-2018 school year [Exhibit P-17]. Ogele noted that Ikheloa's instructions to the students were sometimes unclear; classroom values and norms were inconsistently reinforced; students often were not on task throughout the

lessons; students rarely mastered the lesson objectives; and, that few students reached the goal Ikheloa set in his CAP.

Ogele testified about Ikheloa's rating in P-17, explaining that Ikheloa struggled with lesson sequence; clarity; and, twice made the same feedback error to students. Ogele also explained that Ikheloa failed to submit IEP planners for some students which made it difficult for the Child Study Team to provide enough services for those students; and he failed to submit all of the required student assessments. Ogele concluded that Ikheloa did not perform up to the required standards.

Student Growth Objectives or SGO's is a measurement of progress that is generated by students with IEP's which are used not only to measure the student's progress, but is also used to determine whether the teacher has met his/her set student goals. The grades of students with IEP's are modified based upon the child Study Team determination and that modification is used to determine the SGO's.

Since the SGO's were used to determine whether Ikheloa met the goal he established in his revised CAP, P-10, or rather, because the SGO's were used to determine he did not meet his goal; early in the hearing – and renewed at various times during the hearing – the Respondent questioned whether the SGO's were correctly calculated. The Respondent did not believe they were properly calculated and raised that as an issue in the case. The Respondent requested the opportunity to review the IEP's which contain information used to determine the SGO's to see if the District correctly calculated those SGO's.

The Board objected to that request raising the confidentially of the information generally contained in an IEP. Ramkissoon also explained that the SGO's only

represented 15% of a teacher's overall rating. He noted that even if the Respondent could produce evidence that there was a mistake in the SGO's and more students achieved mastery, then in the best case scenario Ikheloa's end of year evaluation, P-17, would only move from an ineffective rating to a partially effective rating, which would still support the filing of tenure charges.

To resolve the issue over the accuracy of the SGO's I eventually performed an *in camera* inspection of the IEP's and required the District to provide grade modification information from the IEP's to the Respondent for his review. The Respondent did not subsequently present any evidence that the SGO's were improperly calculated.

Ogele testified that during 2017-2018 Ikheloa failed to timely submit student assessments and spreadsheets showing student progress for at least two quarters that were needed to be used to determine if the students were meeting expectations. Ogele noted that based upon the information he had, Ikheloa did not meet the goal of 100% of students would achieve 80% mastery which Ikheloa had set in P-10. Ogele said that only 69% of Ikheloa's students achieved 80% mastery.

Ogele also testified that at least in four cases (that is, regarding four students) Ikheloa used incorrect percentages to determine student grades. Ikheloa used higher percentages than included in those students' IEP's which would make it easier for those students – or at least make it appear – that those students achieved mastery. Ikheloa did not explain his failure to timely submit assessment information and the record supports Ogele's testimony that Ikheloa used incorrect information for four students.

In rebuttal to P-17 Ikheloa requested that Douglas submit a recommendation on his (Ikheloa's) behalf. In Exhibit R-7 Douglas defined Ikheloa as an outstanding teacher who cared about each student and was dedicated to his work.

As a result of P-17, on June 4, 2018 Ramkissoon sent Interim Superintendent Robert Gregory a memorandum [Exhibit P-1] recommending tenure charges against Ikheloa because he had a partially effective rating for 2016-2017, and an ineffective rating for 2017-2018. Ramkissoon noted that Ikheloa received substantial support throughout 2017-2018 but noted he struggled in all of the Framework Competencies. R-1 included information showing that students failed to meet the goal Ikheloa had established in his CAP.

As a result of the tenure charges and in accordance with *N.J.S.A.*18A:6-14, Ikheloa was suspended for 120 days. That time ran before the hearing in this case was completed. On January 25, 2019 the District – at least temporarily – offered Ikheloa reemployment when he was provided a letter by the District's Acting Executive Director, Yolanda Mendez, [Exhibit R-8] confirming his transfer to Central High School as a math teacher effective January 29, 2019. Ikheloa accepted that position and presumably worked for the District through the end of the 2018-2019 school year while awaiting the decision in this matter.

POSITIONS OF THE PARTIES

PETITIONER-DISTRICT

The Petitioner argued that it had no improper or unlawful motive for filing the tenure charge against Ikheloa. It denied the charges were filed due to any of Ikheloa's

affiliations or based upon any of Ikheloa's conduct, and it noted that the Respondent did not provide any such evidence.

The Petitioner also denied the Respondent's claim that its (the District's) filing of tenure charges was arbitrary and capricious. The District emphasized that Ikheloa was certified to teach both the Geometry and Algebra courses particularly with the co-teaching provided by Douglas and the other supports Ikheloa received. It highlighted the fact that even if teaching the Geometry class raised a certification problem, only one of Ikheloa's 2017-2018 observations occurred in that class, and there was no dispute that he was properly certified to teach the Algebra classes which were clearly not self-contained classes.

The District also argued that the Respondent failed to demonstrate that it (the District) did not comply with the requirements of TEACHNJ or its own Framework for Effective Teaching or any procedural requirement. It claimed there was no factual basis for any of the four statutory defenses and that the Respondent failed to produce evidence supporting those or any other defenses or claims.

The District noted that Ikheloa was observed eight times over two years by five different evaluators and only one of those observations resulted in an effective rating, and that in accordance with *N.J.S.A.* 18A:6-17.(c), I am not authorized to review Ikheloa's classroom performance. The District maintains that Ikheloa's SGO's were properly calculated and that its witnesses were not effectively disputed.

Finally, the District explained that it reassigned Ikheloa to a classroom in 2019 because it was obligated to resume paying Ikheloa during the processing of this matter and therefore it could not also pay for a substitute teacher.

RESPONDENT-IKHELOA

The Respondent primarily argued that the District acted in an arbitrary and capricious manner by requiring Ikheloa to teach what it (the Respondent) claimed was a self-contained Geometry class of special needs students. According to the Respondent, that assignment materially affected the outcome of Ikheloa's observations and evaluations and violated both *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A:14-4.7(g) warranting dismissal of the tenure charge.

In its brief, the Respondent indicated that Ikheloa agreed to teach math classes with special needs students on the condition that the District would pay for him to obtain a standard special needs certification. According to the Respondent in its brief, Ikheloa was legally unqualified and ill prepared to be a special needs teacher, and when the District refused to pay for him to obtain a standard special needs certificate the District arbitrarily and capriciously, would not reassign him back to the District's pool of teachers. The Respondent claims that Ikheloa was "forced" or "compelled" to teach what it claimed was a self-contained special needs Geometry class making him a "*defacto*" teacher of special education.

The Respondent noted that Ikheloa had not received an ineffective rating prior to 2017-2018, and but for what it claimed was the District's "arbitrary, capricious and unreasonable" actions he would not have been rated inefficient in 2017-2018.

The Respondent acknowledged that Ikheloa took advantage of all of the training opportunities and supports that were made available to him but that those opportunities and supports were inadequate resulting in his inefficient ratings. According to the

Respondent, Ogele was biased towards Ikheloa because he (Ogele) was required to change Ikheloa's 2016-2017 end of year evaluation.

The Respondent criticized the District's decision reinstating Ikheloa to the classroom during the processing of this matter, but seeks a remedy here making Ikheloa whole for all lost wages and benefits. In the alternative, even if there is some basis for the tenure charge, the Respondent seeks a lesser penalty than termination.

DISCUSSION

As noted earlier in this Decision and in accordance with *N.J.S.A.* 18A:6-17.2(23a) a Respondent in an inefficiency case must prove: 1) that the employee's evaluation failed to substantially adhere to the evaluation process; or, 2) that there is a mistake of fact in the evaluation; or 3) the charges were brought based upon political affiliation, nepotism, union activity, or discrimination prohibited by State or Federal law; or 4) that the district's actions were arbitrary and capricious: in order to overcome inefficiency charges. Here, the Respondent did not present evidence that the District failed to adhere to the evaluation process; made a mistake of fact in any evaluation or brought the charge due to any unlawful or improper considerations. The Respondent's case is based primarily upon its argument that the District acted arbitrarily and capriciously in assigning – and allegedly compelling – Ikheloa to teach what it (the Respondent) claimed was a self-contained Geometry class of special needs students without him having a standard certificate to teach special education.

The Respondent's claims and arguments, however, were not persuasive. In the first instance I find that the Respondent did not conclusively prove that Ikheloa's Geometry class was self-contained. At best, it is unclear whether that class was self-

contained. Ramkissoon and Johnson testified it was not a self-contained class and I found them to be credible witnesses; and the mere "N" designation on R-4 did not conclusively establish that point. Johnson testified that an "N" designation means it's an inclusion class, and the Respondent never argued that the "N" designation on R-2, the Algebra class, meant that it was a self-contained class. Based on the record before me I cannot conclude that Ikheloa's Geometry class was self-contained. Therefore, the Respondent's reliance on *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A:14-4-7(a) to invalidate the charges is misplaced.

The Respondent's claim that Ikheloa was forced or compelled to teach the Geometry class is also unpersuasive. Ikheloa acknowledged that Ramkissoon never offered or agreed that the District would pay for Ikheloa to take classes towards obtaining a full special education certification. In fact, Ikheloa accepted the opportunity to teach the special education inclusion classes in R-5 on June 7, 2017, and he did not therein condition his acceptance on the District paying for classes. Although he testified that – at least presumably in his mind – he conditioned his acceptance on the District paying for classes, by the time he told Ramkissoon of that in R-11 on August 16, 2017, and asked to be placed in the teacher pool for some other work, it was too late to make the change. But there is no evidence the District somehow "forced" Ikheloa to continue in the position. He clearly was able to refuse to teach the Geometry class and continue with the Algebra classes even if it meant he'd lose the whole teaching opportunity.

The Respondent's position that the District acted arbitrarily and capriciously by refusing to move Ikheloa into the teacher pool in August also makes little sense given Ikheloa's own statement that he only wanted to accept the position if the District paid for

the certification classes. By tying the certification tuition costs to teaching the math classes to his willingness to accept the position Ikheloa was really acknowledging that his willingness to accept the position had nothing to do with the fact that he would be teaching an inclusion class. I find Ikheloa's acknowledgement that even if he had enrolled in the special education classes he would not have had a full special education certification during the 2017-2018 school year or even by the following school year supports a finding that his lack of such a certification in 2017-2018 was not the primary basis upon which he wanted to be reassigned to the teacher pool after he had previously agreed to teach the inclusion classes. I believe he wanted to be assigned to the teacher pool primarily because the District would not pay for him to obtain the special education certification. No evidence was presented disputing Ramkissoon's testimony that by the time Ikheloa asked him (Ramkissoon) in August 2017 to reassign him (Ikheloa) to the teacher pool it was too late to effectuate such a move.

It is important to remember that this case is really only about what happened in 2017-2018. Although the evidence shows that after Ikheloa's complaint in the spring of 2017, Ogele changed the results of the 2016-2017 final evaluation, there was no evidence that there was a special education problem with Ikheloa's classes that year nor any evidence the District violated any of the provisions in *N.J.S.A.* 18A:6-17.2 (23a) for that year. I found Ogele to be a credible witness and do not infer that his change of Ikheloa's 2016-2017 final evaluation tainted his ability to honestly evaluate him in 2017-2018.

In recognition that Ikheloa was assigned to teach inclusion classes, and was working under CAP requirements, the District provided Ikheloa with a substantial level of support in 2017-2018, particularly the co-teaching by Douglas in Geometry, and the

coaching by Bhatt and Hancock. To suggest otherwise is a mischaracterization of the evidence. Ikheloa acknowledged that he took advantage of all of the supports, including the peer teaching, yet he struggled on a number of Competencies.

Ikheloa was not just observed by Ogele, he was observed by several different administrators – even by two different administrators on the same day – yet he was consistently rated ineffective or partially effective. To the extent he blames ineffective ratings on teaching the Geometry class, the record shows that in 2017-2018 only one of his many observations was in Geometry. Most of the results of his 2017-2018 final evaluation were based upon his performance in the Algebra classes which clearly were not self-contained classes.

Although the Respondent seems to argue that Ikheloa was not certified to teach the Algebra and Geometry classes, the record does not support that contention. Ramkissoon and Johnson testified that Ikheloa's math certification, particularly with his special education eligibility and the co-teaching support provided by Douglas, entitled Ikheloa to teach those classes. Nothing Ikheloa or Douglas said effectively disputed their (Ramkissoon and Johnson's) testimony.

Finally, the Respondent's suggestion that the District's decision to reassign Ikheloa to a classroom in 2019 pending the results of this case somehow weakens the District's inefficiency case lacks merit. I am unaware of any statute; regulation; court or arbitration decision finding that a school district's decision to reassign a teacher to a teaching position during the pendency of tenure hearings regarding a charge of inefficiency somehow negates such a charge.

Having considered all of the testimony, documents, arguments and briefs related to this case I find that the District did not act arbitrarily or capriciously in assigning Ikheloa to teach inclusion classes without possessing a standard special education certification.

Based upon all of the above I issue the following:

AWARD

The District has established that the Respondent properly received a partially effective rating in his annual summative evaluation for 2016-2017, and an ineffective rating in his annual summative evaluation for 2017-2018. The Respondent has failed to prove the District violated any of the provisions in *N.J.S.A.* 18A:6-17.2 (23a).

Accordingly, the inefficiency charge is sustained, and in accordance with *N.J.S.A.* 18A:6-17.3, the Respondent's dismissal is upheld.

Arnold H. Zudick
Arbitrator

Dated: June 19, 2019
Morrisville, Pennsylvania

Commonwealth of Pennsylvania}
County of Bucks }

On this 19th day of June 2019, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Notary Public

Commonwealth of Pennsylvania-Notary Seal
Lori A Hackman, Notary Public
Bucks County
My Commission Expires June 04, 2022
Commission Number 1332692

166-19

OAL Dkt. No. EDU 00912-19
Agency Dkt. No. 1-1/19

New Jersey Commissioner of Education

Final Decision

A.L. on behalf of minor child, K.L.,

Petitioner,

v.

Board of Education of the Hanover Park Regional High School District, Morris County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/28/19

Date of Mailing: 6/28/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00912-19
AGENCY DKT. NO. 1-1/19

A.L. ON BEHALF OF MINOR CHILD K.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE HANOVER PARK REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

A.L., petitioner, pro se

Dennis McKeever, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: May 16, 2019 Decided: May 20, 2019

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On January 17, 2019, the Department, transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On March 4, 2019, the parties settled this matter. A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

5/20/19
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 5/24/2019

Date Mailed to Parties: 5/21/2019

dr

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

E-mail: dmckeever@sciarrillolaw.com

March 4, 2019

Sent via Facsimile (973-648-2358)
Honorable Barry E. Moscowitz, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: A.L. o/b/o K.L. v. Hanover Park Board of Education ("Board")
Agency Ref. No. 1-1/19

Dear Judge Moscowitz:

In accordance with our recent telephone conversation, I reviewed settlement options with my client in order to resolve the above-referenced matter. To that end, kindly be advised of the following proposal from the Board. By copy of this letter I am providing same to Ms. Love for her review and consideration. In the event Ms. Love accepts this proposal, I would ask that she simply sign the bottom of this document where indicated.

The parameters of the proposal are as follows:

1. K.L. will be permitted to continue at the Hanover Park Regional High School for the balance of the 2018-2019 school year, free of tuition;
2. A.L. o/b/o K.L. will either provide proof of permanent residency within the three Districts that send to Hanover Park on or before June 30, 2019;
3. In the event A.L. fails to provide said proof of residency, K.L. will be immediately removed from Hanover Park and his files transferred to the East Orange Board of Education, or district of residence, for registration. The parties agree to a Consent Judgment with no additional need for a Residency Hearing;
4. Temporary residency will not be acceptable unless A.L. provides proof that she will be residing at a location for the 2019-2020 school year a minimum of four (4) nights per week. Said proof must be submitted by June 30, 2019. Failure to do so will also result in K.L. being deregistered from the Hanover Park Board of Education as set forth by Consent Judgment as outlined above; and
5. A.L. agrees to withdraw the within Petition of Appeal.

Mrs. Love 3/19/19

Please review these parameters and advise as to your position.

Thank you.

Very truly yours,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Dennis McKeever
DM:klb
Enclosure
cc: Alicia Love (via certified mail, return receipt requested and regular mail)
Mrs. Carol Grossi, Superintendent (via electronic mail)
Ms. Marie C. Carrell, Director of Curriculum, Instruction and Assessment (via email)
Mr. William Albert, SBA/BS (via email)

I agree to the terms of this agreement.

Alisa Love
Agreement to the Proposal

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: edlawgroup@sciarrillolaw.com

March 14, 2019

Sent via Electronic Mail
Ms. Alisa Love
P.O. Box 265
East Orange, NJ 07017

RE: Hanover Park Regional High School Board of Education ("Board")
A.L. o/b/o K.L.

Dear Ms. Love:

I am in receipt of your correspondence dated March 12, 2019 concerning the above-referenced matter. While I do not understand the text of your correspondence, it appears that we do not have an agreement with respect to settlement.

The Board of Education requires permanent residency in order to continue Kahlil's education. If you cannot secure permanent residency for four (4) nights of out a given week, then the Board of Education will have no recourse but to submit this matter to Judge Moscowitz for adjudication.

Kindly advise at your earliest convenience as to the status of this matter.

Thank you.

Very truly yours,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

[redacted]

DM:klb
cc: Mrs. Carol Grossi, Superintendent (via email)
Ms. Marie C. Carrell, Director of Curriculum, Instruction and Assessment (via email)

Ms. Love 3/19/19

Moscowitz:

see attached correspondence in regards to the above-referenced matter.

ank you.
nnis McKeever
n L. Berry on behalf of Dennis McKeever, Esq.

n L. Berry | Legal Assistant
iarrillo, Cornell, Merlino, McKeever & Osborne, LLC
8 St. Paul Street | Westfield, NJ 07090
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SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

E-mail: dmckeever@sciarrillolaw.com

March 29, 2019

Sent via Facsimile (973-648-2358)
Honorable Barry E. Moscowitz, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: A.L. o/b/o K.L. v. Hanover Park Board of Education
Agency Ref. No. 1-1/19

Dear Judge Moscowitz:

Please be advised the parties have reached an agreement in the above-referenced matter. Enclosed is a copy of the signed Agreement.

Thank you.

Very truly yours,
SCIARRILLO CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Dennis M. Keever
DM:klb
Enclosure
cc: Alicia Love (via email)
Mrs. Carol Grossi, Superintendent (via email)
Ms. Marie C. Carrell, Director of Curriculum, Instruction and Assessment (via email)
Mr. William Albert, SBA/BS (via email)

167-19

OAL Dkt. No. EDU 16138-17
Agency Dkt. No. 201-9/17

New Jersey Commissioner of Education

Final Decision

R.B. and A.B. on behalf of minor child, J.B.,

Petitioners,

v.

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

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/03/19

Date of Mailing: 7/03/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16138-17
AGENCY DKT. NO. 201-9/17

R.B. AND A.B. ON BEHALF OF
MINOR CHILD J.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
MORRIS SCHOOL DISTRICT,
MORRIS COUNTY,
Respondent.

Bennett Susser, Esq., for petitioners (Jardim, Meisner & Susser, attorneys)

Janelle Edwards-Stewart, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: June 14, 2019 Decided: June 17, 2019

BEFORE **SUSANA GUERRERO**, ALJ:

STATEMENT OF THE CASE

On or about September 6, 2017, petitioners R.B. and A.B. on behalf of J.B. filed a Petition of Appeal with the Commissioner of Education challenging the HIB determination

by respondent Board of Education of the Morris School District. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on October 30, 2017, for hearing as a contested case. A telephone prehearing conference was held on November 21, 2017. The undersigned issued an Order denying respondent's motion to dismiss on January 24, 2018, and a hearing was scheduled for May 17, 2018. Subsequently, the hearing was adjourned in view of the parties' motions for summary decision. On June 26, 2018, the undersigned issued an Order denying the motions for summary decision, and a hearing was scheduled for July 16, 2018, which adjourned at petitioners' request as the parties were discussing settlement. Following the adjournment of the hearings scheduled for December 12, 2018 and February 4, 2019, at petitioners' request, the hearing was rescheduled to May 6, 2019. Petitioners requested that the hearing be converted to a settlement conference during which the parties reached an amicable resolution. Under cover letter dated June 13, 2019, counsel for respondent submitted the attached Agreement and Release, indicating the terms of agreement between the parties.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

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

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

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

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

June 17, 2019
DATE

Susana E. Guerrero
SUSANA E. GUERRERO, ALJ

Date Received at Agency: June 19, 2019

Date Mailed to Parties: June 18, 2019

jb

AGREEMENT AND RELEASE

RECEIVED
2019 JUN 14 P 1:41
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

This Agreement and Release is made and entered into by and between the MORRIS SCHOOL DISTRICT BOARD OF EDUCATION (hereinafter "the Board") and R.B. and A.B. o/b/o J.B. (hereinafter "the Parents"), (collectively the "parties").

WHEREAS, the Board operates the Morris School District; and

WHEREAS, J.B. is a student who resides within the Morris School District; and

WHEREAS, N.J.S.A. 18A:37-13.1 *et. seq.* and Board Policy prohibit the Harassment, Intimidation and Bullying ("HIB") of District students; and

WHEREAS, on or about April 4, 2017, J.B. was alleged to have committed an act of HIB against District student M.D.; the school's Anti-Bullying Specialist ("ABS") investigated the matter; and District administration found that J.B. had, indeed, committed an act of HIB against M.D.; and

WHEREAS, the Parents and J.B. disputes that J.B. committed an act of HIB against M.D.; and

WHEREAS, J.B.'s parents appealed the administrative determination to the Board; and

WHEREAS, the Board held a hearing on the matter, and voted to uphold the HIB finding against J.B.; and

WHEREAS, the Parents filed then an appeal of the Board's determination with the Commissioner of Education on under Agency Ref No. 201-9/17 and OAL Docket No. EDU 16138-2017N; and

WHEREAS, the parties now desire to amicably resolve this dispute and avoid the additional time and expense of a hearing.

Initials: JB AB and MP

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Board of any acts or omissions alleged or those that could have been alleged by the Parents against the Board.

2. This Agreement shall not be construed as an admission by the Parents or J.B. of any HIB or ABS act alleged or that could have been alleged by M.D. and the Board.

3. The parties acknowledge that, pursuant to the Board's request, J.B. has prepared a statement of apology, attached hereto as **Exhibit "A,"** which the Parents represent re-affirms the apology he previously provided during the initial investigation of the incident.

4. The Parents acknowledge the Board's strong recommendation that J.B. proceed with counseling, anger management, or other appropriate therapy service aimed towards improving J.B.'s peer relations.

5. The Board acknowledges that the Parents and J.B. have consistently maintained that: (i) J.B.'s comments which initiated the HIB investigation were not made in anger or with malice; and (ii) no evidence exists that any of J.B.'s comments or actions relating to this incident were made in anger or with malice.

6. The parties agree that the District's record of the HIB finding against J.B. shall be expunged. For purposes of this agreement, expungement means the following:

A. Hard copy reports of the HIB investigation and finding shall not be made part of J.B.'s cumulative folder and shall remain confidential, unless there is a future report of an alleged violation by J.B. of the HIB law and policy through the end of grade 8, at which time this HIB incident shall not be used or referenced in connection with any future HIB incident.

B. Hard copy documents relating to the HIB investigation and finding shall remain with the Principal of the Alexander Hamilton Elementary School and shall not be, and has not been, transferred to Frelinghuysen Middle School, where J.B. is currently attending, or any other school.

C. Hard copy documents relating to the HIB investigation and finding shall not be made part of J.B.'s middle school or other school's file.

7. In exchange for the consideration set forth herein, the Parents agree that they will formally withdraw, with prejudice, their appeal before the Commissioner of Education under Agency Ref. No. 201-9/17 and OAL Docket No. EDU 16138-2017N, cancel the hearing currently scheduled to occur today, and give up any and all claims and rights they may have against the Board for any damages in connection with the HIB Investigation. As used in this Agreement, the term "Board" means: the Morris School District Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

8. In exchange for the consideration set forth herein, the Board agrees that it will bring no further action relating to the April 4, 2017 incident between J.B. and M.D. or otherwise relating to the HIB investigation and findings in the future.

9. The Parties agree not to file any lawsuit or claim against each other, based on the HIB matter that is the subject of this Agreement, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality.

10. The parties agree that the terms of this Agreement will be kept confidential to the extent permitted by law and the parties shall only state that the matter has been resolved and the HIB has been expunged, and that they will not criticize, denigrate, or disparage each other.

11. The parties agree that each shall be solely responsible for all costs associated with the present litigation including, but not limited, their respective attorney's fees.

12. This Agreement contains the sole and the entire agreement between the Parents and the Board. The Parents and the Board represent and acknowledge that they have not relied upon any representation or statement by the other party, or their counsel, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parents and the Board, and expressly stated to be a modification of this Agreement.

13. **Signatures.**

BY SIGNING THIS AGREEMENT, EACH OF THE PARTIES STATE THAT:

A. THEY HAVE READ IT;

B. THEY AGREE WITH EVERYTHING IN IT;

C. THEY HAVE HAD THE OPPORTUNITY TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT;

D. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Parents:

R.B.

A.B.

Dated: 5/8/19

Morris School District Board of Education

By: Mackey Pendergrast, Superintendent

Dated: 6/4/19

Board Counsel

Initials: RB, AB, and ____

OAL Dkt. No. EDU 17927-13
Agency Dkt. No. 288-11/13

New Jersey Commissioner of Education

Final Decision

Newark Teachers Union Local 481 AFT, AFL-CIO and John and Jane Does,

Petitioners,

v.

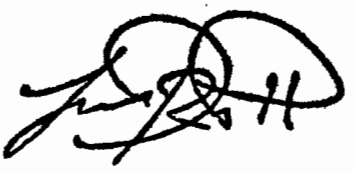
State-Operated School District of the City of Newark, Essex County,

Respondent.

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

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 7/03/19

Date of Mailing: 7/03/19

[1] The Initial Decision issued by the OAL included a line stating that the ALJ was filing the "...initial decision with the Civil Service Commission for consideration." The Initial Decision was, in fact, filed for consideration with the Commissioner of the Department of Education.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17927-13

AGENCY DKT. NO. 288-11/13

NEWARK TEACHERS UNION LOCAL 481 AFTM AFL-CIO & JOHN & JANE DOES.,

Petitioners,

v.

CITY OF NEWARK STATE-OPERATED SCHOOL DISTRICT,

Respondent.

Eugene G. Liss, Esq., appearing on behalf of appellant

Shana T. Don, Esq., appearing on behalf of respondent (Scarinci Hollenbeck)

Record Closed: May 22, 2019 Decided: May 24, 2019

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on December 13, 2019, 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. This matter was initially assigned to ALJ Way. Various conference calls and hearings were scheduled and adjourned. In February 2015 the matter was reassigned to ALAJ Laura Sanders. On or about February 5, 2018, this

matter was reassigned to the undersigned. Several telephone conferences and hearings were scheduled, the last one being June 14, 2019. Prior to that date, the parties submitted the fully executed agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

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

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

I **CONCLUDE** that this 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 **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 24 2019
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: 5-31-2019

Date Mailed to Parties:

ljb

SCARINCI HOLLENBECK
ATTORNEYS AT LAW
1100 VALLEY BROOK AVENUE
P.O. BOX 790
LYNDHURST, NEW JERSEY 07071-0790
Telephone: (201) 896-4100
Attorneys for Newark State-Operated School District
Our File No. 11899.4700

NEWARK TEACHERS UNION LOCAL 481 AFT, AFL-CIO & DOES, JOHN & JANE,	OFFICE OF ADMINISTRATIVE LAW
	AGENCY DKT. NO. 288-11/13 OAL DKT. NO. EDU 17927-2013N
v.	
	STIPULATION OF SETTLEMENT
CITY OF NEWARK STATE-OPERATED SCHOOL DISTRICT.	

The CITY OF NEWARK STATE-OPERATED SCHOOL DISTRICT, now known as the Newark Board of Education (the "District"), whose principal office is located at 765 Broad Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively, "School District"), and NEWARK TEACHERS UNION LOCAL 481 AFT, AFL-CIO, whose principal office is located at 1019 Broad Street. Newark, NJ 07102 ("NTU") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS, the Parties appeared for a status conference on August 28, 2018;

WHEREAS, the Parties executed a global Memorandum of Agreement dated November 14, 2018, which referenced this matter along with a series of additional matters pending between and among the parties;

WHEREAS, the District has stringent budget limitations and due to the uncertainty of the outcome of litigation as well as the expenditure of resources due to multiple days of hearings with

numerous witnesses, and in the spirit of resolving matters in light of the District's return to local control, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with litigation; and

WHEREAS, the proposed Stipulation of Settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, in consideration for the premises and mutual covenants set forth herein, the Parties hereby agree as follows:

1. NTU hereby withdraws all claims for employees separated from the District, who are listed below:

Gaskin, Colin	**Bailey, Jenielle**	**Blackwell, Wanda**
Brienza, Sandra	**Coppola, Megan**	**Hagel, Nicole**
Mironychev, Sergey	**Ravines, Luz**	**Reece, Kimberly**
Tol, Ryan	**Barbosa, Vera**	**Brady, Elena**
Bravoco, Lisa	**Edelstein, Charlotte**	**Hohl, Thomas**
Hoots, Allegra	**Olsen, Enid**	**Brodo, Danielle**
Whitehurst, Ursula	**Kelly-Gamble, Linda**	

2. The District will remit a payment via a separate check through direct deposit to each affected employee listed below. Amounts listed below are **gross amounts** and do not reflect deductions. All payments will be subject to local, state, and federal deductions.

3. As to **Linda Kelly Gamble**, the Board shall make a single payment of $8,989.00. NTU voluntarily dismisses this claim, with prejudice.

4. As to **Robert M. Porter**, the Board shall make a single payment of $6,050.00, and place Mr. Porter on Step 12 for the 2018-2019 school year. NTU voluntarily dismisses this claim, with prejudice.

5. As to **Yadhira P. Ortiz**, the Board shall make a single payment of $5,000.00 and place Ms. Ortiz on Step 16 for the 2018-2019 school year. NTU voluntarily dismisses this claim, with prejudice.

6. As to **Roger J. Watson**, the Board shall make a single payment of $16,735.00. NTU voluntarily dismisses this claim, with prejudice.

7. As to **Sheryl Glovin**, the Board shall make a single payment of $11,000.00 and place Ms. Glovin on Step 16 for the 2018-2019 school year. NTU voluntarily dismisses this claim, with prejudice.

8. As to **Corona Gordon-Williams**, the Board shall make a single payment of $4,300.00 and place Ms. Gordon-Williams on Step 11 for the 2018-2019 school year. NTU voluntarily dismisses this claim, with prejudice.

9. As to **Adriane Belton**, the Board shall make a single payment of $13,670.00. NTU voluntarily dismisses this claim, with prejudice.

10. As to **Daniel Wolf**, the Board shall make a single payment of $3,000.00 and place Mr. Wolf on Step 12 for the 2018-2019 school year. NTU voluntarily dismisses this claim, with prejudice.

11. As to **Toni Ann Casale**, the Board shall make a single payment of $8,000.00 and place Ms. Casale on Step 16 for the 2018-2019 school year. NTU voluntarily dismisses this claim, with prejudice.

12. NTU agrees to dismiss with prejudice any and all claims, law suits and/or litigation that it is a party to against the District, Board, and Superintendent. NTU also agrees to file a stipulation of dismissal with any court within 14 days execution of this Stipulation. This Stipulation is intended to be the final resolution of all outstanding matters and/or litigations relating to incremental withholdings between the District and NTU and dismissals of all actions with

prejudice is a material term of this Stipulation of Settlement. If NTU fails to strictly comply, this Stipulation of Agreement will be void.

13. NTU waives all claims of any nature against the District.

14. In exchange for the consideration set forth in paragraphs 2-11 above, the sufficiency of which is hereby acknowledged, NTU hereby waives, releases and discharges any and all claims or rights that it has or may have against the District, the Superintendent, its Board of Education and its Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to incremental withholdings with the District. It specifically includes, without limitation, all claims which NTU may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act;

tile New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on their employment by and/or termination of their employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss.

15. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises NTU of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, NTU and its individual claimants acknowledge that they: (i) fully understand the terms and conditions of this Stipulation of Settlement; (ii) have consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives their right to pursue any current claims they may have under the Age Discrimination in Employment Act; (iv) have been given sufficient time within which to consider this Stipulation of Settlement; and (v) have 7 days from the date of the execution of this Stipulation of Settlement to revoke it. NTU understands that it may rescind this Agreement within 7 calendar days of signing and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7 day period.

16. This Stipulation shall not constitute a precedent in any matters involving other District employees.

17. This Stipulation does not constitute an adjudication or finding on the merits and it is not, and shall not be construed as, an admission or acknowledgement by the Parties of any violation of any policy, procedure, state or federal law or regulation, or any unlawful or improper act or conduct, all of which is expressly denied. Moreover, neither this Stipulation nor anything in this Stipulation shall be construed to be, or shall be, admissible in any proceeding as evidence of or an admission by any party of any violation of any policy, procedure, state or federal law or regulation, or any unlawful or improper act or conduct. This Stipulation may be introduced, however, in any proceeding to enforce this Stipulation.

18. This Stipulation, and all of its terms, are and will remain confidential to the maximum extent permitted by law. NTU is expressly forbidden from discussing this Stipulation with any person, other than their accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which it is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, NTU agrees that it will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. NTU specifically agrees not to discuss the nature, terms, conditions of this Stipulation with others, any representative of the media, or any past, present, or prospective employee of the District, or its agents or attorneys. NTU understands that this provision is not a simple recital but is an important, integral part of this Stipulation.

19. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure

from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

20. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

21. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation and that NTU consents to both personal and subject matter jurisdiction in the aforementioned courts or before the Commissioner of Education.

22. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signature or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

23. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

24. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understanding or agreements directly or indirectly connected with this Stipulation.

25. NTU agrees that it will not make any statement that has, have or can be expected to have the effect of disparaging the District and/or the Superintendent.

26. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

27. This Stipulation of Settlement is subject to the final approval of the District Superintendent and will only become effective upon the final approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue this matter.

Dated: 1/8/2019	**JOHN ABEIGON** **NTU President**
Dated: 1/8/2019	**EUGENE G. LISS, Esq.** **Attorney for NTU**
Dated: 3/07/2019	JOSEPHINE GARCIA Board Chairperson

Dated: 4/7/19	**RAMON E. RIVERA, Esq.** **Attorney for School District of the City of Newark**

Sworn and Subscribed to before me this ____ day of _____, 2018.

_____
Notary Public
State of New Jersey

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 7 day period referred to in the 15th recital of this Agreement.

JOHN ABEIGON

DATED: 1/8/19

169-19

OAL Dkt. No. EDU 04260-19
Agency Dkt. No. 39-2/19

New Jersey Commissioner of Education

Final Decision

S.G. on behalf of minor child, J.W.,

Petitioner,

v.

Board of Education of the Township of Orange, Essex County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/03/19

Date of Mailing: 7/03/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04260-19

AGENCY REF. NO. 39-2/19

S.G. ON BEHALF OF MINOR CHILD J.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ORANGE, ESSEX COUNTY,

Respondents.

Jennifer N. Rosen Valverde, Esq., for Petitioner Rutgers Law School-Newark, Education and Health Law Clinic

Jessika Kleen, Esq., for Respondent (Machado Law Group, attorneys)

Record Closed: May 31, 2019 Decided: May 31, 2019

BEFORE **THOMAR R. BETANCOURT,** ALJ:

NATURE OF PROCEEDINGS

Petitioner challenges the residency determination of Respondent Board of Education.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on March 27, 2019.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation and Settlement Agreement.

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

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

ORDER

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

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

It is further **ORDERED** that Respondent's cross-petition is withdrawn with prejudice

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

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

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

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

May 31, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 6-5-2019

Date Mailed to Parties:

EDUCATION AND HEALTH LAW CLINIC
Rutgers U. School of Law
123 Washington Street
Newark, N.J. 07102
(973) 353-3218
By: Jennifer N. Rosen Valverde, Esq.
Attorney for Petitioner, S.G., individually and on behalf of her minor child, J.W.

S.G., individually, and on behalf of her minor child, J.W. Petitioner, v. Orange Township Board of Education Respondent.	:	**STIPIULATION AND SETTLEMENT AGREEMENT**

WHEREAS, Petitioner, S.G., is the parent of, J.W., an eight-year-old child who is diagnosed with autism and attends Mount Carmel Guild Academy, an out-of-district private school, currently being financed by the Orange Township Board of Education;

WHEREAS, Petitioner and J.W. resided at 500 South Center Street Apartment 6, Orange, N.J. until on or about December 31, 2017;

WHEREAS, on or about January 1, 2018, Petitioner and J.W. became homeless and moved temporarily to the home of S.G.'s brother, located at 472 Beardsley Avenue, Bloomfield, NJ;

WHEREAS, since on or about January 1, 2018, Petitioner and J.W. have resided, and continue to reside, at 472 Beardsley Avenue, Bloomfield, NJ, temporarily, out of necessity, and have lacked a fixed, adequate, and regular residence and continue to reside at this location;

WHEREAS, Respondent Orange Township Board of Education in the County of Essex, with principal offices located at 451 Lincoln Avenue, Orange, NJ, currently is the local education

agency with the responsibility for providing a thorough and efficient education to J.W. as a homeless student, as defined by the McKinney-Vento Homeless Assistance Act and corresponding NJ law and regulations, and for providing a free and appropriate public education to J.W. as a student with a disability, as defined by the Individuals with Disabilities Education Improvement Act and corresponding NJ law and regulations;

WHEREAS, according to J.W.'s current IEP, dated February 8, 2019 and developed by Respondent, J.W. is placed at and attends Mt. Carmel Guild Academy;

WHEREAS, a dispute arose between Respondent and Petitioner regarding Petitioner and J.W.'s residency status and homelessness under the McKinney-Vento Homeless Assistance Act and corresponding NJ law and regulations; and

WHEREAS, the Parties have negotiated in good faith and desire to settle the matter by entering into this Stipulation and Settlement Agreement (hereinafter "Agreement") in order to resolve this dispute;

NOW THEREFORE, the Parties hereby agree as follows:

1. Respondent agrees that Petitioner and J.W. are, and at all relevant times to this action have been, homeless in accordance with the McKinney-Vento Homeless Assistance Act, 42. U.S.C. § 11431 *et seq.*, and corresponding federal and state law and regulations;
2. Respondent agrees that it is the "district of residence," which is defined as, "the school district in which the parent or guardian of a homeless child resided prior to becoming homeless," in accordance with NJSA § 18A:7B-12.1, NJAC § 6A:17-2.3, and NJAC § 6A:27-6.2;
3. Respondent, as the "district of residence" for J.W., agrees that it is the school district in which J.W. was and continues to be enrolled, pursuant to NJAC §§ 6A:17-2.3 and 2.5.

4. Respondent agrees that, at all relevant times, it was and continues to be in J.W.'s best interest to attend Mt. Carmel Guild Academy;

5. The Parties agree that as of January 1, 2019, Petitioner and J.W. were and are "deemed domiciled" in Bloomfield, pursuant to NJAC §§ 6A:17-2.3 and 2.5; NJSA § 18A:38-1(d).

6. Upon request, Petitioner agrees to provide to Bloomfield Public Schools necessary paperwork to register J.G. in Bloomfield Public Schools for the sole purpose of including J.G. in its Annual Application for State School Aid (ASSA). Pursuant to the attached guidance from the N.J. Department of Education (attached and incorporated herein), J.G.'s registration in Bloomfield Public Schools for ASSA purposes shall not have any effect on J.G.'s school district of enrollment, as set forth at NJAC 6A:17-2.5, or on J.G.'s entitlement under the federal McKinney-Vento Homeless Assistance Act to remain in his school of enrollment (here, Orange Public School District) for the duration of homelessness;

7. Respondent agrees that, by no later than thirty calendar days from the date of this signed Agreement, the chief school administrator, or designee, for Respondent shall issue a written determination finding that J.W. is homeless; that Respondent is the "district of residence" pursuant to the relevant homelessness rules and regulations; that Respondent is the school district in which J.W. was and continues to be enrolled; that, at all relevant times, it was and continues to be in J.W.'s best interest to attend Mt. Carmel Guild Academy; and that since January 1, 2019, Petitioner and J.W. were and are "deemed domiciled" in Bloomfield.

8. Respondent agrees to withdraw its Cross-Petition against S.G. for tuition payments filed on March 12, 2019 with prejudice, and to remove S.G. as a Party-Respondent in its Petition against Bloomfield Board of Education and S.G. filed on April 23, 2019 with prejudice;

9. The Parties hereby mutually waive any and all claims and counterclaims against each other arising under the McKinney-Vento Homeless Assistance Act, 42. U.S.C. § 11431 *et seq.*, and corresponding and/or related federal and state law and regulations, including but not limited to NJSA 18A-1 et seq., NJAC 6A:22, NJAC 6A:17, and NJAC 6A:27, where such claims arose prior to the date of this Agreement. This waiver includes, but is not limited to, any and all claims for reimbursement, money damages, attorney's fees and costs, misrepresentation, fraud, and/or any other equitable or legal relief arising under and/or related to the aforementioned statutes and regulations. This Agreement shall not be construed as a waiver of any claims arising after the date of this signed instrument;

10. In consideration for the above, Petitioner withdraws her Petition against Respondent, S.G. o/b/o J.W. v. City of Orange Board of Education, OAL Dkt. No. 04260-19, with prejudice.

11. The Parties agree that this Agreement shall be submitted to the Honorable Thomas Betancourt, ALJ, for entry into a Court Order;

12. This Agreement shall be construed fairly, according to the plain language of its terms.

13. 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 remain in full force and effect.

14. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

15. This Agreement shall be governed by the laws of the State of New Jersey.

16. The Parties have entered into this Agreement freely, willingly and voluntarily, with a full understanding of their rights and the content of the Agreement.

17. The Parties have had the opportunity to consult with their respective legal representation. The Parties are satisfied with the legal representation they have received.

18. District and its successors are bound by the Agreement and each of its provisions.

19. The undersigned representative with the Board of Education for the Orange Township, in the county of Essex, represents and warrants that she/he is authorized and empowered to sign this Agreement on behalf of the Board of Education and is able to bind District to the Agreement's terms.

20. This Agreement constitutes the entire Agreement and understanding between the Parties and constitutes a full and final settlement relating to the dispute referenced herein.

IN WITNESS WHEREOF, the Parties have signed this Agreement or caused their representatives to sign this Agreement on the dates set forth below.

Date: 5/30/2019

PETITIONER, S.G., individually, and on behalf of J.W.

Date: 5/29/19

RESPONDENT ORANGE BOARD OF EDUCATION

172-19

New Jersey Commissioner of Education

Final Decision

Glenn Ciripompa,

Petitioner,

v.

Board of Education of the Borough of Bound Brook, Somerset County,

Respondent.

Synopsis

Petitioner's tenure as a physical education teacher in Bound Brook schools was revoked following two arbitration hearings and multiple court actions stemming from two charges of unbecoming conduct – namely, sending nude photographs from a school district computer and iPad, and inappropriate and harassing interactions with female staff members – filed in July 2014 by the respondent Board of Education of the Borough of Bound Brook (Board). In the instant petition, Mr. Ciripompa sought back pay for the period between the end of his 120-day suspension without pay and the resolution of the tenure charges. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; following suspension from his teaching position, petitioner received income from unemployment ($16,514), earnings from driving a school bus for Snyder's Bus Service during the 2014-15 and 2015-16 school years ($46,335.44), earnings from driving a school bus for Snyder's during the summers of 2015 and 2016 ($4,509.65) and earnings from umpiring games ($3,105); petitioner's income for the period following his 120-day suspension without pay totaled $70,464.09, which exceeded his backpay expectation of $63,886 from employment by the Board; and petitioner is not entitled to realize the unwarranted financial gain which would result from his demand for back pay. The ALJ concluded that petitioner is not entitled to any back pay; accordingly, the Board's motion for summary decision was granted and petitioner's claim was dismissed.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as set forth in the Initial Decision. The Commissioner noted that the only issue for consideration at this stage of the proceedings was petitioner's legal entitlement to back pay, and the Board's legal ability to deduct sums received by petitioner during his period of suspension as mitigation. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter. Summary decision was granted in favor of the Board, and petitioner's claim for back pay was dismissed with prejudice.

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

July 8, 2019

172-19

OAL Dkt. Nos. EDU 9073-17 and EDU 10698-17 (Consolidated)
(EDU 9073-17 On Remand)
Agency Dkt. Nos. 5-1/15, 89-5/17

New Jersey Commissioner of Education

Final Decision

Glenn Ciripompa,

Petitioner,

v.

Board of Education of the Borough of Bound Brook, Somerset County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner Glenn Ciripompa, and the reply thereto by respondent Board of Education of the Borough of Bound Brook (Board), have been reviewed and considered. The lengthy procedural history of this matter is recounted both in the Initial Decision and a previous decision by the Commissioner in this matter. Commissioner Decision No. 206-17, decided July 27, 2017. Currently at issue before the Commissioner is the petitioner's entitlement to back pay for the period between the end of his 120-day unpaid suspension and the resolution of the tenure charges filed against him by the Board. The ALJ found that the petitioner's earnings of $70,464.09, which included earnings from unemployment, substitute employment as a bus driver during the school year and the summer, and as an umpire, exceeded his back pay expectation of $63,886. As such, the ALJ concluded that the petitioner was not entitled to receive any back pay from the Board and granted the Board's motion for summary decision.

Petitioner argues in his exceptions that the ALJ improperly reduced his back pay by the amount of unemployment benefits he received during his 120-day unpaid suspension. Petitioner

contends that *N.J.S.A.* 18A:6-14 does not allow the board to recoup money that the employee earned during the time when the board had no obligation to pay salary. Petitioner claims that the law as applied through the Initial Decision would result in a "double punishment" whereby an employee would be deprived both of his normal earnings and of the opportunity to earn a salary from other employment during the 120-day unpaid suspension.

Petitioner next disputes the ALJ's finding that earnings from his employment during the summer months with Snyder's Bus Service (Snyder's) mitigate his back pay entitlement, arguing that because he was not entitled to receive any salary from the board during the summer, other employment during that time should not be deducted. Finally, petitioner contends that the ALJ incorrectly found that his employment with Snyder's conflicted with his school employment. Petitioner notes that he may have worked approximately 80 potentially conflicting hours over an 18-month period but alleges that applying the entirety of his earnings as mitigation is an inequitable reading of *N.J.S.A.* 18A:6-14. Petitioner argues that he did not fail to discharge any duty imposed by the board on him during his paid suspension and, accordingly, nothing he did during that time could be incompatible with his duties.

In its reply, the Board argues that *N.J.S.A.* 18A:6-14 clearly provides that the Board is entitled to deduct "any sums received" during the "period of suspension," and that the period of suspension runs from the filing of the tenure chares to their resolution, including the 120-day unpaid suspension period. The Board notes that if petitioner had been successful in his defense of the tenure charges and received no penalty, he would have received full back pay for the entire period of suspension, including for the initial 120 days, minus any earnings from the entire period of the suspension.

Next, the Board replies that all earnings from Snyder's must be deducted, because petitioner did not work for Snyder's prior to his suspension, and he could not have done so during the school year while he was teaching. The Board contends that petitioner's exceptions distort the record

and that there were at least 419 days when petitioner's work for Snyder's conflicted with his work hours as a teacher. Finally, the Board argues that because petitioner only received summer employment at Snyder's based on his employment there during the school year, the summer earnings should also be deducted.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ's findings and determination of this matter. While the facts in this case are complex, the issue at this stage of the proceedings pertains only to the legal entitlement of the petitioner to back pay, and the legal ability of the Board to deduct sums received by the petitioner during the period of suspension as mitigation. The facts themselves are not in dispute; therefore, the ALJ's disposition of this case via summary decision was proper.

The Commissioner concurs with the ALJ's conclusion that the petitioner's unemployment benefits, including those received during his 120-day unpaid suspension, must be deducted from his back pay, pursuant to *N.J.S.A.* 18A:6-14. The "period of suspension" runs from the beginning of his unpaid suspension on September 1, 2014 until the second arbitration decision sustaining the tenure charges on June 16, 2017.[1] Nothing in *N.J.S.A.* 18A:6-14 suggests that the "period of suspension" does not include the 120-day unpaid suspension. To the contrary, all references to the suspension encompass the entire time period, beginning "[u]pon certification of any charge to the commissioner." Because the statute plainly requires that "any sums received . . . during such period of suspension" must be deducted from the back pay owed, the unemployment benefits received by the petitioner during the 120-day unpaid suspension must be deducted.

The Commissioner agrees with the ALJ that the petitioner's employment with Snyder's during the school year constitutes "substituted employment" within the meaning of

[1] This is consistent with the Commissioner's prior decision in this matter, Commissioner Decision No. 206-17, decided July 27, 2017, which found that the issue of back pay should not be dealt with in a piecemeal fashion and that the matter must instead be viewed as a whole.

N.J.S.A. 18A:6-14, as explicated in *School District of the Township of Willingboro and Gilbert*, 3 *N.J.A.R.* 206 (1981), *affirmed* at 3 *N.J.A.R.* 209 (1981). The petitioner did not obtain his employment with Snyder's until after he was suspended by the Board, and the ALJ found that the undisputed evidence from the deposition testimony of the president of Snyder's was that his employment there during the school year was inconsistent with his obligation to the Board. The routes driven by the petitioner occurred during times that he would have been required to be present at school, and the records of his work hours demonstrate that he regularly worked hours that were incompatible with his teaching hours. The Commissioner is therefore satisfied that all earnings from Snyder's during the school year may be counted as mitigation.

Regarding summer earnings, the Commission concurs with the ALJ's finding that the petitioner would not have obtained summer employment with Snyder's if he had not also worked there during the school year. The president of Snyder's so stated explicitly in her deposition, and the petitioner has not presented any evidence to refute the information she presented. Additionally, the Commissioner reiterates that the petitioner did not obtain employment with Snyder's until after he was suspended by the Board, differentiating his circumstances from those of teachers who held summer employment prior to their suspensions and whose summer earnings did not count as mitigation.

During the petitioner's period of suspension, the maximum back pay due was $63,886. For the reasons stated above, his unemployment benefits of $16,514, his school-year earnings from Snyder's of $46,335.44, and his summer earnings from Snyder's of $4,509.65 are all countable as mitigation. Additionally, the ALJ found that the petitioner earned $3,105 as an umpire during the period of suspension. Neither party disputes this amount in the exceptions or reply, and the Commissioner concurs with the ALJ's conclusion. Accordingly, the petitioner earned $70,464.09 during his period of suspension, exceeding the amount of his back pay expectation. The petitioner is entitled to be made whole by the Board, but he is not entitled to be made more than whole.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter; summary judgment is granted in favor of respondent, and the claim for back pay is dismissed with prejudice.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/19
Date of Mailing: 7/08/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9073-17
AGENCY DKT. NO. 89-5/17
OAL DKT. NO. EDU 10698-17
(ON REMAND OAL DKT. NO. EDU 9073)
AGENCY DKT. NO. 5-1/15
(CONSOLIDATED)

GLENN CIRIPOMPA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondent.

Edward Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: April 22, 2019 Decided: May 23, 2019

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

The Bound Brook Board of Education seeks summary decision in the latest installment of this long-running case, which began when the District filed tenure charges against Glenn Ciripompa. After an arbitrator found Ciripompa guilty of a portion of the allegations and dismissed the remainder, the Superior Court overturned the arbitration decision, the Appellate Division reinstated the decision, and ultimately, the Supreme Court vacated the arbitration decision, remanding the matter for a new arbitration before a different arbitrator. Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4 (2017). That second arbitration upheld the Board's charges and revoked Ciripompa's tenure. However, the parties have been unable to reach any agreement on what, if any, back pay may be due to Ciripompa, and that dispute has now once again resulted in the Board moving for summary decision.

The chronology of these events is significant. The Board certified its charges to the Commissioner of Education on July 17, 2014. Ciripompa was then suspended without pay for 120 days, as authorized by N.J.S.A. 18A:6-14. The first arbitration decision was issued on October 20, 2014. It suspended Ciripompa for 120 days without pay for the charges he was found guilty of. Other charges were dismissed. That 120-day suspension without pay, which was separate from the statutory suspension, ended on March 9, 2015. However, as the Board was then appealing the Superior Court Order that had overturned the arbitrator's decision, the Board did not return Ciripompa to pay status. He remained unpaid until November 1, 2015, the day after the Appellate Division upheld the arbitrator's decision. He was reinstated to full pay status on November 1, 2015. The Supreme Court vacated the first arbitrator's decision on February 21, 2017. Nevertheless, Ciripompa remained in full pay status until his termination on June 16, 2017, following the issuance of the second arbitrator's decision sustaining the tenure charges.

On April 28, 2017, this judge issued a decision on a previous motion, establishing the Board's back pay responsibility in light of the need for Ciripompa to mitigate damages for the period from March 9, 2015 until October 31, 2015, that is, the period following the

conclusion of the first arbitrator's suspension until Ciripompa's return to paid status, while noting that any remaining issues of additional back pay and mitigation should be the subject of a new petition to the Commissioner.[1] The second arbitrator's decision was issued on June 16, 2017. On July 27, 2017, the Commissioner rejected the April 28, 2017, decision, determining that the back-pay issue should be resolved for the entire period from September 1, 2014 through June 16, 2017 in one proceeding.

In June 2018, the Board moved for summary decision, arguing that the undisputed facts confirmed that Ciripompa's salary from substitute employment with Snyder's Bus Service, combined with unemployment benefits and additional earnings working as an umpire, exceeded those he would have received from Bound Brook and thus no back pay was due. However, on July 30, 2018, I issued an Order Denying Summary Decision, finding that there were disputed facts as to whether the employment at Snyder's during the school year would have conflicted with Ciripompa's responsibilities to Bound Brook. Subsequently, a subpoena was issued to Snyder's for Ciripompa's work records and a deposition was taken of Tina Snyder, the president of Snyder's Bus Service. The Board again moves for summary decision, and Ciripompa responds that the facts show that he is indeed entitled to back pay.

The Board's claim is based upon N.J.S.A. 18A:6-14, which in pertinent part, provides that while a Board is required to pay the suspended tenured employee his full salary after the completion of the initial 120-day period following the certification of tenure charges, any back pay award must be mitigated and the "board of education shall deduct from such full salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension."

The Board offers that given the undisputed rates of pay that Mr. Ciripompa would have or did receive in his role as a teacher in school years 2014-15, and 2015-16, his back pay for those periods in those two school years in which he did not receive pay

[1] Based upon the then available evidence, I held that Ciripompa was entitled to $22,000.53 for the period between March 10, 2015 and October 31, 2015.

totaled $50,104 for 2014-15 and $13,782 for 2015-16, for a total back pay due of $63,886. During his unpaid suspension he received unemployment benefits totaling $16,514. In addition, he earned $68,960.75 from Snyder's Bus Company, of which $4,509.65 was paid for summer work performed from July 1, 2015, through August 31, 2015, and July 13 through August 31, 2016. Additionally, the Board offers that he earned another $18,115.31 from June 17, 2017, the day after his termination, until December 31, 2017. Finally, after subtracting certain sums previously disallowed as mitigation in a prior ruling, the Board contends that he earned $3,105 as an umpire during 2015 and 2016. Mr. Ciripompa does not appear to dispute these figures. He asserts that he should receive $34,494.41 in back pay. The Board claims that he is not entitled to receive any back pay, as his earnings, combined with the unemployment benefits, totaled 65,954.44, exceeding the total of back pay that would be due. Indeed, this total does not include the summer earnings from Snyder's. However, the Board urges that given new evidence, the summer earnings should be included in the mitigation calculation.

In reply to the Board's motion, Mr. Ciripompa contends that the back-pay calculations must be made for four distinct time frames. These are the (1) the statutory unpaid suspension (effectively September 1, 2014 through November 17, 2014); (2) the arbitrator-imposed 120-day unpaid suspension from November 17, 2014 through March 9, 2015; (3) the unpaid period, following the March 10 conclusion of the arbitrator's suspension until pay was restored on November 1, 2015, and (4) from November 1, 2015 until termination on June 16, 2017, during which time Ciripompa received his full pay. In regard to the third of these periods, Ciripompa argues that in rejecting the April 28, 2017, decision, the Commissioner did not dispute the initial decision's calculation of the back pay and mitigation for the period from March 10, 2015 through October 31, 2015, that is, the period when the 120-day suspension ordered by Arbitrator Pecklers ended through the date Ciripompa was reinstated to pay status after the Appellate Division reinstated that arbitrator's decision. As such, Ciripompa contends that the back pay due for the third unpaid suspension period of March 10, 2015 through October 31, 2015, has already been established at $22,000.53. However, the Board argues that the mitigation offset to any back-pay award must be measured by Ciripompa's total earnings from September 1,

2014 through June 17, 2017, that is, the entire period from the start of the 2014-15 school year through the date when Ciripompa was terminated after Arbitrator De Treux's decision sustaining the termination of tenure.

Considering these arguments, I **CONCLUDE** that given the Commissioner's rejection of the initial decision and determination that the back pay and mitigation issues should be resolved for the entire period of suspension, it is appropriate to reconsider the matter without considering the prior initial decision to be in any manner the law of the case. And this is particularly true as there is now additional evidence to consider, especially the deposition testimony of Ms. Snyder. The record existing at the time of the prior initial decision lacked evidence that would have clarified two key questions. One is the question whether Ciripompa's work at Snyder's during the school year was inconsistent with his obligations to the Board. The second is whether his summer earnings from Snyder's were dependent upon his employment already existing prior to the summer, or whether, alternatively, those summer earnings were independent of any need for Ciripompa to have been already employed by Snyder's during the school year.[2]

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[2] In the prior ruling, I noted that the Board asserted it should be entitled to mitigation for earnings received by petitioner while working for Snyder Bus Service during the summer months of 2015. The basis for this claim is that while the Board recognizes that it is generally not permitted to seek mitigation for earnings during a period of time when an employee would not have been working for the Board, in this case it posits that were it not for petitioner's employment with the bus company during the school year while he was serving his suspension, he would never have been employed by the company during the summer . . . The Board notes that Mr. Ciripompa did not work for the bus company prior to his suspension and could not have done so had he been actively working for the Board. The Board cites cases in which an employee had already been employed by an outside employer prior to a suspension and continued that employment during the period of suspension. In such cases mitigation has not been permitted from the earnings obtained from that employer. However, here, employment with the bus company did not predate the suspension. Thus, the Board argues that mitigation should be permitted from these earnings.

Mr. Ciripompa does not appear to respond to the Board's contentions regarding the summer employment with Snyder Bus Service. However, he more generally notes that earnings during the summer when an employee is not expected to be working for the school employer are generally not subjected to mitigation. Presumably he contends that as for the monies earned from the bus service during the summer which the Board seeks to be included in mitigation, no mitigation should be permitted.

Based upon the record then existing, I concluded that "any determination of whether Mr. Ciripompa might have obtained employment with the Bus Service for the summer of 2015 had he been actively employed by the Board for the entire 2014-2015 school year must be based upon speculation," as "neither party had presented any affidavits or certifications from anyone connected to Snyder, nor otherwise addressing the circumstances under which the employment was obtained, or might, or might not, have been obtained, in a different factual scenario." Because of this, I concluded that, since it was not unreasonable to assume

In her deposition, Ms. Snyder explained that Mr. Ciripompa started working for Snyder's part-time in late 2014, as he attempted to qualify for a commercial driver's license, or CDL. He began driving for the company shortly thereafter. In late 2014, Ciripompa was serving the 120-day suspension ordered by the first arbitrator, which followed upon the issuance of that arbitrator's decision on October 20, 2014. That suspension lasted until March 9, 2015. Thus, Mr. Ciripompa's employment with the bus company did not begin until after he had been initially suspended in July 2014. Thus, all of his earnings with Snyder post-date that initial suspension date. Some of the monies he earned were for employment that occurred during the school year, some for work performed in the summer when school was not in session and Ciripompa would not have been expected to be performing duties for the Board even if not suspended.

In seeking to include all of Ciripompa's earnings from Snyder's as mitigating his back-pay award, the Board relies on School District of the Township of Willingboro and Gilbert, 3 N.J.A.R. 206 (1981). In Gilbert, Administrative Law Judge Beatrice Tylutki considered the meaning of "substituted employment," the type of employment specified in the statute as the type of earnings to be included in calculating mitigation ("any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension.") After his suspension, Gilbert obtained employment at a job that involved working hours which Judge Tylutki concluded were "not consistent with his employment as a teacher." Thus, while earnings from an employment held prior to the suspension and not inconsistent with his teaching responsibilities would not be included as mitigation, as it was not "substituted" for the employment with the District, the "set off of wages earned by the employee" applied to "a position which the employee could not have held while employed by the [school district]." The judge held that as the teacher had never been employed by the outside employer prior to his suspension and "it appears to be a substitute employment sought out by Mr.

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that even if Ciripompa was not employed by Snyder before his suspension that he could have secured employment for the summer, the summer earnings from Snyder Bus Service were not subject to mitigation.

Gilbert because of his suspension," the earnings were required to be included in calculating mitigation against the back pay. 3 N.J.A.R. 209. Allowing Gilbert to exclude the earnings from such employment from the calculation of mitigation "would be to permit Mr. Gilbert, during a period of suspension and while receiving his full teacher's salary, to realize a financial gain." Id. On review, the Commissioner of Education adopted Judge Tylutki's decision. 3 N.J.A.R. 209.

As Ciripompa's employment with Snyder, like that of Gilbert's post-suspension job, was a position only secured after his July 2014 suspension, it seems clear enough that the earnings from Snyder are included as mitigation as "substituted employment," unless it were shown that that employment was not inconsistent with the obligations that Ciripompa would have had to the Board, thus, as Judge Tylutki suggested, employment he "could . . . have held while employed by the [school district]." In Gilbert's case, the testimony made it clear that he secured the post-suspension employment to replace income lost from the Board during his suspension. It is not clear how the judge would have ruled if Gilbert's new employment had involved time commitments that would have not clashed with those he would have had to the district. One way of understanding "substituted employment" could be that any post-suspension employment is "substituted," for any money earned could be viewed as "substituted" for the lost wages. Another understanding could focus on the "consistency" or "inconsistency" of the time obligations, considering that only work "inconsistent" with the time requirements as a teacher was actually "substitute" employment, while work performed at times consistent with maintaining the teacher's obligations to the district was "supplemental" employment," not includable as mitigation. But in Mr. Ciripompa's case, the undisputed evidence garnered from Ms. Snyder's deposition testimony makes it clear that his employment with Snyder's during the school year was inconsistent with this obligation to Bound Brook and thus countable as mitigating earnings. And, there is no evidence to suggest other than that he sought this employment to substitute the earnings therefrom for that he was not receiving from Bound Brook during his unpaid suspension.

According to Ms. Snyder's deposition testimony, her company is located in Washington Township, Warren County. Ms. Snyder explained that the company's morning bus routes run from 6:30 a.m. to 9:05 a.m., however, "most everyone comes in at 6:00." These routes usually last between two and three hours. Some afternoon routes start between 1:00 and 2:00 p.m., but "most everyone comes in between 2:00 and 3:00." These routes generally last until 4:00 and 4:30. She confirmed that the company had no morning routes that finished before 6:45 a.m. or any regular afternoon routes that started after 3:40 p.m., except perhaps a late start at 3:30 p.m. Bound Brook High School is in Somerset County. According to a regular day schedule for 2014-15, the school day periods ran from 7:35 a.m. until 2:52 p.m. In 2015-16 and 2016-17, the schedule of periods ran from "Teacher Arrival" at 7:30 a.m. until "Teacher Dismissal" at 2:55 p.m. According to a MapQuest printout offered as Exhibit J to the Board's brief, the 32.0-mile trip from Bound Brook to Snyder's facility in Washington Township (based on traffic conditions at 3:15 p.m. on March 20, 2019) lasted for 47 minutes. Given these time frames, which appear reasonably translated to the time frame of Ciripompa's employment in 2014-17, the Board posits that Mr. Ciripompa could not have worked at Snyder's during the school year if he had been working his required hours at Bound Brook, as he could not have operated the company's morning routes and arrived at school by 7:35 a.m. or have left school at 2:52 or 2:55 p.m. and arrived at Snyder's before about 3:45 p.m. Thus, he could not have obtained work at Snyder's if he had been working at Bound Brook. And the records of his work hours in 2015 amply support that he did in fact regularly work during hours incompatible with employment as a teacher for Bound Brook. Thus, I **FIND** that the employment for Snyder's was "substitute" employment, inconsistent with his obligations to Bound Brook, rather than "supplemental," non-conflicting employment.

As for his summer earnings, Ms. Snyder testified that her company does not hire summer employees. Instead, the work is performed by the same drivers who work for the company during the school year.

Q. Do you hire from outside for the summer work or do you use the same drivers?
A. No. We use the same drivers but they don't all work.

Q. You don't hire just summer drivers?
A. No.

In his response to the current motion, Mr. Ciripompa does not present any evidence to refute Ms. Snyder's testimony. As such, in the absence of any affidavit or certification disputing her answers regarding summer employees, I **FIND** that Snyder's Bus Service did not hire additional employees for summer work and that to have worked for the company during the summer months following the conclusion of the school years 2015-16 and 2016-17, Mr. Ciripompa would have had to have been employed by Snyder's during the school year. And, since he could not have worked for Snyder's during the school year without substantial, disqualifying schedule conflicts with his obligations to Bound Brook or have been hired for solely summer work, as the company did not hire separate employees for the summer, I **FIND** that all of the earnings from Snyder's, both that earned during the school year and that earned in the summers, must be included as income in calculating the mitigation against back pay. Taking these facts into account, I **FIND** that Mr. Ciripompa received

$16,514.00	Unemployment
$46,335.44	School year earnings from Snyder's in 2014-15 and 2015-16
$ 4,509.65	Summer earnings from Snyder's in July/August 2015 and July/August 2016
$ 3,105.00	Umpiring
$70,464.09	

Even if the summer earnings are not included, the total earnings were $65,954.44, which exceeded his backpay expectation of $63,886 from employment by the Board during the entire period from September 1, 2014 through the resumption of pay on November 1, 2015. Mr. Ciripompa is not entitled to realize a financial gain from his substituted employment. Gilbert. And, of course, as explained above, the summer earnings count as well. Thus, receipt of any back pay would provide such an unwarranted gain.

I **CONCLUDE** that there are no genuine disputes of material fact that need resolution and that applying the applicable standard of review and substantive law to the undisputed facts, Bound Brook Board of Education, as the moving party, is entitled to summary decision in its favor. N.J.A.C. 1:1-12.5; Brill v. The Guardian Life Ins. Co. Of America, et al., 142 N.J. 520 (1995).

ORDER

I **CONCLUDE** that Mr. Ciripompa is not entitled to any back pay. **IT IS HEREBY ORDERED** that the Board's motion for summary decision is **GRANTED** and the claim for back pay is **DISMISSED**.

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

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

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

May 23, 2019
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 5-23-19

Date Mailed to Parties: 5-23-19

mph

EXHIBITS

For petitioner:

Exhibit A Initial Decision dated April 28, 2017

Exhibit B Interlocutory Decision dated July 30 , 2018

For respondent:

Certification of Robert J. Merryman, Esq., March 21, 2019, with attached Exhibits A through D, E-1 through 5, F (referred to as F in Certification but labeled "6" in binder), G through J

New Jersey Commissioner of Education

Final Decision

Y.Y., on behalf of minor children, W.Y. and D.Y.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

Synopsis

This residency appeal was remanded to the OAL in July 2018 for supplementation of the record and calculation of tuition due to the respondent Board following consideration of the merits by the Commissioner (Commissioner Decision No. 229-18R, decided July 27, 2018). The Commissioner found no basis to disturb the findings of fact and credibility determinations of the ALJ, and adopted the conclusion that the petitioner was never domiciled in North Arlington but, rather, was domiciled in Kearny from September 2014 forward. A hearing was held on February 14, 2019 on the issue of tuition owed to the Board for the period of ineligible attendance.

The ALJ found, *inter alia*, that: a certification from the Board's business administrator was submitted into evidence, and concluded that $30,857.03 was due from the petitioner for the ineligible attendance of her sons, D.Y. and W.Y.; petitioner disputed two of the days of attendance, which the Board deducted from the total tuition owed, making the amount due $30,720.47. The ALJ found the certification to be accurate and credible. Accordingly, the ALJ filed the Initial Decision with the Commissioner for his consideration.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, with a slight modification to the amount of tuition due because of rounding differences. The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and modified the amount of tuition owed to $30,720.36. The petitioner was directed to reimburse the Board in the total amount of $30,720.36 for tuition costs incurred during the time period for which D.Y. and W.Y. were ineligible to attend school in North Arlington.

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 8, 2019

173-19R

OAL Dkt. No. EDU 11099-18
(EDU 05241-17 On Remand)
(EDU 09260-16 Prior Remand)
Agency Dkt. 149-5/16

New Jersey Commissioner of Education

Final Decision on Remand

Y.Y., on behalf of minor children, W.Y. and D.Y.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed – mindful of the Commissioner's July 26, 2018 decision remanding this matter for calculation of tuition due to the Board. The parties did not file exceptions.

In his July 26, 2018 decision, the Commissioner determined that the petitioner failed to sustain her burden of demonstrating that she was a domiciliary of North Arlington from the 2014-2015 school year to the present; thus, the minor children were not entitled to a free public education in the District's schools during that time. Pursuant to *N.J.A.C.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in North Arlington. The Commissioner noted, however, that pursuant to *N.J.A.C.* 6A:22-6.2(a), tuition may only be assessed for the period during which the hearing was pending "and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal." As such, the Commissioner determined that since the Board issued its final notice of ineligibility on May 4, 2016, the tuition assessment is limited to the period from May 4, 2015 to

the present. As the record lacked the information required to calculate the amount of tuition owed to the Board, the Commissioner remanded the matter to the OAL for calculation of tuition due to the Board and supplementation of the record as warranted.

Upon review, the Commissioner finds that the Board is entitled to tuition reimbursement in the amount of $30,720.36[1] for the period from May 4, 2015 to the present, during which time petitioner's minor children were ineligible to attend school in the District. Specifically, the record establishes that D.Y. attended school for 30.5 days from May 4, 2015 through the end of the 2014-15 school year, at a cost of $60.24 per day, and 8 days in the 2015-16 school year, at a daily rate of $68.28. The cost of tuition for W.Y. at the Bergen County Technical Schools was $47.60 per day for 33 days from May 4, 2015 through the end of the 2014-15 school year, $8,730.00 for the 2015-16 school year, $8,910.00 for the 2016-17 school year, and $9,126.00 for the 2017-18 school year.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, as modified herein, and the petition is hereby dismissed. Petitioner is directed to reimburse the Board in the amount of $30,720.36 for tuition costs incurred during the time period for which D.Y. and W.Y. were ineligible to attend school in North Arlington.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/19
Date of Mailing: 7/08/19

[1] The ALJ found that the petitioner owed the Board $37,720.47 – a difference of $.11 from the Commissioner's calculation – due to a difference in rounding of the daily tuition cost.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

Y.Y. ON BEHALF OF MINOR CHILDREN W.Y. AND D.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

OAL DKT. NO. EDU 11099-18
AGENCY DKT. NO. 149-5/16
on Remand

Y.Y. ON BEHALF OF MINOR CHILDREN W.Y. AND D.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

OAL DKT. NO. EDU 05241-17
AGENCY DKT. NO. 149-5/16

Y.Y. ON BEHALF OF MINOR CHILDREN W.Y. AND D.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

OAL DKT. NO. EDU 09260-16
AGENCY DKT. NO. 149-5/16

Y.Y. parent of D.Y. and W.Y. petitioner, pro se

Eric L. Harrison, Esq., for respondent, Borough of North Arlington Board of Education (Methfessel & Werbel, attorneys)

Record Closed: February 14, 2019 Decided: May 23, 2019

BEFORE **JEFFREY A. GERSON**, ALJ t/a:

STATEMENT OF THE CASE

The Commissioner remanded the above matter in July 2018 to supplement the record with a calculation of tuition due from petitioner.

The Commissioner found no basis to disturb the undersigned Findings of Fact and credibility determination and adopted the conclusion that petitioner never was domiciled in North Arlington and remained domiciled in Kearny from September of 2014 forward.

An In-person hearing was conducted on February 14, 2019.

Submitted in evidence was a Certification from Kathleen Marano, Business Administrator for the North Arlington School District. The Certification of Marano (attached hereto) concludes that $30,857.03 is due from petitioner for the ineligible attendance of her sons, D.Y. and W.Y. Marano's Certification, supported by several exhibits was, for the most part, uncontested by petitioner. Petitioner questioned only 2 days which the district credited to petitioner in the amount of $137.56 reflecting two days of attendance.

The total owed by petitioner after deducting the two days of credit is $30,720.47.

The Certification of both Marano and John Susino, the Business Administrator and Board Secretary for the Bergen County Technical and Special Services School, I **FIND** to be accurate and creditable. (Susino Certification attached).

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

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

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

May 23, 2019

DATE

JEFFREY A. GERSON, ALJ/Ret., on recall)

Date Received at Agency: May 23, 2019

Date Mailed to Parties:

sej

APPENDIX

Admitted In Evidence

Certification of Kathleen Marano

Certification of John Susino

Eric L. Harrison - ID #033381993
METHFESSEL & WERBEL, ESQS.
2025 Lincoln Highway, Suite 200
PO Box 3012
Edison, New Jersey 08818
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Attorneys for North Arlington Board of Education
Our File No. 81780 ELH

05241-17

Y.Y O/B/O D.Y AND W.Y Petitioners, V. NORTH ARLINGTON BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AGENCY REF NO. 149-5/16 OAL DOCKET NO. EDU 08260-2016 N Administrative Action **CERTIFICATION OF KATHLEEN MARANO**

I, Kathleen Marano, of full age, duly certify and say:

1. I am the Business Administrator for the North Arlington School District ("the District") and Secretary for the Board of Education ("the Board").

2. I make this certification in response to the Commissioner of Education's July 26, 2018 Decision on Remand, requiring the Office of Administrative Law to calculate tuition due to the District.

3. In accordance with the Decision on Remand, the foregoing calculations include the period from May 4, 2015 to the present.

4. Attached as **Exhibit A** is a spreadsheet showing that petitioner is responsible for reimbursing the District for $30,857.03 for the ineligible attendance of her sons, D.Y. and W.Y., during that period.

TUITION REIMBURSEMENT FOR D.Y.

5. As of May 4, 2015, petitioner's son D.Y. was a 5th grade student in the District.

6. The per pupil tuition rate for Grades 1-5 in the District for the 2014-15 school year was $10,844.00. A true copy of an August 5, 2014 memorandum outlining the District's tuition costs for the 2014-15 school year is attached as **Exhibit B**.

7. Thus, the daily per pupil tuition rate for Grade 5 in the 2014-15 school year was $60.24,[1] calculated by dividing $10,844.00 by 180, the total number of yearly school days.

8. Between May 4, 2015 and the last day of school on June 19, 2015, D.Y. missed 2.5 days (half day on May 11, 2015; full days on May 12, 2015 and June 16, 2015) out of a remaining 33 days. A true copy of D.Y.'s attendance records for the 2014-15 school year is attached as **Exhibit C**.

9. The total tuition owed for the 30.5 days that D.Y. was in attendance during the 2014-15 school year starting on May 4, 2015 is $1,837.46, calculated by multiplying 30.5 days by $60.24/day.

10. During the 2015-16 school year, D.Y. was a 6th grade student in the District.

---

[1] Please note that all decimal points are rounded to the hundredths place for simplicity in this certification. The figures calculated in the spreadsheet take into account the full decimal value and may not match the computed value using the rounded figures stated in this certification. The final tuition figures are based on the full values from the spreadsheet.

11. The per pupil tuition rate for Grades 6-8 in the District for the 2015-16 school year was $12,290.00. A true copy of a June 24, 2015 memorandum outlining the District's tuition costs for the 2015-16 school year is attached as **Exhibit D**.

12. Thus, the daily per pupil tuition rate for Grade 6 in the 2015-16 school year was $68.28, calculated by dividing $12,290.00 by 180.

13. D.Y. attended school for 10 days during the 2015-16 school year. A true copy of D.Y.'s attendance records for the 2015-16 school year is attached as **Exhibit E**.

8 days
9 DAYS

14. The total tuition owed for the 10 days that D.Y. was in attendance during the 2015-16 school year is $682.78, calculated by multiplying 10 days by $68.28/day.

15. D.Y. did not attend school in the District in either the 2016-17 or 2017-18 school years.

16. The total tuition reimbursement owed by petitioner Y.Y. for her son D.Y.'s ineligible attendance is $2,520.23, which is calculated by adding the total tuition of $1,837.46 from the 2014-15 school year (after May 4, 2015) and $682.78 from the 2015-16 school year. (See Exhibit A)

TUITION REIMBURSEMENT FOR W.Y.

17. As of May 4, 2015, petitioner's son W.Y. was a student at the Bergen County Technical Schools ("BCTS").

18. For the 2014-15 school year, the District paid a total of $8,568.00 for W.Y. to attend BCTS. A true copy of the District's payment ledger showing

the total billed tuition amount for W.Y.'s attendance at the Bergen County Technical Schools during the 2014-15 school year is attached as **Exhibit F**.

19. Thus, W.Y.'s daily tuition rate was $47.60, calculated by dividing $8,568.00 by 180.

20. Between May 4, 2015 and the last day of school on June 19, 2015, there were 33 total school days. (See Exhibit C)

21. The total tuition owed for these 33 days is $1,570.80, calculating by multiplying 33 days by $47.60/day.

22. For the 2015-16 school year, the District paid a total of $8,730.00 for W.Y. to attend BCTS. A true copy of the District's payment ledger showing the total billed tuition amount for W.Y.'s attendance at the Bergen County Technical Schools during the 2015-16 school year is attached as **Exhibit G**.

23. For the 2016-17 school year, the District paid a total of $8,910.00 for W.Y. to attend BCTS. A true copy of the District's payment ledger showing the total billed tuition amount for W.Y.'s attendance at the Bergen County Technical Schools during the 2016-17 school year is attached as **Exhibit H**

24. For the 2017-18 school year, the District paid a total of $9,126.00 for W.Y. to attend BCTS. A true copy of the District's payment ledger showing the total billed tuition amount for students at the Bergen County Technical Schools during the 2017-18 school year is attached as **Exhibit I**.

25. The September 17, 2018 Certification of John Susino, Business Administrator and Board Secretary for the Bergen County Technical and Special Services School Districts, confirms that the North Arlington School

District has paid all billed amounts for the 2014-15, 2015-16, 2016-17, and 2017-18 school years in full.

26. The total tuition reimbursement owed by petitioner Y.Y. for her son W.Y.'s ineligible attendance is $28,336.80, which is calculated by adding the total tuition of $1,570.80 from the 2014-15 school year (after May 4, 2015), $8,730.00 from the 2015-16 school year, $8,910.00 from the 2016-17 school year, and $9,126.00 from the 2017-18 school year.

TOTAL TUITION REIMBURSEMENT

27. In total, petitioner Y.Y. is responsible for total tuition reimbursement to the District of **$30,857.03**.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by law.

Kathleen Marano

Kathleen Marano

DATED: 9/19/18

30720.47

174-19

New Jersey Commissioner of Education

Final Decision

Ruth Young-Edri,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner, a tenured teacher employed by the Elizabeth Board of Education (Board), alleged that the Board failed to comply with the due process requirements of the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.*, when it determined that she had harassed, intimidated, or bullied a student in her class. Petitioner requested that the charges against her be dismissed, or – in the alternative – remanded to the Board with the directive that she be afforded the due process to which she is entitled by law. The petitioner filed a motion for summary decision, which was opposed by the Board.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; school districts are required by law to adopt policies that prohibit harassment, intimidation and bullying (HIB) of students, outline expectations for student behavior, and create procedures for reporting HIB-related concerns; the Commissioner has recognized that the due process protections contained in law have equal applicability when an HIB charge is directed against a staff member; in this case, the due process protections enumerated in the Act were largely ignored by the Board; petitioner was not given an opportunity to review the report produced by the Board's anti-bullying specialist, nor any statements or documentary evidence upon which the report was based; there is no evidence that the report was ever shared with the superintendent of schools as required by the Act; and petitioner was not given the opportunity to fully understand the evidence against her and to present testimony in her defense. Accordingly, the ALJ granted petitioner's motion for summary decision and remanded the matter to the local board of education with a directive that petitioner be afforded the due process required under *N.J.S.A.* 18A:37-15.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons well stated therein. Summary decision was granted in favor of petitioner, and the Board was directed to conduct further proceedings consistent with the requirements of the 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.

July 8, 2019

174-19

OAL Dkt. No. EDU 17812-18
Agency Dkt. No. 263-10/18

New Jersey Commissioner of Education

Final Decision

Ruth Young-Edri,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons thoroughly stated in the Initial Decision – that the Elizabeth Board of Education (Board) failed to comply with the due process requirements of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, related to an allegation of harassment, intimidation, and bullying (HIB) made against petitioner by a student in her class. Staff members accused of committing an act of HIB are entitled to the same due process guaranteed to students under the Act. *Gibble v. Hunterdon Central Board of Education*, Commissioner Decision 254-16 (July 13, 2016). The record is clear, and the Board did not refute, that: the petitioner was not provided with a written summary of the HIB investigation, *N.J.S.A.* 18A:37-15(b)(6)(d); the results of the investigation were not reported to the superintendent, *N.J.S.A.* 18A:37-15(b)(6)(b); and the superintendent did not render a decision regarding the allegations, *N.J.S.A.* 18A:37-15(b)(6)(e).

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter, and summary decision is granted in favor of petitioner. The Board is directed to conduct further proceedings consistent with the Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/19
Date of Mailing: 7/08/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 17812-18
AGENCY DKT. NO. 263-10/18

RUTH YOUNG-EDRI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Nicholas Poberezhesky, Esq., for petitioner (Caruso Smith Picini, attorneys)

Heather Ford-Savage, Esq., for respondent

Record Closed: May 9, 2019 Decided: May 30, 2019

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

STATEMENT OF THE CASE

Petitioner, Ruth Young-Edri, a tenured teacher employed by respondent, the Elizabeth Board of Education (the Board), alleges that the Board failed to comply with the due-process requirements of the Anti-Bullying Bill of Rights Act (the Act), N.J.S.A. 18A:37-13, et seq., when it determined that she had harassed, intimidated, and bullied a

student in her class. Young-Edri asks that the charges against her be dismissed, or, in the alternative, remanded to the Board with the direction that it afford her the due process to which she is entitled by law.

PROCEDURAL HISTORY

Young-Edri filed her petition of appeal on October 25, 2018. An answer was filed by the Board on December 7, 2018, and the matter was transmitted to the Office of Administrative Law (OAL) on December 10, 2018. Young-Edri filed a motion for summary decision on March 1, 2019. The Board opposed the motion on April 1, 2019. Young-Edri replied to the opposition on April 8, 2019.

On April 12, 2019, I conferred with counsel via telephone conference. I advised both attorneys that I would like to offer them an opportunity to supply additional information via supplemental certifications. The Board had opposed the motion, but not in certification form. And the Board's submission focused on the truth of the allegations against Young-Edri, rather than the issue in the case, which is whether the Board had afforded Young-Edri an adequate measure of due process. Counsel for Young-Edri had not supplied a certification from his client, and I afforded him an opportunity to do so. These additional submissions were filed on May 9, 2019, at which time the record closed.

FINDINGS OF FACT

It is uncontroverted, and I **FIND**, that Young-Edri is a tenured teacher who has been employed by the Board for over twenty-six years. In or around April 2018, she became the subject of a harassment, intimidation, or bullying (HIB) investigation, conducted in accordance with N.J.S.A. 18A:37-13. She was removed from her active teaching duties and placed on administrative leave.

Anti-bullying specialist Peter Vosseler investigated the charges, and interviewed both teachers and students between April 24, 2018, and May 3, 2018. Young-Edri was interviewed on April 26, 2018. I **FIND** that a written report was generated by Vosseler,

but that report was not shared with Young-Edri. The report reveals that Young-Edri was told which child had alleged mistreatment. Young-Edri recounted that the child at issue was a behavioral problem. The summary of her interview reveals that she did not feel fully supported in dealing with this child; for example, she notes that she was not made aware that he had a behavioral intervention plan in place. She was asked about several incidents, to include one involving a mess made at lunch, another about a confiscated laptop, and yet another involving the child's personal cell phone. The author of the report shares that Young-Edri denied any wrongdoing.

A letter of reprimand dated May 9, 2018, was issued to Young-Edri by her building principal, indicating that she was a "perpetrator" in the HIB case, and that she had created a "hostile educational environment." But I **FIND** that the letter did not provide any information about the investigation, or in any way recount the factual support for the letter's conclusion that Young-Edri had violated the Anti-Bullying Law. Despite being afforded two opportunities to do so, counsel for the Board, in her opposition to the pending motion, shared no evidence that the findings of the anti-bullying specialist were shared with either the superintendent of schools or with the Board itself. The Board offered no evidence that any investigatory materials were shared with Young-Edri at any time prior to this litigation.

Young-Edri appealed the HIB determination on May 16, 2018, and requested a hearing before the Board. Pending that hearing, she was transferred involuntarily to another school building. Young-Edri and her attorney appeared before the Board in executive session on or about July 19, 2018. Young-Edri asserts that she and her attorney were given an opportunity to make brief statements to the Board; Vosseler, who was at the meeting, did not speak. The Board does not disagree. On July 25, 2018, Young-Edri received a letter from the Board attorney notifying her that it had upheld the determination of the anti-bullying specialist. But I **FIND** that this letter again did not detail with specificity the conduct or incidents that were perceived to have risen to a violation of law.

ANALYSIS AND CONCLUSIONS OF LAW

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

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision. The Board has offered no facts that would call into question, much less defeat, Young-Edri's claim that the Board failed to provide her with the due process required under N.J.S.A. 18A:37-15.

Districts are required by law to adopt policies that prohibit HIB; that outline expectations for student behavior; that set forth consequences for inappropriate behavior; and that create procedures for reporting HIB-related concerns. N.J.S.A. 18A:37-14; N.J.S.A. 18A:37-15. In regard to the investigation of bullying charges, the law requires as follows:

> (b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation . . . ;
>
> (c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
>
> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed, or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision . . . .
>
> [N.J.S.A. 18A:37-15 (emphasis supplied).]

Regulations promulgated by the Department of Education further assist local districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.7.

The Commissioner has recognized that the due-process protections contained in law have equal applicability when a bullying charge is directed against a staff member. See K.T. on behalf of K.H. & T.D. v. Deerfield Bd. of Educ., OAL Dkt. No. EDU 00489-13, Initial Decision (June 19, 2013), rev'd and remanded, Comm'r (July 30, 2013), https://www.nj.gov/education/legal/ (where, in the context of a claim that a teacher bullied a kindergarten student, the Commissioner confirmed that the internal HIB investigation mandated by law is not discretionary); see also Gibble v. Hunterdon Central Bd. of Educ., EDU 02767-15, Final Decision (July 13, 2016), http://njlaw.rutgers.edu/collections/oal/; Sadloch v. Cedar Grove Bd. of Educ., EDU 00619-14, Initial Decision (March 26, 2015), http://njlaw.rutgers.edu/collections/oal/, aff'd, Comm'r (June 23, 2015), https://www.nj.gov/education/legal/.

I **CONCLUDE** that the due-process protections contained in the Anti-Bullying Law were largely ignored by this board. A written summary of the investigation was not provided to Young-Edri within five days of the issuance of the anti-bullying specialist's report. The results of the investigation were not shared with the superintendent of schools. The superintendent rendered no decision relative to the bullying allegations and investigation, although, ultimately, the Board was required to "issue a decision, in writing, to affirm, reject, or modify the superintendent's decision." N.J.S.A. 18A:37-15(b)(6)(e) (emphasis supplied). Relative to the scope of the information that should have been shared with Young-Edri, the recent unpublished Appellate Division decision in J.L. v. Bridgewater Board of Education, No. A-2022-16 (App. Div. October 16, 2018), https://njlaw.rutgers.edu/collections/courts/, is instructive. There, the local board did not supply the parents of an alleged bully with investigative reports completed by the anti-bullying specialist and an HIB committee. The matter was remanded to the local board, which was directed to provide the parents with the full record of the HIB allegations, "including the underlying investigative report, [and] any additional written reports or summaries." Ibid. Only with this completeness of information, the court determined,

would the hearing contemplated by law afford the family its rightful measure of due process, and satisfy the requirements of N.J.S.A. 18A:37-15(b)(6).

The proper remedy under the totality of the circumstances is a remand to the Board so that it may afford Young-Edri a proper measure of due process. This case is readily distinguishable from Sadloch v. Cedar Grove Board of Education, where the Commissioner determined that violations of due process warranted dismissal of charges against petitioning football coaches. As noted in Gibble v. Hunterdon Central Board of Education, the relief fashioned in Sadloch was based on a unique set of circumstances, and a "state of the record in that case [that] made it impossible for a determination to ever be reached." Gibble, EDU 02767-15, Final Decision (July 13, 2016), at *9, http://njlaw.rutgers.edu/collections/oal/. Not so here. The investigatory report shared here reveals that the anti-bullying specialist conducted a comprehensive investigation and interviewed numerous witnesses. I **CONCLUDE** that due process requires that Young-Edri be given an opportunity to review that report, and any available statements or other documentary evidence, and be permitted to appear again before the Board for the hearing contemplated by law. And Young-Edri is moreover entitled to evidence that her situation was properly shared with the superintendent and the Board.

As for what the board-level hearing should look like, the plain language of the statute does not require a full adversarial hearing, and it is well established that statutory language should be given its ordinary meaning. Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 23–24 (2009).[1] The statute only demands that the hearing be conducted in executive session, and that "the board may hear from the school anti-bullying specialist about the incident." N.J.S.A. 18A:37-15. But what is surely required is an opportunity for Young-Edri to fully understand the evidence against her and to present testimony and documents to the Board for its consideration; or, put another way, what is required is the modicum of local due process needed to guard against arbitrary, capricious, or ill-informed Board action.

[1] The opportunity for a full adversarial hearing is available if and when the matter is appealed to the Commissioner of Education. In other contexts, law and regulations make it clear when an adversarial hearing is required at the board level. See, e.g., N.J.A.C. 6A:16-7.3(a)(10), which specifies that the right to cross-examination is available in a board-level appeal of a long-term student disciplinary suspension.

ORDER

Based on the foregoing, it is **ORDERED** that petitioner's motion for summary decision is **GRANTED**. This matter is **REMANDED** to the local board of education so that it can afford petitioner the due process required under N.J.S.A. 18A:37-15. This requires that the Board have its superintendent review the determination of the anti-bullying specialist; that the results of the investigation be shared with the Board; that Young-Edri be supplied with the investigatory file to include witness statements and the report of the anti-bullying specialist; and that she be permitted to present witnesses and documentary evidence to the Board at a hearing.

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

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

May 30, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 5/30/19

Date Mailed to Parties: 5/30/19

OAL Dkt. No. EDU 06902-19
Agency Dkt. No. 111-5/19

New Jersey Commissioner of Education

Order on Emergent Relief

C.D., on behalf of minor child, N.D.,

Petitioner,

v.

Board of Trustees of the Paterson Charter School for Science and Technology, Passaic County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and Initial Decision of the OAL have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The Commissioner notes, however, that although this matter was captioned as an Initial Decision, decisions on emergent motions instead require the issuance of an Order. *N.J.A.C.* 1:1-12.6. An Initial Decision on the underlying matter may be issued following a plenary hearing on the merits or a dispositive motion. *N.J.A.C.* 1:1-18.1.

Accordingly – for the reasons expressed herein – this matter is hereby remanded to the OAL for a plenary hearing, or other such proceedings as the ALJ and the parties determine, to resolve the underlying claim on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/19
Date of Mailing: 7/08/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY
EMERGENT
INITIAL DECISION
OAL DKT. NO. EDU 06902-19
AGENCY DKT. NO. 111-5/19

C.D.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE PATERSON CHARTER SCHOOL FOR SCIENCE AND TECHNOLOGY, PASSAIC COUNTY,

Respondent.

C.D., petitioner, pro se

Teresa Moore, Esq., for respondent (**Riker Danzig Scherer Hyland & Perretti**, attorneys)

Record Closed: May 31, 2019 Decided: June 5, 2019

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed the within Emergent Appeal on May 21, 2019. The case was transmitted to the Office of Administrative Law and docketed on May 22, 2019. A hearing was conducted on

May 29, 2019. The record was left open until May 31, 2019 to allow both sides to submit additional documents.

TESTIMONY AND UNDISPUTED FACTS

Petitioner C.D. is the mother of N.P. who is a sophomore at the Paterson Charter School for Science and Technology. Thinsha Carter is the Dean of Discipline at the school. According to Ms. Carter, N.D. has been a challenging student for all school officials and teachers throughout her enrollment at the school. This is N.P.'s third year at the school. Due to poor academic performance, it was necessary for N.D. to repeat 9th grade. She was headed for the same recommendation at the end of the school year, due to failing grades in Language Arts and Math.

Ms. Carter testified that while serving a two day in school suspension, a serious incident occurred on May 9, 2019 involving N.D. and another student who became involved in an altercation. Unable to express herself properly, N.D. threw a plastic milk container at the other student hitting them in the face. The incident triggered a ten day out of school suspension due to the severity of the incident. C.D. was advised that upon returning to the school N.D. would be facing an expulsion hearing at the end of May. Not wanting N.D. to face expulsion, C.D, voluntarily withdrew N.D. from school. Shortly thereafter, C.D. experienced second thoughts about this decision and sought readmission to the school for N.D. so she could complete the school year. The school declined and the within appeal was filed.

Thinsha Carter provided background about N.D.'s experience at the school as well as an uncontroverted affidavit. N.D. frequently left class early. She failed to report to suspensions. N.D. also missed twenty-six days of school unexcused. Petitioner says some of the unexcused absences were due to suspensions, but she can't account for any of the days N.D. failed to report to school. Petitioner further testified N.D. is one of five children she is responsible for. She is single mom who works full-time. Each of her children have different types of challenges. She feels great stress trying to guide N.D. and feels she is doing the best she can in difficult circumstances. Petitioner says she made a mistake pulling N.D. out of school and want N.D. to have an opportunity to compete the school year, even it if means she must repeat the year due to academic issues.

On behalf of the school, Ms. Carter states N.D. has had several chances to correct her behavior, she is a distraction to others and the school is unwilling to take her back. Ms. Carter was unable to say if N.D. was evaluated by the school's Child Study Team, but there is no evidence to indicate that such a study was ever suggested or done.

LAW

This is an application for Emergent Relief. N.J.A.C. 6A:3-1.6 Emergent relief or stay is set forth below:

a) Where the subject matter of controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or stay of that action pending the Commissioner's final decision in the contested case.

b) A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has 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.

c) Any party opposing such motion shall so indicate as part of the answer to the petition field pursuant to N.J.A.C 6A:3-1.5. However, upon review, the Commissioner may:

1. Act upon such motion prior to the filing of an answer, provided a reasonable effort is made to give the opposing party an opportunity to be heard;

2. Act upon such motion upon receipt of the answer; or

3. Transmit the motion to the OAL for immediate hearing on the motion.

> d) The Commissioner may decide a motion for interim relief or stay prior to any transmittal of the underlying matter to the OAL for hearing. Once a matter has been transmitted, any subsequent motion for emergent relief shall be field with Commissioner who shall forward the motions for determination by the OAL in accordance with applicable rules of the OAL. See T.I. v Monroe Township Board of Ed OAL Docket No. EDS 10816-17 2017 NJ AGEN. LEXIS 814 denying Emergent Relief due to failure to establish four elements.

According to the Charter School Act, N.J.S.A. 18A:36A-1 *et seq.,* PCSST acted within its authority when it notified C.D. of the possibility of N.D.'s expulsion. Section 9 of the Act provides:

> Except as otherwise provided in [C. 18A:37-2a], a student may be expelled from a charter based on criteria determined by the board of trustees, which are consistent with the provisions of N.J.S. 18A:37-2, and approved by the commission as part of the school's charger. Any expulsion shall be made upon the recommendation of the charger school principal, in consultation with the student's teachers.

Conduct that is considered "good cause" for suspension or expulsion of as student includes insubordination and physical assault of another student, pursuant to N.J.S.A. 18A:37-2. The Act also provides, "A student may withdraw from a charter school at any time." N.J.S.A. 18A:36A-9. C.D. did just that on May 14, 2019, rather than allow her child to finish the school year at least until a hearing before the board of trustees occurred. C.D. was informed that if she withdrew N.D. from PCSST, N.D. could not return without going through the annual lottery for admission because the school has a waiting list for this school year and the following year. (Carter Cert., ¶9.) Admission to PCCST, like other charter schools is "on a space available basis.: See N.J.S.A. 18A:6A-7. Although the school registrar explained to C.D the difficulty in re-enrolling N.D. if C.D. were to withdraw her and later change her mind, C.D. withdrew N.D. anyway. Id. She also withdrew N.D.'s brother from enrollment. Id.

When a student withdraws from a charter school, the student may enroll in the public-school district in which the student lives. Therefore, N.D. will be able to continue her high school education in Paterson is she is not enrolled in PCSST.

Under the circumstance presented here, C.D.'s petition does not meet the criteria for emergent relief found in Crowe v. DiGoia, 90 N.J. 126 (1982). First of all, N.D.. will not suffer irreparable harm since she can attend high school in Paterson Public Schools at not cost to her. She also may not prevail on the merits since she was facing an expulsion hearing for valid reasons. Unfortunately, she will have to repeat the tenth grade, since she did not earn sufficient credits in 2018-19 school year to advance to eleventh grade. (Carter Cert.,¶13.)

Further, the legal right that C.D. asserts is not settled in petitioner's favor. N.D. has no right to continued enrollment in PCSST because her mother withdrew her enrollment voluntarily. The law permits withdrawal form a charter school, and there is no allegation that N.D.'s withdrawal was compelled or processed erroneously. Therefore, petitioner has no likelihood of success on the merits. And finally, weighing the equities between the petitioner and PCSST in granting or denying the relief sought, there is not equitable reason for granting the relief sought. N.D. has at least one educational option available to her to enroll in a Paterson public high school.

FINDINGS OF FACT

1. N.P. was a sophomore at Paterson Charter School for Science and Technology.

2. This is N.P.s third year as a student at the school. Throughout her tenure there, she has been a challenge to teachers and school officials, periodically skipping class or not attending school altogether.

3. Due to academic infractions, she was required to repeat 9th grade, and was on track to be told she had to repeat 10th grade due to failing grades in Language Arts and Math.

4. On May 8th, while serving a two day "in school" suspension, an incident occurred between N.P. and another student that escalated, leading N.P. to throw a full plastic container of chocolate milk at the other student.

5. The container struck the other student in the face, and resulted in N.P. receiving a 10 day "out of school" suspension.

6. When N.P.'s mother, petitioner C.P. was brought to school, it was explained to her that it was likely upon returning to school, N.P. would be facing expulsion.

7. Rather than expose N.P. to this likely event, petitioner immediately withdrew her from school, with only 30 days remaining in the school year.

8. C.P. admitted to being under great stress, as she is a single mother of five children who works full time.

9. Petitioner admitted that although it was recommended to her that she arrange for N.P. to go for counseling to address her behavioral issues, she never did so.

10. It does not appear that officials at the school ever recommended N.P. undergo a Child Study Team evaluation, so there was no I.E.P. or 504 accommodations provided to N.P., nor was such a study ever requested by N.P.'s mother.
11. Within days of removing N.P. from school, petitioner had second thoughts and sought re-enrollment for N.P.

12. The 10-day suspension, the de-enrollment process, the notice of possible expulsion and the denial of re-admission to the school were all in accordance with the student handbook which was provided to all students and families at the time of enrollment.

13. The decision not to re-admit N.P. to the school does not constitute a violation of FAPE or IDEA in that N.P. is not classified, there is no IEP or 504 involved and there is an alternative school available to her specifically the Paterson Public Schools, and one of its general high schools.

Based on the testimony of the witnesses, the affidavit of Thinsa Carter, and other related documents, I **CONCLUDE** that the decision of the Paterson Charter School for Science and Technology, denying re-admission to N.P. was appropriate and should be **AFFIRMED**. [1]

ORDER

It is **ORDERED** that petitioner's Petition of Appeal be and hereby is **DISMISSED**.

[1] Though not obligated to do so, to help N.P.'s transition back to the general Paterson Public Schools, it is recommended that officials at Paterson Charter School of Science and Technology communicate with the school N.P. will be placed and suggest a Child Study Team evaluation to help streamline her transition to a new school.

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

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

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

June 5, 2019
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: June 5, 2019

Date Mailed to Parties:

mm

APPENDIX

Witnesses

For Petitioner:

C.D.

For Respondent:

Thinsa Carter

Exhibits

For Petitioner:

None

For Respondent:

Exhibit-A	Pupil Intervention and Referral Services Policy
Exhibit-B	Email about N.P.'s Freshman Grade
Exhibit-C	10th Grade Absence
Exhibit-D	December 2018 Suspension
Exhibit-E	List of Multiple Notices to Parent
Exhibit-F	May 2017 Nurse E-Mail
Exhibit-G	List of 2018-19 Absences
Exhibit-H	Truancy Notice
Exhibit-I	November 27, 2018 Understanding
Exhibit-J	April 17, 2019 Attendance List
Exhibit-K	Report Card
Exhibit-L	May 14, 2019 Email
Exhibit-M	Student/Parent Handbook
Exhibit-N	Chocolate milk container

176-19E

OAL Dkt. No. EDU 06502-19
Agency Dkt. No. 45-2/19[1]

New Jersey Commissioner of Education

Order on Emergent Relief

Antoine Gayles,

Petitioner,

v.

Board of Education of the Township of Hillside, Union County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, granting petitioner's application for emergent relief, is adopted for the reasons expressed by the ALJ. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/19
Date of Mailing: 7/08/19

[1] The docket numbers on the recommended order of the OAL were incorrectly listed as those of a related matter: OAL Dkt. No. EDU 05548-19 and Agency Dkt. No. 49-3/19.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 05548-19
AGENCY DKT. NO. 49-3/19

ANTOINE GAYLES,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,
Respondent.

William F. Koy, Esq., for petitioner

Allan C. Roth, Esq., for respondent (Ruderman & Roth, attorneys)

Record Closed: June 17, 2019 Decided: June 21, 2019

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioner Antoine Gayles, currently suspended/placed on leave from his position as Superintendent of Schools in Hillside, New Jersey, with pay, brings a second Emergent Relief application to this tribunal as a result of a recent unilateral action by the Hillside

Board of Education with the substantive underlying matter on remand from the Commissioner still pending before this forum wherein with virtually no notice stopped all further payments, health coverage and benefits.

PROCEDURAL HISTORY

Petitioner filed a second motion for Emergent Relief directly with the undersigned due to its connection to a pending related case, seeking reinstatement of salary and benefits. The matter had been the subject of a prior application for Emergent Relief before the Hon. Thomas Betancourt on March 6, 2019. Based on certain representations that were made on the record at the time by the Board counsel, and the respective position of the Board itself, Judge Betancourt denied the application by petitioner on the basis among other things that the Board was still paying petitioner and continuing to provide benefits, and his determination that he did not believe petitioner could succeed on the merits and meet the other criteria required for this type of application.[1]

Although Judge Betancourt ruled at the time that the rest of petitioner's case was moot, the Commissioner disagreed and remanded the matter for additional proceedings. Subsequently, Judge Betancourt recused himself from handling the rest of the case as well as the related Summary Action filed by the board. [2]

On May 9, 2019, the Board changed its position on the continued payments to petitioner based in part on the recently decided case of Wall Twp. Educ. Ass'n v. Wall Twp. Bd of Ed. The decision to do so, while the case on the merits was still pending before the office of Administrative Law was only done on 3 days notice to petitioner, with the notice omitting what action was going to be taken against him.

Having learned that the salary and benefits would now be terminated, petitioner brings the within second Emergent Application on May 23, 2019, to compel the Board to

[1] March 6, 2019 decision of Hon. Thomas Betancourt attachment
[2] Transcript of prior proceeding March 5, 2019 attachment

return him to the status quo and continue the payments, at least until both cases on the merits could be heard.

Each party filed briefs and oral argument was held on June 17, 2019. Counsel for both parties granted the undersigned additional time though June 21st to file this decision. The current Superintendent, Dr. Sheard was notified of her right to file to Intervene in this proceeding and be heard, but declined to do so.

Virtually all of the facts set forth below are undisputed:

1. Petitioner began his position as Superintendent of the Hillside Public Schools under a contract with a term from July 1, 2016 through June 30, 2020.

2. On November 6, 2018, an election for five seats on the District Board of Education was held. Four new members were elected, together with one remaining incumbent member.

3. At one of its last public meetings prior to the new Board assuming office, on November 29, 2018, the prior Board took action to rescind petitioner's existing contract, and replace it with a new contract, which, among other things extended petitioner's term for three additional years through June 2023 and raised his salary.

4. At its first meeting which took place on January 3, 2019, the new Board issued a Rice Notice to petitioner.

5. At another meeting on January 24, 2019, the Board suspended petitioner with pay and benefits continuing. No date was memorialized for this change of status to end, and there are no facts that have been presented that the superintendent has been suspended for cause or any allegations of improper acts.

6. The parties, with counsel, appeared before Judge Betancourt on March 6, 2019, at which time the District through counsel represented that the relief requested should be denied because petitioner would still be paid. In fact, it was represented to Judge Betancourt that "the Board did not want to diminish petitioner's compensation, until it got a got a declaratory ruling as to which contract if either, was valid....he's out with pay." (Transcript of Argument before Judge Betancourt page 7 lines 11-20).

7. Two days before the hearing before Judge Betancourt, on March 4, 2019, the District filed its request for a Declaratory Ruling.

8. Both matters were remanded to the OAL, and with Judge Betancourt's recusal, the matters were assigned to the undersigned ALJ.

9. Following a status phone conference, the parties were directed to appear for a settlement conference, one of which was held on April 29, 2019, and the second on May 14, 2019.

10. Five days prior to the second conference, the Board on less than 3 days notice to petitioner, unilaterally took action to stop the payments it had previously agreed to make, resulting in no further payments to petitioner as of May 15, 2019. As of the date of this unilateral action, no date had been scheduled for the Board's request for Summary Decision, and/or the remand of the remaining parts of the case that had previously been filed by petitioner.

11. On the return date of the second request for Emergent Relief, no testimony was taken and the parties relied on their submissions and oral argument. Subsequent thereto, an expedited hearing date has been scheduled on the merits of both matters for July 8 and July 9, 2019. The District has also filed a Motion to Strike Petitioner's Answer and Disqualify Petitioner's counsel, a date for which is still to be assigned.

12. In support of its actions and position, the District relies on the recently decided Wall case, as well as its belief this is a contract case only and since the first contract was mutually rescinded, they have authority to cease payments.

13. The Board does not dispute however that when making its representations to Judge Betancourt, which in part were the basis for his denial of the first application since he was told petitioner would be paid, at no time did the District indicate that there was a deadline for when the payments would end, or that they would do so while both cases on the merits were still pending before the Office of Administrative Law. The District, which shortly after placing petitioner on suspension hired a new superintendent, represents that it has to protect its taxpayers and cannot afford to pay two superintendents.

LEGAL ANALYSIS AND CONCLUSIONS

The threshold question in this matter is again whether or not the District can place the superintendent on administrative leave or otherwise suspend him, and then cease his salary payments after agreeing to do so.

N.J.S.A. 18A:6-8.3 states: "any employee or officer of a board of education in this State who is suspended from his employment office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, **SHALL** receive his full pay or salary during the period of suspension except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of this section.

N.J.A.C. 6A:23A-3.1 governs the review of employment contracts for superintendents, and N.J.A.C. 6A23A-3.2 addresses the required actions for early terminations of such contracts. Among other things, notice is required, and at least 30 days notice of a hearing is required before any such action is taken. Simply put, the District's argument on the return date of the second Emergent Relief application that

these provisions due not apply because there was a prior rescission are not justified, at least until a hearing on the full merits can be conducted.

And the undisputed fact that a prior ALJ ruled on Emergent Relief, albeit on different facts and representations estopps this ALJ from ruling is not a convincing argument, as again, for lack of a better term, the Board changed the playing field while the game had not yet been played.

It is undisputed that the question of which contract or either contract has still not been decided, yet the Board on May 9, 2019 unilaterally voted to stop the payments it had been making to petitioner, which it previously represented it would do to the ALJ previously assigned to this case. During argument, the District advocated that the provision of N.J.A.C. 6A:23A do not apply since there was a prior mutual rescission yet at the same time they also argue that the actions of the prior Board in providing a new and extended term contract to petitioner were invalid. The argue that at worst, petitioner has a money damages argument which the Office of Administrative Law does not have the power or authority to entertain.[3]

Finally, the Board argues that with respect to this second Emergent Relief application, petitioner cannot meet the requirements of Crowe v. DeGioa, 90 NJ 126, 132,34 (1982), factors of which are also enumerated at N.J.A.C. 6A:14.2-7 as follows:

i. The petitioner will suffer irreparable harm if the requested relief is not granted.

ii. The legal right underlying petitioner's claim is settled

iii. The petitioner has a likelihood of prevailing on the underlying merits

iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will if the relief is not granted.

[3] The District argues that this matter of damages should be litigated in Superior Court despite being well aware that such parties must first exhaust administrative remedies at the OAL.

The burden for demonstrating success on these prongs is on the moving party. Waste Management of NJ v. Union County Utilities Authority, 399 NJ Super 508 (App. Div. 2008).

Certainly, petitioner can demonstrate he will suffer immediate and irreparable harm. Contrasted with the first application for Emergent Relief, the second action by the Board on May 9th strips him of the continuing temporary salary and benefits while the underlying matter is working its way through the OAL. And further and equally if not more important, there was no action to undue or explain the suspension effective January 2019, thereby making it difficult if not impossible to mitigate his damages and secure a new position in another District, which would essentially meet the needs of the Board to save its taxpayers money.

Petitioner's moving papers essentially represent that he was not considered for 5 positions he applied for due to the suspension, and also had to turn down a prestigious award, so as not to embarrass the organization that wanted to honor him. As to prong ii- , the law on the underlying claim is settled and can be decided once a full hearing is conducted.

As to the likelihood of success on the merits, an argument can be made either way, but there is at least a 50 percent likelihood that petitioner may prevail given the Board's failure to follow statutory and code requirements governing early termination of a superintendent.

Finally, as to prong iv- it seems clear that with no pay and benefits, while a full hearing is pending, with a black mark of a suspension not triggered by bad conduct causing petitioner to be unable to find a new position, he will suffer greater harm than that of the District, and will suffer a financial hardship, at least until a full hearing on the merits now scheduled for July 8th and 9th can be conducted.

ORDER

I **ORDER** that petitioner's motion for Emergent Decision be and hereby is **GRANTED** as to the request for ongoing salary and benefits only, retroactive to May 15, 2019 until further Order of this Tribunal and/or the Commissioner of Education. However, this ruling should not in any way be deemed to restore petitioner to the status of superintendent of the Hillside Schools, as that would be too disruptive to the District and its students since another individual is currently serving in that position.

I further **ORDER** that the Board compensate petitioner for any salary and benefits lost and credit petitioner any seniority credit lost retroactive to January 1, 2019, pending further Order of this Tribunal and/or the Commissioner of Education, and this Order shall remain in full force and effect until the hearing on the merits is held on July 8th and 9th 2019, and a Final Decision is entered.

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

June 21, 2019
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: June 21, 2019

Date Mailed to Parties: June 21, 2019

mm

PURSUANT TO THE REFERRAL BY THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF NOEL GORDON	**: BEFORE THE COMMISSIONER OF : EDUCATION, STATE OF NEW JERSEY**
BY THE SCHOOL BOARD OF THE CITY OF ENGLEWOOD, BERGEN COUNTY	**: AGENCY DOCKET NO. 25-1/19**
	: DECISION ON MOTION TO DISMISS

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

APPEARANCES:

On behalf of Noel Gordon
Andrew L. Schwartz, Esquire
Schwartz Law Group, LLC

On behalf of Englewood Board of Education
Dennis McKeever, Esquire
Sciarrillo, Cornell, Merlino,
McKeever & Osborne, LLC

On January 25, 2019, the Englewood Board of Education ("Board", "Petitioner", or "District") filed Tenure Charges of unbecoming conduct, incompetence and other just cause consisting of one hundred and thirty-six (136) separate paragraphs (some with sub-parts) against Respondent Noel Gordon ("Dr. Gordon" or "Respondent"). The charges against Dr. Gordon emanated from irregularities found in student transcripts at Dwight Morrow High School ("DMHS") and Academies@Englewood.

The instant sworn Tenure Charges is the third occasion in which the District filed charges against Respondent. By Resolution, on February 16, 2017, the Board placed numerous employees,

including Dr. Gordon, on paid administrative leave until the completion of an internal investigation regarding, *inter alia*, transcript irregularities.

After the investigation, on September 20, 2017, the District filed a consolidated set of Tenure Charges against eight (8) employees. The Commissioner of Education ("Commissioner") dismissed the charges, Agency Docket Number 216-9/17, declaring them "procedurally defective," sealing all records on November 9, 2017 because identifying student information was included in support of the charges. The dismissal was without prejudice to refile. (R- 1)[1]

On January 29, 2018, the District filed separate charges against each employee, including Dr. Gordon. Those charges, Agency Docket Number 24-1/18 were dismissed on August 13, 2018, by Arbitrator Joseph Licata for failing to comply with specific requirements of *N.J.A.C. 6A:3-5.1(b)(1)* and failing to adhere to the Commissioner's prior directives. Again, the dismissal was without prejudice to refile. (R-2) In both dismissals, the Board was directed to reinstate Dr. Gordon with full back pay and benefits.

Dr. Gordon's employment, however, was effected by the Board's determinations to abolish positions - a Reduction In Force (RIF). At the expiration of the 2016-2017 school year, during the investigation, the Board abolished the Position of Director of Guidance, Testing and Evaluation. Dr. Gordon also held tenure as a Vice Principal. Nonetheless, On June 1, 2017, Dr. Gordon was informed, "Please be advised, however, that due to the pendency of the investigation and your status of being on paid suspension, no formal assignment shall be designated at this time for the 2017/2018 school year." (R-4)

During the following school year, on May 1, 2018, Superintendent of Schools Robert L.

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[1] Respondent's Exhibits attached to the Motion to Dismiss are identified as R-.

Kravitz conveyed the following notification to Dr. Gordon:

> "Please be advised that at the May 3, 2018 Englewood Public School District Board of Education meeting, I will be recommending a reduction in force to the Englewood Board of Education. My recommendation is based upon reasons of economy and other just cause. Your employment position will be impacted by this recommendation, and effective for the 2018-2019 school year, your position will be eliminated.
>
> ***Your employment with the District will, therefore, conclude on June 30, 2018.*** COBRA information will be provided to you by the Business Office, Department of Human Resources.
>
> This is a difficult decision to make, one that I have given careful and deliberate thought, and one that is not made lightly.
>
> ***I thank you for your service*** and dedication to the Englewood Public School District." (R-3, emphasis supplied)

On May 3, 2018, by Resolution, the Board abolished the position of Vice Principal, effective July 1, 2018, "for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause." (R-3)

On July 1, 2018, after the Board's approval of the RIF, Dr. Gordon was removed from the payroll, from insurance programs and ceased receiving pension contributions. He retains no District property nor has any access to District emails or technology.

On or about July 25, 2018, Dr. Gordon filed a Petition of Appeal, with the Commissioner (thereafter amended), claiming, *inter alia*, tenure entitlement to various positions held by non-tenured and/or less senior staff members. The Petition is before the Honorable Danielle Pasquale, A.L.J. with the Office of Administrative Law.

In his Brief in Support of the Motion to Dismiss, Dr. Gordon argues the "Tenure Hearing Law", *N.J.S.A. 18A:6-10 et seq.* applies only to school district employees under tenure. And, as Dr.

Gordon is no longer a District employee, the charges, procedurally invalid, should be dismissed.

The Board maintains the tenure laws do not prohibit a District from certifying tenure charges against a tenured "inactive employee" who has been reduced-in-force.

Accordingly, in assessing whether to grant or deny the instant Motion, the following issue must be addressed:

> *Whether the Englewood Board of Education can file tenure charges against Dr. Gordon after the positions to which he earned tenure were abolished by Resolutions of the Board of Education, Reduced-in-Force, said RIFs the subject of a Petition of Appeal before the Office of Administrative Law?*

Title 18A - EDUCATION

The Parties identified the following provisions of ***Title 18A- Education*** as particularly relevant:[2]

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,...

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.

18A:6-11 Written charges, statement of evidence; filing; statement of position by employee; certification of determination; notice.

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[2] The Parties also identified numerous administrative code provisions, the recitation of which would overburden this decision.

Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide ***such employee*** with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto....

18A:6-14 Suspension upon certification of charge; compensation; reinstatement.

18A:6-14. Upon certification of any charge to the commissioner, ***the board may suspend the person*** against whom such charge is made, with or without pay, but, if the determination of the ***charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.*** Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

18A:28-9. Reduction of force; power to reduce and reasons for reduction

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to ***reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions*** for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district ***or for other good cause*** upon compliance with the provisions of this article.

18A:28-12. Reemployment in order of seniority

18A:28-12. ***If any teaching staff member shall be dismissed as a result of such reduction***, such ***person shall be and remain upon a preferred eligible list*** in the order of seniority for re-employment 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 and in determining seniority, and in computing length of service for re-employment, full recognition shall be given to previous years of ***service***.....
(emphasis supplied to statutes above)

POSITION OF THE PARTIES

The Parties proffered comprehensive argument; the essence of each is as follows:

Respondent Noel Gordon

In support of his motion, Dr. Gordon maintains the *Tenure Employees' Hearing Law*, *N.J.S.A. 18A:6-10 et seq.*, applies only to school district employees under tenure. It does not apply to individuals such as Dr. Gordon who have been dismissed by way of a reduction in force pursuant to *N.J.S.A. 18A:28-9*.

Every applicable provision of the *Tenure Employees' Hearing Law* assumes employment within the district or suspended persons under salary. The *State Board of Education Administrative Code Provisions*, the implemented regulations, also refer to employees, professes Respondent. RIF statutes would be undermined if tenure charges could ensue after the abolishment of a teaching staff member's position. That Dr. Gordon has a pending Petition of Appeal before the Commissioner of Education, does not change his status from one who's employment with the district "concluded" on June 20, 2018. (R-3)

Respondent requests the instant tenure charges be dismissed, as procedurally invalid, without prejudice to refile.

Petitioner Englewood Board of Education

Tenure laws provide procedures to follow and criteria for dismissal or salary reduction. The laws do not prohibit the Board of Education from certifying tenure charges against a tenured "inactive" employee who has been reduced-in-force, avers the Board. A *person*, within the meaning of *N.J.S.A. 18A:6-10 et seq.*, who has been reduced-in-force is tenured, otherwise there would not be entitlement to a preferred eligibility list - to be recalled to the position. The Board

maintains a *person* is not isolated from tenure charges while on the preferred eligibility list.

As a tenured employee, Dr. Gordon does not lose his status regardless of whether he is an active employee or inactive employee on the eligibility list. As Respondent's tenure rights did not disappear when Dr. Gordon was reduced-in-force, the legal ability of the Board to terminate him for inefficiency, unbecoming, conduct or just cause did not disappear.

Moreover, the District asserts, every statute and administrative code regulation relating to the *Tenure Employees' Hearing Law* also applies to a tenured person who has been reduced-in-force. "The focus of tenure charges is on an inactive employee's tenure entitlement to a position in the school district and not whether the person is an active employee." (Brief at 8) Counsel concludes,

> "It is Respondent's tenure status that required Respondent be on a preferred eligibility list and it is Respondent's tenure status that permits the Petitioner to certify tenure charges against Respondent. Respondent's motion to dismiss the tenure charges must be dismissed." (Brief at 10)

ANALYSIS

Whether the Englewood Board of Education can file tenure charges against Dr. Gordon after the positions to which he earned tenure were abolished by Resolutions of the Board of Education, Reduced-in-Force, said RIFs the subject of a Petition of Appeal before the Office of Administrative Law?

Contrary to the two previous tenure charges referred by the District, neither the verbiage of the charges, nor supporting evidence is the basis of the instant Motion to Dismiss. Rather, a determination of the issue before me requires an examination of statutory language and enforcing administrative code provisions.

The instant charges of January 25, 2019, were certified and referred to the Commissioner of Education by the District, almost six (6) months after the position of Vice Principal was

eliminated in a RIF, pursuant to *N.J.S.A. 18A:28-9.* Almost six (6) months after Dr. Gordon's employment in the District "concluded."

The issue herein necessitates a discussion as to whether the tenure statutes can be interpreted to apply to the Board's concept of an "inactive employee." While the Board presented creative thought-provoking argument, upon consideration of the statutory provisions of Title 18A, the enforcing administrative code provisions found in *N.J.A.C. 6A*, and the parties' argument, I ***find*** the Board's concept of tenure of an "inactive employee" unconvincing, not persuasive. The undersigned ***finds*** she lacks statutory authority to conduct a hearing, pursuant to *N.J.S.A. 18A:6-17.1, Panel of Arbitrators,* on tenure charges alleging conduct unbecoming against Dr. Gordon.

Tenure is a statutory right. As recently as April 30, 2019, the Supreme Court of New Jersey in *Zimmerman v. Sussex Cty. Educ. Servs. Comm'n, 237 N.J. 465* reiterated, once employed for the "duration of service" required to acquire tenure, termination of a tenured individual's employment rights requires strict compliance to the Tenure Act. The Court, therein, cited *Spiewak v. Bd of Educ. of Rutherford, 90 N.J. 68, 74-75 (1982)* recognizing tenure protections, as remedial legislation, "should be liberally construed to achieve its beneficent ends."

The statutes provide two pathways to terminate a tenured individual's employment. The Board may certify charge(s) of inefficiency, incapacity, unbecoming conduct, or other just cause. Upon review, if the Commissioner determines the tenure charge(s) are sufficient, if true, to warrant dismissal or a reduction in salary, the matter is transmitted to an arbitrator appointed to hear and determined the case, according to the provisions of *N.J.S.A. 18A:6-17.1 Panel of Arbitrators. (see also N.J.A.C. 6A:3-5.5 Controversies and Disputes).*

A tenured employee can be also be "concluded" by elimination of the tenured position by

way of a RIF conducted in accordance with *N.J.S.A. 18A:28-9*, upon the abolishment of "any such position for reasons of economy or because of reduction in the number of pupils or of administrative change or supervisory organization of the district or for other good cause." Thereafter, the reduced-in-force employee is listed, in order of seniority, upon a preferred eligibility list.

The language of the *Tenure Employees' Hearing Act* is clear, unambiguous and consistent with code provisions. In order to evoke *N.J.S.A. 18A:6-10*, a "person" must be "under tenure of office, position or employment." *N.J.S.A. 18A:1-1* expresses the word "employee", refers to "the holder of any position or employment." *N.J.S.A. 18A:6-11* articulates charges are made "against any employee." It is to the "employee" that a Board must provide a copy of a charge or an opportunity to submit a written statement of position. And, upon the Board's referral of the case for arbitration, "the *employing* Board of Education shall provide all evidence...to the *employee* or the *employees'* representative." *N.J.S.A. 18A:6-17.1 (b)(3).*

The Petitioner did not proffer any decisions of the Commissioner of Education or Appellate Courts to support the concept of an "inactive employee"; nor of its claim placement of an employee who was subject to a reduction in force on a preferred eligibility list until a vacancy occurs, pursuant to *N.J.S.A. 18A:28-12* and *N.J.A.C.6A32-5.1(I)*, resurrects the Board's power to certify tenure charges.

DETERMINATION

In light of the above review, I ***find*** the "person" referenced in *N.J.S.A. 18A:6-10*, *Dismissal and reduction in compensation of persons under tenure in public school systems*, must be an employee of the Board of Education at the time charges are certified. The *Tenure Employees'*

Hearing Act, *N.J.S.A. 18A:6-10 et seq.* applies only to school district employees under tenure. The Englewood Board of Education cannot pursue tenure charges filed against Noel Gordon after the positions to which he earned tenure were abolished by Resolutions of the Board of Education, Reduced-in-Force, said RIFs the subject of a Petition of Appeal before the Office of Administrative Law.

Accordingly, Respondent's Motion to Dismiss is, hereby, ***granted***, without prejudice to refile.

DATED: 7/15/19

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on
CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

DATED: 7/15/19

K Flanagan Kelly
NOTARY PUBLIC

KRISTIN M FLANAGAN-KELLY
Commission # 2391982
Notary Public, State of New Jersey
My Commission Expires
December 11, 2019

182-19

OAL Dkt. No. EDU 08312-18
Agency Dkt. No. 116-5/18

New Jersey Commissioner of Education

Final Decision

N.W. on behalf of minor child, N.W.,

Petitioner,

v.

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

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/19/19

Date of Mailing: 7/19/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8312-19

AGENCY DKT. NO. 116-5/18

N.W. on behalf of minor child, N.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

Gregory G. Johnson, Esquire, for petitioner

Joseph L. Roselle, Esquire, for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: June 28, 2019 Decided: June 28, 2019

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 11, 2018, 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 together with the Board Resolution adopting the settlement. The Settlement Agreement resolves all disputes.

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

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

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

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

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

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

June 28, 2019
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 7-1-19

Date Mailed to Parties: 7-1-19

mph

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for the Ewing Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

N.W. o/b/o N.W., Petitioner, v. EWING BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU-8312-18 Agency Ref. No.: 116-5/18 SETTLEMENT AGREEMENT

This Agreement is made by and between Petitioner, Natasha Williams, and the Respondent, Ewing Board of Education ("Board").

RECITALS

WHEREAS, in or about January of 2018, Respondent Ewing Board of Education determined, based on the results of a residency investigation, that minor student N.W. was not domiciled in the Ewing School District ("District") and thus not entitled to a free, public education in the District and passed a resolution ordering the removal of the student from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to N.W.; and

WHEREAS, this administrative action is captioned N.W. o/b/o N.W. v. the Ewing Board of Education and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 8312-18S, Agency Dkt. No.

116-5/18 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties understand that during the pendency of the residency investigation, N.W. was found by the Board not to be domiciled in Ewing, but rather, in Trenton, New Jersey.
2. Petitioner shall pay the Board the sum of One Thousand, Five Hundred Dollars ($1,500.00), representing back tuition due and owing for the period of N.W.'s ineligible attendance in the District during the 2017-2018 school year, which shall constitute a full and final settlement of the claim for back tuition asserted against Petitioner by Respondent Board of Education in the Litigation.
3. The amount of $1,500 is to be paid as follows: Within fifteen (15) days after approval of the Agreement by the Administrative Law Judge and Commissioner of Education,

Petitioner shall make an initial payment in the amount of Fifty Dollars ($50.00), in the form of a check made payable to the "Ewing Board of Education," hand-delivered or mailed to the office of Dennis Nettleton, School Business Administrator/Board Secretary, at the District Administration office, 2099 Pennington Road, Ewing, New Jersey 08618. The remaining amount of $1,450.00 shall be paid in fourteen (14) subsequent equal monthly installments of One Hundred Dollars ($100.00) each and a final payment of $50.00, until the full amount has been satisfied. Nothing herein shall prevent Petitioner from paying a greater amount than the monthly payment amount, provided that at least the minimum payment of $100.00 is received monthly.

4. Each installment payment is due on the first (1st) day of each Month at the office of the School Business Administrator at the above address, beginning in the month following that in which the initial payment was made. Payments received by the School Business Administrator after the 30th day following the payment due date shall incur a late fee of $25.00. Any payment and late fee not received by the 15th of the then-following month shall constitute a default by Petitioner and a breach of this Agreement. Petitioner will receive receipts for each payment from the School Business Administrator.

5. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.

6. Petitioner further understands and agrees that, if she fails to make a payment in accordance with this Agreement, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

7. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorney's fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner breach the Agreement and/or fail to adhere to the agreed-upon payment plan.

8. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that N.W., nor any other child of Petitioner, as may be applicable, is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate N.W.'s residency status in the District at any time should same become necessary to do so, in order to determine whether or not Petitioner and/or her child(ren) remain domiciled in the District.

9. This Agreement is subject to approval by the Ewing Board of Education. If approved, the Board President, Superintendent and/or Business Administrator, as indicated, is fully authorized to execute this Agreement on behalf of the Board.

10. In exchange for the above consideration, Respondent Ewing Board of Education agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement and agrees to the withdrawal/dismissal of any counter-claim for tuition payments, through the date of this Agreement.

11. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner hereby represents that she is freely entering into this Agreement, that he was advised of her right to obtain counsel of her choosing and has consulted with her attorney regarding the effect of this Agreement.

14. This Settlement shall be subject to the approval of the Office of Administrative Law and the Commissioner of Education prior to becoming effective.

15. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

16. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, effective on the day and year first above written.

PETITIONER

Date: May 21, 2019

Natasha Williams, Petitioner

FOR RESPONDENT,
EWING BOARD OF EDUCATION

Date: 24 JUNE 19

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

THE EWING PUBLIC SCHOOLS

CERTIFIED BOARD RESOLUTION
RESOLUTION #: 06.24.19 – N-1

I, Dennis J. Nettleton, CPA, RSBA, SFO, Board Secretary to the Ewing Township Board of Education, hereby certify that this is a true and exact copy of the Resolution adopted at the regularly scheduled Board of Education meeting held on June 24, 2019 in the Fisher Middle School Media Center.

RESOLUTION # 06.24.19 – N-1

RESOLVED that the Board of Education approves the settlement in the matter captioned N.W. o/b/o N.W. v. Ewing Board of Education, OAL Dkt. No. EDU 8312-18, Agency Dkt. No. 116-5/18, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to sign the agreement on behalf of the Board.

Member	Motion	2nd	Yeas	Nays	Abstentions	Absent
Mr. Benedetti		✔	✔			
Dr. Conway			✔			
Mrs. Delutis			✔			
Mrs. Staub			✔			
Mr. White			✔			
Mr. Bradley	✔		✔			
Mrs. McKeon			✔			
Ms. McConnell			✔			
Mr. Messina			✔			
MOTION CARRIED						

Dennis J. Nettleton, *CPA, RSBA, SFO*
School Business Administrator/Board Secretary

06-25-2019

183-19

OAL Dkt. No. EDU 07993-19
Agency Dkt. No. 124-6/19

New Jersey Commissioner of Education

Final Decision

J.S., on behalf of minor child, R.M.,

Petitioner,

v.

Board of Education of the Ramapo Indian Hill High School District, Bergen County,

Respondent.

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

Throughout the Agreement, reference is made to precise dates upon which the parties agreed to the administration of specific tutoring or instruction sessions, and/or assessments, upon minor child, R.M. Many of the dates stipulated in the Agreement have preceded the consideration of this settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/19/19
Date of Mailing: 7/19/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07993-19
AGENCY DKT. NO. 124-6/19

J.S. ON BEHALF OF MINOR CHILD R.M.,
Petitioner,
v.
RAMAPO INDIAN HILL REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION BERGEN COUNTY,
Respondent.

J.S., petitioner, pro se

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: June 27, 2019 Decided: June 28, 2019

BEFORE **SUSANA E. GUERRERO**, ALJ:

Petitioner, J.S., on behalf of minor child, R.M., filed an emergent relief application with the Commissioner of Education seeking immediate changes to Home Instruction and preventing the respondent Ramapo Indian Hill Regional High School District from administering certain test to R.M. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on June 12, 2019. Prior to the

commencement of the oral argument scheduled on June 27, 2019, the parties engaged in discussions toward an amicable resolution and submitted the attached Settlement Agreement, indicating the terms of agreement between the parties.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

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

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

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

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

June 28, 2019
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 7-5-2019

Date Mailed to Parties: 7-2-2019

jb

27 JUNE 2019

SETTLEMENT AGREEMENT

J.S. obo R.M
v.
RAMAPO INDIAN HILLS BOE
OAL DKT. NO. EDU-07993-2019 N
AGENCY REF. NO. 124-6/19.

THE PARTIES AGREE TO RESOLVE THIS EMERGENT APPLICATION AND THE UNDERLYING PETITION OF APPEAL AS FOLLOWS:

1. THE FOLLOWING TUTORING SHALL BE PROVIDED TO R.M.
   a. TWO (2) HOURS OF MATHEMATICS INSTRUCTION WITH ONE (1) HOUR TO BE PROVIDED ON MONDAY, JULY 1, 2019 AT 10:00 AM AT RAMAPO H.S. J.S. SHALL NOT BE PRESENT FOR THE INSTRUCTION (NOR R.M.'S FATHER). ON JULY 1, 2019, R.M. SHALL ALSO BE PROVIDED 20 MINUTES TO COMPLETE HIS CHAPTER 9 TEST.
   ONE HOUR OF MATH INSTRUCTION SHALL BE PROVIDED ON TUESDAY JULY 2, 2019 AT RAMAPO HIGH SCHOOL AT 10:00 AM. R.M. MUST ALSO HAND IN HIS TAKE HOME QUIZ WHICH REMAINS OUTSTANDING.

   J.S. AND OR M.M. SHALL WAIT FOR R.M. IN THE RECEPTION AREA OF RAMAPO HS.

2. SPANISH INSTRUCTION - ONE HOUR SHALL BE PROVIDED DURING THE WEEK OF JULY 1, 2019, AT A TIME AND DATE TO BE PROVIDED TO PETITIONER BY JUNE 28, 2019. TIME: JULY 2, 2019 AT 12:30 PM *

3. CHEMISTRY - OPEN ACCESS TO EDUCERE SHALL BE PROVIDED TO R.M. ~~DURING THE WEEK OF~~ BEGINNING JULY 1, 2019.

*SPANISH - THE 4.1 CHAPTER TEST AND THE REGULAR VERB TEST CAN BE ADMINISTERED ON JULY 2, 2019 FOLLOWING HIS TUTORING SESSION OR DURING THE WEEK OF JULY 22, 2019 AT PETIONER'S DISCRETION.

3. CHEMISTRY ASSESSMENTS SHALL BE ADMINISTERED DURING THE WEEK OF JULY 22, 2019. DATES AND TIMES SHALL BE PROVIDED TO PETITIONER ON JUNE 28, 2019. TOTAL THREE ASSESSMENTS; TWO @ 45 MINUTES and ONE AT 65 MINUTES. Q.3 gen laws and THERMOCHEMISTRY AND Q4

* 4. HISTORY ASSESSMENTS SHALL BE ADMINISTERED DURING WEEK OF JULY 15, 2019. THREE ASSESSMENTS @ 1 HR EACH. 7/15 10AM 7/16 10AM 7/17 10AM.

5. ALL SUPERVISORS AND TEACHERS SHALL BE MADE AWARE OF R.M.'S ANXIETY. ALL SHALL BE PROVIDED HIS IEP

6. ALL ISSUES ARE RESOLVED. THE REENROLLMENT APPLICATION AND THE UNDERLYING PETITION ARE WITHDRAWN.

FOR THE BOARD

Judith Sullivan

JUDITH SULLIVAN

& 4. HISTORY - IF THERE IS AN ADDITIONAL ASSESSMENT - ANTEBELLUM DIVS. WRITING WILL BE ADMINISTERED, IF REQUIRED ON ONE OF THE DAYS ALREADY SCHEDULED FOR THE OTHER THREE ASSESSMENTS.

27 JUNE 2019

SETTLEMENT AGREEMENT

J.S. obo R.M
v.
RAMAPO INDIAN HILLS BOE
OAL DKT. NO. EDU-07993-2019 N
AGENCY REF. NO. 124-6/19.

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6. ALL ISSUES ARE RESOLVED. THE REINSTATEMENT APPLICATION AND THE UNDERLYING PETITION ARE WITHDRAWN.

FOR THE BOARD

Judith Sullivan

JUDITH SULLIVAN

4. HISTORY – IF THERE IS AN ADDITIONAL ASSESSMENT – ANTIBELLUM DIVS. WRITING WILL BE ADMINISTERED, IF REQUIRED ON ONE OF THE DAYS ALREADY SCHEDULED FOR THE OTHER THREE ASSESSMENTS.

185-19

New Jersey Commissioner of Education

Decision

Guadalupe Ferreiro,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner – a tenured social worker employed in the respondent Board's school district – alleged that the Board violated her rights under *N.J.S.A.* 18A:6-10 when it docked her salary in the amount of $1,033.38 as discipline for excessive tardiness. The Board contended that its actions were lawful and must be upheld, as the docking for tardiness falls within the category of minor discipline which was agreed upon in the Collective Bargaining Agreement (CBA) with the Elizabeth Education Association (Association). The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner has been employed by the Board for 20 years, and is tenured; the salary deduction at issue here came after petitioner was marked tardy on thirteen occasions during September and October 2018; the Board contended that petitioner's tardiness has been an ongoing issue, and she was also chronically tardy during 2017-2018 school year; no tenure charges were filed against petitioner; the Board is party to a CBA with the Association, which includes a clause that defines the penalty for chronic tardiness; the penalty structure agreed upon in the CBA is also spelled out in a Board policy entitled "Staff Attendance Improvement Plan"; petitioner's claim springs from *N.J.S.A.* 18A:6-10, which provides that a tenured employee may not be "dismissed or reduced in compensation" unless tenure charges are brought against her; however, the deduction in petitioner's salary here does not violate her tenure rights under *N.J.S.A.* 18A:6-10 because *N.J.S.A.* 34:13A-24 allows school boards to impose minor discipline when it is duly negotiated with the collective bargaining unit. The ALJ concluded that the docking of petitioner's pay for tardiness is a fine that amounts to minor discipline, and the Board's action was consistent with the law. The Board's motion for summary decision was granted and the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

July 22, 2019

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03865-19
AGENCY DKT. NO. 9-1/19

GUADALUPE FERREIRO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Nicholas Poberezhsky, Esq., for petitioner (Caruso Smith Picini, attorneys)

Heather Ford-Savage, Esq., for respondent

Record Closed: June 7, 2019 Decided: June 11, 2019

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

STATEMENT OF THE CASE

Petitioner, Guadalupe Ferreiro, a tenured social worker employed by respondent, the Elizabeth Board of Education (the Board), alleges that the Board violated her rights under N.J.S.A. 18A:6-10, when it docked her salary in the amount of $1,033.38 due to tardiness. The Board replies that its actions should be upheld, as this is minor discipline

agreed upon in the Collective Bargaining Agreement with the Teachers' Association, and expressly authorized by N.J.S.A. 34:13A-24.

PROCEDURAL HISTORY

Ferreiro filed her petition of appeal with the Commissioner of Education (the Commissioner) on January 14, 2019. An answer was filed by the Board on February 25, 2019, and the matter was transmitted to the Office of Administrative Law (OAL) on March 19, 2019. I conferred with counsel via telephone, and it was agreed that this dispute could be resolved via Cross-Motions for Summary Decision, as the pleadings presented a purely legal issue. Motions were filed by the parties on or about May 31, 2019, and simultaneous replies were filed on June 7, 2019, at which time the record closed.

FINDINGS OF FACT

The salient facts are not in dispute, and I **FIND** as follows:

Ferreiro has been employed by the Board as a social worker for approximately twenty years, and is employed under tenure. During two pay periods in October 2018, her salary payment was reduced due to tardiness. In total, her gross salary was docked in the amount of $1,033.38. In an email to her building principal dated October 14, 2018, Ferreiro acknowledged that she had been tardy in the past, and that her principal had alerted her that effective with the 2018-2019 school year, the Board would be strictly enforcing its attendance policies for staff. And on September 4, 2018, Ferreiro had signed a document entitled "2018-2019 Statement of Assurance," in which she acknowledged receiving and reading a list of policies, to include the attendance policy.

No tenure charges have been filed against Ferreiro. The salary deduction came after Ferreiro was marked tardy on thirteen occasions during the months of September and October 2018. The Board relates that Ferreiro's tardiness has been an ongoing issue, and notes that during the 2017-2018 school year, Ferreiro was also chronically tardy. Ferreiro disagrees that she has been tardy quite this often. But she concedes

that this disagreement is not material as the issue presented is not the egregiousness of her lateness, but rather, the scope of the Board's authority to dock the pay of a tenured employee.

The Board is a party to a Collective Bargaining Agreement with the Elizabeth Education Association. At page 82, the agreement provides that

> A. The accumulation of five (5) tardy marks to an assigned duty within a given school year will result in a deduction from pay of twenty-five percent (25%) of the daily salary computed at 1/200 for ten (10) month employees; 1/220 for eleven (11) month employees; 1/240 for twelve (12) month employees of the employee's annual salary.
> B. After the first accumulation of five (5) tardy marks in a given school year, each tardy will result in a deduction from pay of twenty-five percent (25%) of the daily salary computed at 1/200 for ten (10) month employees; 1/220 for eleven (11) month employees; 1/240 for twelve (12) month employees of the employee's annual salary.

[Board Exhibit G; Petitioner's Exhibit C]

The penalty structure agreed upon in the collective bargaining agreement is spelled out as well in Board Policy 4151/4251, entitled "Staff Attendance Improvement Plan."

ANALYSIS AND CONCLUSIONS OF LAW

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

challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision, and that the Board is entitled to judgement as matter of law.

Ferreiro's claim to relief springs from N.J.S.A. 18A:6-10, which provides that as a tenured employee, she may not be "dismissed or reduced in compensation" except "for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held...by the commissioner, or a person appointed by him to act in his behalf..." Since no tenure charges have been filed against her, she urges that the Board has violated her rights.

But N.J.S.A. 18A:6-10 must be read in conjunction with N.J.S.A. 34:13A-24, which provides as follows:

> a. Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the

> appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.
>
> b. The scope of such negotiations shall include a schedule setting forth the acts and omissions for which minor discipline may be imposed, and also the penalty to be imposed for any act or omission warranting imposition of minor discipline.
>
> c. Fines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S. 18A:6-10.

[Emphasis supplied]

N.J.S.A. 34:13A-22 defines "minor discipline" thusly:

> "Minor discipline" includes, but is not limited to, various forms of fines and suspensions, but does not include tenure charges filed pursuant to the provisions of subarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq., or the withholding of increments pursuant to N.J.S. 18A:29-14, letters of reprimand, or suspensions with pay pursuant to section 1 of P.L. 1971, c. 435 (C.18A:6-8.3) and N.J.S. 18A:25-6.

It is clear that in the public-school setting, duly negotiated minor discipline, even if such discipline results in a reduction of salary, does not violate N.J.S.A. 18A: 6-10.

I **CONCLUDE** that the docking of petitioner's pay is precisely the type of minor discipline contemplated by N.J.S.A. 34:13A-24, as it is a fine, but neither tenure charges nor an increment withholding, letter of reprimand or suspension with pay. The schedule for such discipline was negotiated and agreed upon between the Board and the majority representative for teaching staff members in Elizabeth, and thus does not constitute a reduction in benefits or compensation in violation of the school laws.[1] N.J.S.A. 34:13A-

[1] The school law issue is the only one cognizable before the Commissioner. I do not have jurisdiction to invalidate the Collective Bargaining Agreement, as petitioner urges in her submission. Petitioner's

> appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.
>
> b. The scope of such negotiations shall include a schedule setting forth the acts and omissions for which minor discipline may be imposed, and also the penalty to be imposed for any act or omission warranting imposition of minor discipline.
>
> c. Fines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of N.J.S. 18A:6-10.

[Emphasis supplied]

N.J.S.A. 34:13A-22 defines "minor discipline" thusly:

> "Minor discipline" includes, but is not limited to, various forms of fines and suspensions, but does not include tenure charges filed pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq., or the withholding of increments pursuant to N.J.S. 18A:29-14, letters of reprimand, or suspensions with pay pursuant to section 1 of P.L. 1971, c. 435 (C.18A:6-8.3) and N.J.S. 18A:25-6.

It is clear that in the public-school setting, duly negotiated minor discipline, even if such discipline results in a reduction of salary, does not violate N.J.S.A. 18A: 6-10.

I **CONCLUDE** that the docking of petitioner's pay is precisely the type of minor discipline contemplated by N.J.S.A. 34:13A-24, as it is a fine, but neither tenure charges nor an increment withholding, letter of reprimand or suspension with pay. The schedule for such discipline was negotiated and agreed upon between the Board and the majority representative for teaching staff members in Elizabeth, and thus does not constitute a reduction in benefits or compensation in violation of the school laws.[1] N.J.S.A. 34:13A-

[1] The school law issue is the only one cognizable before the Commissioner. I do not have jurisdiction to invalidate the Collective Bargaining Agreement, as petitioner urges in her submission. Petitioner's

24(c). I **CONCLUDE** that the action of the Board in docking Ferreiro's salary is consistent with law.

ORDER

Based on the foregoing, it is **ORDERED** that the Board's Cross-Motion for Summary Decision is **GRANTED,** and the petition of appeal is **DISMISSED**.

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

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

June 11, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 6/11/19

Date Mailed to Parties:

sej

submission likewise appears to urge that N.J.S.A. 34:13A-24 is impermissibly vague, and as a result, invalid. I likewise lack jurisdiction to invalidate statutes.

OAL Dkt. No. EDU 03865-19
Agency Dkt. No. 9-1/19

New Jersey Commissioner of Education

Final Decision

Guadalupe Ferreiro,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.[1]

In this matter, the petitioner alleges that the Board violated her tenure rights when it docked her salary in the amount of $1,033.38 due to tardiness on thirteen occasions in September and October 2018. According to the Collective Bargaining Agreement (CBA) between the Board and the Elizabeth Education Association (Association), the Board will deduct 25 percent of the daily salary after the accumulation of five tardy marks in a given school year, and each tardy thereafter will result in a deduction of 25 percent of the daily salary. The Administrative Law Judge (ALJ) found that the deduction in salary does not violate the petitioner's tenure rights under *N.J.S.A.* 18A:6-10 because *N.J.S.A.* 34:13A-24 allows boards to impose minor discipline when it is duly negotiated with the collective bargaining unit.

[1] The supplemental exceptions filed by petitioner were not timely pursuant to *N.J.A.C.* 1:1-18.4, and were therefore not considered by the Commissioner.

Specifically, *N.J.S.A.* 34:13A-24(c) provides that "[f]ines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of *N.J.S.* 18A:6-10." As such, the ALJ concluded that the docking of the petitioner's pay for tardiness is a fine that amounts to minor discipline.

In her exceptions, the petitioner argues that a 25 percent reduction in the daily salary for excessive tardiness constitutes major discipline, rather than minor discipline. The petitioner relies on *N.J.A.C.* 4A:2-3.1, which defines minor discipline in the New Jersey Civil Service context as "a formal written reprimand or a suspension of five working days or less." The petitioner maintains that the ability to withhold 25 percent of an employee's salary can exceed a 5-day suspension. Accordingly, the petitioner argues that the provision in the CBA that allows for the docking of pay for tardiness is unenforceable because it permits the Board to impose major discipline. The petitioner argues, however, that she is not asking the Commissioner to invalidate a CBA provision – which the ALJ found is not within the Commissioner's jurisdiction – but is instead seeking to uphold the petitioner's tenure rights and reimburse her for the $1,033.38 docked from her pay.

Upon review, the Commissioner agrees with the ALJ, for the reasons thoroughly set forth in the Initial Decision, that the Board's action in docking the petitioner's salary was consistent with the law. The Commissioner does not find the petitioner's exceptions to be persuasive. *N.J.S.A.* 34:13A-24, which allows for boards to negotiate minor discipline, clarifies that "[f]ines and suspensions for minor discipline shall not constitute a reduction in compensation pursuant to the provisions of *N.J.S.* 18A:6-10." Furthermore, *N.J.S.A.* 34:13A-22 defines minor discipline as including "various forms of fines and suspensions, but does not include tenure charges . . . or the withholding of increments . . . letters of reprimand, or

suspensions with pay[.]" The Commissioner agrees with the ALJ that the docking of the petitioner's pay is the type of minor discipline contemplated by *N.J.S.A.* 34:13A-24, and in this circumstance, the minor discipline was negotiated and agreed upon by the Board and the Association, which represents the majority of teaching staff members in the district. As such, the docking of the petitioner's pay for excessive tardiness is not a violation of her tenure rights under *N.J.S.A.* 18A:6-10.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/19
Date of Mailing: 7/22/19

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

186-19

New Jersey Commissioner of Education

Final Decision

Lisa Healy,

Petitioner,

v.

Board of Education of the Township of Hardyston, Sussex County,

Respondent.

Synopsis

Petitioner requested that the Hardyston Board of Education (Board) recognize her tenured status and place her at step five (5) on the salary guide. Petitioner had been employed by the Board as a teacher from September 1994 until April 1999, becoming tenured on or about September 1, 1998. Beginning in April 1999, petitioner was granted several leaves of absence for pregnancy, child-care, and medical reasons. She failed to return to work following the expiration of her child-care leave at the end of the 2000-2001 school year, having filed an application for Social Security Disability Insurance benefits in October 2000. Beginning in the 2015-2016 school year, petitioner became re-employed by the Board as a substitute teacher on an intermittent basis, and in February 2018, petitioner was re-employed as a full-time teacher. She filed the within petition on November 20, 2018. The respondent Board filed a motion to dismiss.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner was hired by the Board as a non-tenured teacher at Step 1 of the school district's salary guide on February 13, 2018, but petitioner did not file her appeal disputing the salary step and non-tenured status until December 14, 2018 – well beyond the ninety-day window for filing a petition of appeal; petitioner's contention that she never submitted a letter of resignation and therefore remained an active employee from 1999 until her return to full-time employment in 2015 is without merit, as is her argument that *N.J.S.A.* 18A:6-10 applies in this case. The ALJ concluded that the within appeal must be dismissed as untimely. Accordingly, the Board's motion for summary decision was granted.

Upon review, the Commissioner concurred with the ALJ that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition was dismissed.

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

July 22, 2019

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00208-19
AGENCY DKT. NO. 279-11/18

LISA HEALY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,
Respondent.

Jesse Humphries, Esq., for petitioner (Oxfeld Cohen, attorneys)

Joseph Roselle, Esq., for respondent (Schenck Price Smith & King, attorneys)

Record Closed: May 22, 2019 Decided: June 13, 2019

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Lisa Healy (Healy) requests that Hardyston Board of Education (District) recognize her tenured status and place her at step five (5) on the salary guide. Healy was employed as a teacher at the District from September 1994, until April 1998.

Healy became re-employed by the District as a substitute teacher on an intermittent basis beginning in the 2015-2016 school year and as a full-time teacher in February of 2018.

PROCEDURAL HISTORY

Petitioner filed the instant petition with the New Jersey Commissioner of Education, which was received on November 20, 2018, by the Department of Controversies and Disputes (Department).

Respondent Hardyston Board of Education filed an answer and affirmative defenses with the Department which was received on December 17, 2018.

The matter was transmitted as a contested case on December 18, 2018, to the Office of Administrative Law (OAL) where it was received on December 20, 2018.

Respondent filed a Motion to Dismiss with the undersigned on May 20, 2019. Petitioner's response to respondent's motion and cross-motion was filed on May 22, 2019. The parties did not request oral argument. The written submissions are sufficient to dispose of the matter.

STATEMENT OF FACTS

The following facts are undisputed, and I **FIND** them to be the **FACTS** of the case:

1. Healy began employment in the Hardyston School District in September of 1994, teaching second grade at the Hardyston Elementary School.
2. Pursuant to the provisions of N.J.S.A. 18A:28-5 et seq., Healy became tenured in the District on or about September 1, 1998.
3. On or about January 22, 1999, Healy wrote to Dr. Anne Wilkins, then-District Superintendent, requesting a leave of absence due to pregnancy.

4. Healy's request for a leave was granted. Healy left the District on April 19, 1999, when the District went on spring vacation.
5. On or about May 12, 1999, Healy was diagnosed with Hodgkin's Lymphoma and immediately began treatment.
6. Via letter dated July 21, 1999, Healy informed then-Superintendent Wilkins that she wished to extend her Family Leave until October 26, 1999, and requested that she be placed on maternity leave thereafter through June 30, 2000.
7. Via an undated letter, but which was received in the District's offices on February 16, 2000, Healy requested an extension of her child care leave for the 2000-2001 school year.
8. The Board granted Healy's request, informing her of same via letter dated March 28, 2000.
9. At the time of her leave from the District, Healy was on Step 5 of the salary guide.
10. Healy did not return to work upon the expiration of her child-care leave at the end of the 2000-2001 school year.
11. Healy was later diagnosed with additional medical problems, including, but not necessarily limited to, radiation pneumonitis, hypothyroidism, hyperthyroidism, and cardio-vascular disease.
12. On October 25, 2000, Healy filed an application for Social Security Disability Insurance benefits. In a decision dated September 26, 2001, (Federal) Administrative Law Judge Dennis O'Leary granted Healy's Social Security Disability application retroactive to May 14, 1999.

13. As Healy did not have sufficient years in the Teacher's Pension and Annuity Fund (TPAF), she could not apply for a Disability Pension from the Division of Pensions and Benefits.

14. On May 18, 2001, Healy did apply for a withdrawal of her TPAF pension funds from the Division of Pensions and Benefits. On her application, she indicated that she terminated her employment in the Hardyston School District in April of 1999, resigning due to illness.

15. Healy did not submit a letter of resignation to the Hardyston School District. There is no such letter contained in Healy's District personnel file.

16. The Board did not file tenure charges against Healy for abandonment of her position.

17. In the spring of 2015, Healy was sufficiently recovered to be able to substitute teach. Healy was informed by the Board of Education that they approved her as a substitute teacher at its August 11, 2015, meeting. Healy thereafter served as a substitute teacher on an intermittent basis beginning in the 2015-2016 school year.

18. On or about March 7, 2017, the Vernon Township School District sent notice to the Hardyston School District, informing the Board that Vernon wished to hire Healy as a substitute teacher and asked that Hardyston verify Healy's employment.

19. On March 16, 2017, Healy was appointed by the Vernon Township Board of Education as a substitute teacher, effective March 17, 2017.

20. In or about January of 2018, the Hardyston Board of Education advertised for a permanent elementary teaching position in order to fill a mid-year vacancy

created when the previous teacher retired. Healy applied for that position and was interviewed by Michael Ryder, Chief School Administrator.

21. After the interview, Mr. Ryder recommended that Healy be appointed to the permanent position.

22. At the Board's February 13, 2018, meeting, a motion was passed to hire Healy for a full-time teaching position at Step 1 of the Masters salary schedule as set forth in the collective negotiations agreement between the Board and the Hardyston Township Education Association.

23. Healy did not object at the time to her placement on the salary guide and thanked Mr. Ryder for the opportunity.

24. On May 8, 2018, the Board of Education approved a motion to renew Ms. Healy's contract for the full 2018-2019 school year as a non-tenured certified staff member.

25. Healy is currently on Step 2 of the Masters salary guide.

26. Healy now seeks credit on the salary guide for her previous five years' experience in the District.

LEGAL DISCUSSION

In the case at bar, both sides seek relief pursuant to N.J.A.C. 1:1-12.5, which 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." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." I **FIND** there is no issue of material

fact in dispute with regard to the foregoing matter and I **CONCLUDE** the matter is ripe for Summary Decision.

I. THE APPEAL WAS NOT FILED TIMELY AND IS BARRED

N.J.A.C. 6A:3-1.3(i) states in pertinent part:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Healy disputes the District's hiring her as a non-tenured teacher at Step 1 of the pay scale and not taking into account her prior years of service. Healy was hired as a non-tenured teacher at Step 1 of the salary guide via unanimous District Board approval on February 13, 2018. The forgoing petition appealing the District Board's action was filed on December 14, 2018; approximately ten months after Healy's hire at Step 1. Thus, I **FIND** the foregoing petition of appeal was filed more than ninety days after the alleged adverse action and I **CONCLDE** that the foregoing petition of appeal is out of time and therefore barred by N.J.A.C. 6A:3-1.3(i).

II. PETITIONER RESIGNED FROM HER INITIAL EMPLOYMENT WITH THE DISTRICT

In the case at bar, it is undisputed that Healy went out on planned maternity leave beginning April 19, 1999, and did not return to work for the 1999-2000 and 2000-2001 school years. It is further undisputed that Healy applied for a withdrawal of her TPAF funds from the Division of Pensions and Benefits on May 18, 2001, indicating on her withdrawal application that she had resigned from her employment at Hardyston in April of 1999 due to illness. Healy now argues that since she never submitted a formal letter of resignation, that she remained an active employee from 1999 up until her return to full time employment with the District in 2015. I disagree.

Petitioner sites Capodilupo v Board of Education of West Orange Township, Essex County, 218 N.J. Super. 510, 515 (App. Div. 1987), which states that "the tenure act should be liberally construed to achieve its beneficent ends." Ibid. (quoting Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 74 (1982)). Notwithstanding this general directive to liberally interpret the tenure act, Healy fails to cite any precedent that would explain how an individual, who has had no communication with a district for such an extended period of time, could possibly remain an "active employee" of that district, especially where the individual applied for Social Security Disability Benefits and withdrew her pension payments. Further, Healy indicated on her TPAF withdrawal form that her reason for withdrawing the pension payments was "resignation due to illness." Based on the foregoing, I **FIND** that Healy resigned from her position as a tenured teacher in 1999 based on her own conduct and admissions. I **CONCLUDE** that Healy was not an active tenured employee at the time of her recent re-hire by the District (February 13, 2015).

III. N.J.S.A. 18A:6-10 DOES NOT APPLY

Healy further argues that since she was never formally dismissed by the District during her sixteen-year absence, that she, then, remained an active employee during that period of time. Healy cites N.J.S.A. 18A: 6-10, which states that no person shall be dismissed or reduced in compensation without formal written charges being brought against her. Since Healy was never served with written tenure charges by the District as required by N.J.S.A. 18A: 6-10, she claims she was never formally dismissed by the District. Thus, she argues, she remained an active employee of the District during her absence. As I have already found that Healy resigned from her teaching position in 1999, I **CONCLUDE** the above-referenced statute does not apply to the case at bar as Healy was not an active tenured employee during her extended absence.

ORDER

It is hereby **ORDERED** that petitioner's Motion for Summary Decision be **DISMISSED**. It is further **ORDERED** that respondent Hardyston Board of Education's

Motion for Summary Decision be **GRANTED**; it is further **ORDERED** that the foregoing petition of appeal is hereby **DISMISSED** and the Respondent's decision to hire Lisa Healy as non-tenured at Step 1 of the pay scale be **UPHELD**.

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

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

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

June 13, 2019
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 6/13/19

Date Mailed to Parties:

id

OAL Dkt. No. EDU 208-19
Agency Dkt. No. 279-11/18

New Jersey Commissioner of Education

Final Decision

Lisa Healy,

Petitioner,

v.

Board of Education of the Township of Hardyston, Sussex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/19
Date of Mailing: 7/22/19

[1] It is not necessary to render a decision on the remaining legal issues that the ALJ decided in the Initial Decision because the petition of appeal was appropriately dismissed as untimely.

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

New Jersey Commissioner of Education

Final Decision

Heather Deitch,

Petitioner,

v.

Board of Education of the Borough of Berlin, Camden County,

Respondent.

Synopsis

The petitioner – a librarian and certified media specialist previously employed in the respondent Board's school district – claimed that her tenure rights were violated when the Board abolished her position in April 2017 and announced plans to make the library/media specialist job a shared position, staffed under an arrangement with the Camden County Educational Services Commission (CCESC). Petitioner filed a motion for summary decision. The Board contended that its actions were consistent with law and regulations.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the Board acted lawfully in eliminating petitioner's position for economic reasons, and its intention to provide library/media services through a shared service agreement was appropriate; there was no violation of petitioner's tenure rights during the time when the Board was relying upon the CCESC to interview and fill the new shared position, from May/June through early September 2017, or perhaps through January 2018, when the Board's waiver request to provide required library/media services using a non-certified employee was rejected by the Commissioner; after that point, however, the Board had an obligation to restore a position for a certified media specialist either full or part-time, and petitioner would have been entitled to that position if she chose to exercise her tenure rights; while a teacher whose tenure rights have been violated is generally entitled to receive back pay, here the petitioner obtained full time employment with another school district by the beginning of the 2017-2018 school year; petitioner therefore suffered no financial damage from the Board's failure to create a part-time library/media services position. The ALJ concluded that despite the Board's failure to honor petitioner's tenure rights by restoring her to a part-time library/media specialist job, petitioner suffered no financial loss because she was already employed by another school district, earning more that she would have made had she been rehired by the Board to fill the new part-time library/media services position. Accordingly, the ALJ granted petitioner's motion for summary decision, but found that she is not entitled to any monetary award given the facts of this matter.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions as thoroughly set forth in the Initial Decision. Accordingly, the recommended decision of the OAL was 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.

July 22, 2019

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11919-17
AGENCY DKT. NO. 165-7/17

HEATHER DEITCH,
Petitioner,
v.
BERLIN BOROUGH BOARD OF EDUCATION, CAMDEN COUNTY,
Respondent.

Amy L. Gillette, Esq. and Matthew B. Wieliczko, for petitioner (Zeller & Wieliczko, LLP, attorneys)

Daniel H. Long, Esq., for respondent (Wade, Long, Wood & Long, LLC, attorneys)

Record Closed: May 13, 2019 Decided: June 24, 2019

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

Heather Deitch was employed by the Berlin Borough Board of Education (BOE) as a librarian and certified media specialist at Berlin Community School. She is the holder of a Standard Elementary School Teacher certificate and a Standard Educational Media Specialist certificate. In April 2017, she was notified that her position as a librarian and

certified media specialist would be eliminated and that she would no longer be employed with the school district as of June 30, 2017. On April 27, 2017, the Board of Education voted to abolish her position and announced plans to make the library/media specialist position a shared position, to be staffed under an arrangement with the Camden County Educational Services Commission (CCESC). The current matter involves Ms. Deitch's claim that the Board of Education violated her tenure rights in the librarian and certified media specialist position. In previous proceedings under this docket, I granted partial summary decision, dismissing her claim for tenure under her instructional certificate. In addition, a separate proceeding filed by petitioner against the CCESC was dismissed because Ms. Deitch had no tenure rights that she could assert against that agency. She now moves for summary decision, as permitted by N.J.A.C. 1:1-12.5, asserting that the undisputed facts demonstrate that the Board violated her tenure as a librarian and certified media specialist.

The parties entered into a Joint Stipulation of Facts and Exhibits, A through Q. The Stipulation is incorporated herein as if recited in full. From the Stipulation, certain facts regarding the chronology of events need be recited here. As already noted, the Board voted to abolish the petitioner's position as a librarian and certified media specialist on April 27, 2017. The Board resolution regarding the abolishment of this position as the result of a reduction-in-force, or RIF, noted that the position was abolished for reasons of economy, reorganization, reassignment of staff and other good cause, effective June 30, 2017. In doing so, the Board also announced its plan to provide library/media services for its students through a shared service arrangement with the CCESC. Thus, the person providing the services in the Berlin Borough District would do so on a part-time basis. On June 22, 2017, the Board approved the shared services agreement. The CCESC quoted the projected salary for the part-time, shared media specialist position for the school year 2017-2018 at $34,272.

Ms. Deitch filed an application with the CCESC for the shared services library/media specialist position on May 24, 2017. On July 27, 2017, the position of library/media specialist was advertised on the Berlin Community School website, with the

posting noting that applications were to be filed online with the CCESC. Ms. Deitch did not interview for nor did she obtain this advertised position. The job posting specified that the media specialist would be shared by one to three public school districts.

On September 14, 2017, the Board, aware that the attempt to provide library/media services through the arrangement with the CCESC for shared services had not produced a provider, passed a motion to approve a submission to the New Jersey Department of Education, seeking a waiver under N.J.A.C. 6A:5. The submission described the necessity for the waiver in the following terms

> The waiver is necessary for the district to implement media services and meet the requirements of N.J.A.C. 6A:13-2.1(h). The district is requesting that media services be provided by a certified Elementary School Teacher in Grades K-6 with Middle School Subject matter specialization: Language Arts/Literacy Specialization in Grades K-5-8 or a certificate Teacher of Supplemental Instruction in Reading and Mathematics, Grades K-8.
>
> The need to eliminate our full-time Media Specialists, due to RIF, was first brought to the attention of the public and the BOE at the April 27, 2017 BOE meeting. The district sought the assistance of the Camden County Educational Services Commission (CCESC) to provide a PT Media Specialist. Since June 2017, the district and the CCESC has posted the availability of the position. The district has reached out to several establishments seeking support and information on individuals who possess the Media Specialists Certificate, as well as seek opportunities for a shared service. To date, we have not been able to locate such a certificated individual or engage in a shared service. The community, parents, BOE, administration and staff have all had access to the BOE agendas and information pertaining to the media specialists since April 2017

The Stipulation of Facts notes that on January 2, 2018, the CCESC website again contained a posting for a shared service school librarian/media specialist. On January 11, 2018, Commissioner of Education Kimberly Harrington denied the BOE's request for a waiver. In her letter, the Commissioner found that the waiver application failed to meet the "spirit and intent" of Title 6A because

> N.J.A.C. 6A:5-1.3 specifically states the certification requirements of N.J.S.A.18A:26-2 shall not be violated. Approval of the equivalency application would be a de facto waiver of school library media specialist certification requirements at N.J.SA.C. 6A:9B-14.14, which would be in violation of N.J.S.A. 18A:26-2.
>
> Please know that finding a candidate who is eligible for an emergency school library media specialist endorsement, which is renewable at least once, would be an appropriate remedy for this situation.

Ms. Deitch again applied for the posted shared services library/media specialist position on January 16, 2018. The CCESC library/media specialist position remained posted on the Berlin Borough School District website as of February 13, 2018. The petitioner, a qualified applicant, was not contacted or interviewed by the CCESC for the posted position. On May 10, 2018, the BOE approved a professional services proposal, dated March 27, 2018, with the CCESC for a media specialist for the 2018-2019 school year. This provided for a media specialist working in the District three days per week and a basic skills teacher working two days a week. The BOE has certified that it did not offer the petitioner an interview because the employment decision for the position was within the purview of the CCESC. According to answers to supplemental interrogatories, Superintendent Martello certified that "to the best of respondent's information Petitioner never applied to CCESC for the posted position."

In moving for summary decision, the petitioner acknowledges that a Board of Education has the right to eliminate positions as part of a reduction in force for the purpose of effecting monetary savings. Ms. Deitch does not argue that the Board's original determination in April 2017 to abolish the position violated her rights. She does not dispute that the determination was made for reasons of economy. However, she notes that at the time that the Board abolished the position that provided services it was legally required to provide under the direction of a certified school library/media specialist it had not yet established a shared services arrangement with the CCESC for the required position and therefore was taking a chance as to whether such an arrangement would

result in the shared services position being filled in time for the 2017-2018 school year. Additionally, she argues that when the position remained unfilled at the start of the next school term in September 2017, the Board violated her rights under the pretense of a shared service arrangement which was not actually put in place for the 2017-2018 school year. The tenure right she asserts arises from N.J.S.A. 18A:28-12.

> If any teaching staff member shall be dismissed as a result of such reduction, such person 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 . . . .

She notes that N.J.A.C. 6A:2.1(h) requires that all school districts shall provide library/media services under the direction of a certified school library media specialist.

> (h) All school districts shall provide library-media services that are connected to classroom studies in each school building, including access to computers, district-approved instructional software, appropriate books including novels, anthologies and other reference materials, and supplemental materials that motivate students to read in and out of school and to conduct research. Each school district shall provide these library-media services under the direction of a certified school library media specialist.

Ms. Deitch argues that when the District was unable to fill the abolished position through the part-time arrangement it sought to initiate under its agreement with the CCESC, the Board, having an ongoing obligation to provide the required service, was, in view of her tenure rights to the position, obligated to place her in that position.

The Board replies that the Uniform Shared Services and Consolidation Act, N.J.S.A. 40A:65-1 to 35 authorized "agreements between local units for services or circumstance to reduce property taxes through the reduction of local expenses." N.J.S.A. 40A:65-2. N.J.S.A. 40A:65-3 specifically includes local school districts in this

authorization. Where a RIF occurs, and a shared services agreement is reached for a service that the local board is required to provide for its students, the agreement does not violate the tenure rights of the riffed individual(s). Prezioso v. Board of Education of the Polytech Career Academy, Hunterdon County. Prezioso involved school nursing services. By statute, each school district was required to "employ a certified school nurse" to provide nursing services while school was in session. N.J.A.C. 6A:16-2.3(b). Yet, despite the "employment" requirement, the shared services arrangement was held to be an acceptable means of assuring that school nursing services were available. In the present case, in contrast to the requirement to "employ" nurses, the law does not require that a school district "employ" a "library/media specialist." Instead, the applicable regulation does requires that the district "provide" library-media services "under the direction of a certified school library media specialist." The shared services agreement with the CCESC was intended to do just that, to "provide" the library/media services, but do so through someone not an employee of the District. As the CCESC was the agency charged with hiring the shared service provider, and as the recall rights afforded to tenured, riffed employees only relate to openings occurring within the employ of the "body causing dismissal," Ms. Deitch cannot assert a right to recall against the Berlin Borough School District, which was not the employer of the person who would provide the part-time, shared service to the District's students. Indeed, as the full-time position she held with the District had been lawfully abolished, there was no position with Berlin Borough for her to be returned to.

In response, the petitioner asserts that while the Board was intending to perform a legally authorized RIF for economic reasons and enter into a shared services agreement for the part-time provision of the required services, it did not proceed "correctly" in pursuing that goal. It had no actual "provider" in place when she was riffed. Then, once the provider position remained open in September, despite the CCESC's presumed attempt to fill it, she was "ready, willing and able to work in that same legally obligated Certified Media Specialist position." And the waiver application, which sought to provide library/media services through improperly certificated personnel, was denied. Thus, as she puts it, there are "two elephants in the room," the lack of any shared services

agreement in 2017-2018 and the denial of the waiver. As counsel sees it, the District's timing on the RIF was "off." As for the alleged lack of any vacancy or opening within the employ of the Board for the certified media specialist position since the RIF, that "contention . . . is incorrect," due to the Board's failure to staff a required position within its schools when its alterative plan failed.

In its reply to this argument, the Board contends that the failure of the CCESC to fill the shared services position neither invalidates the RIF and abolishment of Deitch's position nor violates her tenure rights. CCEC was designated in the shared service agreement as the primary employer, as authorized by N.J.S.A. 40A-65.6(a).

> a. In the case of an agreement for the provision of services by an officer or employee of a local unit who is required to comply with a State license or certification requirement as a condition of employment, the agreement shall provide for the payment of a salary to the officer or employee and shall designate one of the local units as the primary employer of the officer or employee for the purpose of that person's tenure rights. If the agreement fails to designate one of the local units as the primary employer, then the local unit having the largest population, shall be deemed the primary employer for the purposes of that person's tenure rights.

As the employer of the shared service position was designated as the CCESC, it alone had the authority to hire for the position. The Berlin Borough School District had no "opportunity or say at any point to . . . afford Petitioner the opportunity to interview or be considered for the proposed shared services position." It could only advertise that the shared service position with the CCESC existed, "in order to direct potential candidates to the CCESC position." As for the contention that the Board had to "employ" a person to provide the required media specialist services, the wording of N.J.A.C. 6A:2.1(h) only requires that the service be provided by the Board ("shall provide"), but does not require that the person(s) providing the service be employed by the Board. If the Board failed to provide the required service, that failure might implicate the District's obligation under the "Standards-Based Instructional Priorities" of the Department of Education's regulations, but such a failure would not involve any violation of Ms. Deitch's tenure or bumping rights.

Discussion

As petitioner has conceded, the law authorized the Board of Education to RIF her position for economic reasons. She does not challenge the announced reason for that action. The stipulated facts show that the Board then entered into an agreement with the CCESC for that agency to provide part-time library/media specialist services. The Board was, as petitioner notes, required to have such services in the District, but, as respondent argues, the regulation that requires the service does not require that the Board "employ" the provider, only that the service be "provide[d]." As such, I **FIND** that, on its face, the Board's intention to "provide" the service through the shared service agreement was not a violation of its obligations to its students. The record shows that the shared service position was advertised after the District abolished its own in-house position, and, indeed, it is stipulated that Ms. Deitch applied for it on May 24, 2017, even before the Board approved the agreement on June 22. As the Board correctly states, the process of interviewing and hiring for the shared position lay in the hands of the CCESC, not its own. There does not appear to be anything improper in the Board having first abolished the in-house position and then seeking to arrange for the required services through the initiation of an intended shared service position through the auspices of the CCESC. I **CONCLUDE** that based on these facts, there was no violation of Ms. Deitch's tenure rights during this period from May/June through the early days of September 2017. However, on September 14, no doubt shortly after the start of the 2017-2018 school year, the Board was obviously aware that the CCESC had not managed to fill the shared services position, and it was aware that it did not have on staff or otherwise have available the legally required certified library/media specialist to "provide" the services required by law. The existence of this situation raises the question of what the Board's rights and obligations were after it became aware that the proposed shared service position was unfilled, and that school was starting without a certificated media specialist on staff or otherwise "available."

The Board having legally abolished the position of library/media specialist through the reduction in force, Ms. Deitch's claim of a violation of her tenure rights to be reemployed by Berlin Borough Board of Education can only have merit if, at some point in time, the Board was legally required to recreate a position of certified library/media specialist on its own employment rolls. That is so because the wording of the tenure provision that she relies on to establish the Board's obligation to reemploy her after the lawful RIF provides that the Board's obligation to her only exists "whenever a vacancy occurs in a position for which such person shall be qualified and [she] shall be reemployed by the body causing dismissal, if and when such vacancy occurs . . . ." The employment "position" that Ms. Deitch occupied prior to the conclusion of the 2016-2017 school year did not exist after the lawful RIF. Thus, there was no vacancy in that non-existent position for her to be reemployed in. As such, her right to reemployment with the Board was dependent upon action by the Board to restore the position, or, in the absence of such action, there being a legal obligation for the Board to re-establish the position of certified media specialist on its employment rolls, a position that once re-established would be "vacant" and for which she could then be hired in recognition of her tenure rights. But the facts here show that as of September 14, 2017, the Board, aware of the lack of a person to "provide" the required service, did not choose to restore the in-house, full-time position that it had earlier abolished for economic reasons, nor did it decide to create its own part-time position to be staffed by a properly certificated person. Instead, it sought a different means to "provide" required library/media services. It determined to apply to the Commissioner of Education for a waiver that, if granted, would allow it to have a certificated elementary school teacher in grades K-6 with middle school subject matter specialization: Language Arts/Literacy Specialization in grades K-5-8 or a certificate Teacher of Supplemental Instruction in Reading and Mathematics, grades K-8, "provide" the services normally provided, as required by N.J.A.C. 6A:13-2.1(h), by a certified school library/media specialist. As the Board noted in Section 4 of the Waiver Application, the "description of the process," it had riffed the full-time media specialist position and had sought the "assistance" of the CCESC to provide a part-time media specialist. Clearly, by seeking this waiver, the Board was announcing that in the face of the absence of a certified part-time library/media specialist produced through the shared services

agreement, it was not intending to recreate the full-time position that it had eliminated to save money, or, alternatively, to create a part-time position of its own. It still wanted to proceed without the economic burden it had shed with the abolition of the full-time slot(s).

As previously noted, N.J.A.C. 6A:5 does provide for the possibility of a waiver. N.J.A.C. 6A:5-1.1 announces

> (a) This chapter's purpose is to provide regulatory flexibility for school districts to meet the requirements of the rules contained in the New Jersey Administrative Code Title 6A. Regulatory flexibility may be granted as a waiver or equivalency to a specific rule so school districts can provide effective and efficient educational programs. The Commissioner, with authority delegated by the New Jersey State Board of Education, may approve on a case-by-case basis a waiver or equivalency to a specific rule.

Despite this authorization for some regulatory flexibility, here the Commissioner decided to deny the waiver. In doing so, she noted that its fundamental premise, the provision of library/media services by personnel not properly certificated, violated the "spirit and intent" of Title 6A because

> N.J.A.C. 6A:5-1.3 specifically states the certification requirements of N.J.S.A.18A:26-2 shall not be violated. Approval of the equivalency application would be a de facto waiver of school library media specialist certification requirements at N.J.A.C. 6A:9B-14.14, which would be in violation of N.J.S.A. 18A:26-2.

Thus, the Commissioner in effect advised the Board that, given the specific commands of N.J.A.C. 6A:5-1.3 and N.J.S.A. 18A:26-2, its proposal was fundamentally flawed. Despite this seemingly obvious flaw in its plan, given the Board's intent to economize, perhaps the Board thought it worth the chance that the Commissioner might nevertheless allow the waiver. However, it must be noted that in its description of the facts underlying its application, the Board stated that after posting of the shared service position by the CCESC and by the Board itself (with that posting directing the applicants to file with the CCESC), it "reached out to several establishments seeking support and information on

individuals who possess the Media Specialists Certificate, as well as seek opportunities for a shared service. To date, we have not been able to locate such a certificated individual or engage in a shared service." It is not at all clear why the Board did not attempt to contact Ms. Deitch, its very own recent and fully certificated employee, about the position, who it certainly could have located. Even if the position was to be a shared service job through CCESC, rather than a position on the Board's own payroll, the Board could have asked her if she had applied to the CCESC, or if it contemplated the need to staff the position itself, to see if she was interested in it as either a part- or full-time position. The lack of any suggestion that the Board tried to see if Deitch was interested raises concerns about the Board's representation to the Commissioner in the waiver application. Yet, that said, I **FIND** that there is no direct evidence that in filing for the waiver, the Board was purposely seeking to deny Ms. Deitch a job or directly seeking to avoid her tenure rights.

The Board was legally obligated to provide services and, as the Commissioner explained, to do so with properly certificated personnel. If the waiver attempt, fundamentally flawed as it was, did somehow postpone the Board's obligation in the face of the failure to obtain shared services until the waiver was denied, surely by January the Board could no longer avoid an obligation to lawfully staff the services. In either case, whether that obligation attached in September or in January, Ms. Deitch would have been entitled to be offered the restored position, even though she was then employed in the Trenton School District. That said, if the Board did have an obligation to restore a position so as to "provide" services through a properly certificated individual in conformity with N.J.A.C. 6A:2.1(h), what exactly did that obligation entail? Must the Board have created a full-time position, as existed prior to the RIF, or was it only required to create a part-time slot, in accordance with the intent of the shared service agreement, which clearly contemplated that the services to be provided by a shared, properly certificated, individual working part-time in the District under the auspices of the CCESC would be sufficient to meet the requirements of the law? In either case, if the obligation existed, Ms. Deitch was entitled under her tenure rights to the position, but the question of what damages

and remedy is appropriate for any violation of her rights may turn on the nature and timing of the Board's obligation.[1]

Counsel for the Board argues that while the District did not "provide" the library/media services during 2017-2018 through a properly certificated library/media specialist, any violation of its legal obligations under N.J.A.C. 6A:2.1(h) might subject the District to criticism or possibly some sanction for not complying with that regulation, but that failure would not provide any basis for Deitch to claim a violation of her tenure rights. And, even if the Board did, either in September or January, have an obligation to create a position of library/media specialist, at most it was required to create a part-time position. Given her full-time employment in Trenton during the entire 2017-2018 school year, even if her rights were violated, Ms. Deitch's potential earnings from such a part-time position in Berlin, whether for the full school year or certainly from January through June, were such that she has no claim for any financial damages. In response, counsel for Ms. Deitch notes that there never was a shared service in the 2017-2018 school year, and as such, the full-time position that existed before the RIF is the position the Board was required to restore and to which Ms. Deitch had rights.

The Board of Education is legally responsible to manage its school district in conformity with the established statutes and regulations that mandate the curriculum and the providers authorized to deliver it to students. So long as the Board assures that these mandates are met, it is within the Board's discretion as to how to allocate staff and funding to achieve these mandates. As such, if a school board determines that library/media services can be properly "provided" by properly certificated, part-time staff, subject to any other statutory or possibly contractual obligations, the Board may so arrange. If the Board decides that full-time certificated staff are not necessary to fulfill the obligation, it may reduce the position(s) to part-time, so long as it does so, in the case of tenured staff, for legally acceptable reasons of economy or efficiency. And, as said before, it may RIF certificated staff completely, so long as it provides the required media services in some

[1] It is noted that when the Board did manage to obtain shared service for the 2018-2019 school year, the arrangement was for three days a week for the certified media specialist.

other lawful manner, such as a shared service arrangement. As such, in the spring of 2017, the Berlin Borough Board of Education could have chosen to reduce Ms. Deitch's position to part-time rather than eliminate it, and so long as the services were properly filled in this part-time fashion, the Board's action would be acceptable. Importantly, no claim is made here that the services could not have been properly provided by the shared service personnel intended by the arrangement with the CCESC. As such, I cannot readily see why in September 2017, the Board could not have both sought to economize and still provide the mandated services through a part-time staff member on its own payroll. Merely because the CCESC did not deliver a provider does not mean the Board had to abandon any possibility of lessened expense, so long as the mandated services to its students were met. Given this, I **FIND** that the Board had an obligation, at least as early as September 2017, to restore a position for a certified media specialist on its rolls, but in the absence of any evidence to the contrary, that obligation could have been met by a part-time position. I **CONCLUDE** that Ms. Deitch would have been entitled to that restored, vacant part-time position, if she chose to exercise her tenure rights. Indeed, she had applied for that very part-time position through the CCESC.

Damages

While a teacher whose tenure rights have been violated and who has thereby been denied employment is generally entitled to receive back pay for such losses as she may have suffered, measuring whether Ms. Deitch is entitled to any monetary damages for the Board's failure to honor her tenure rights presents some difficulties. After her position with Berlin Borough was abolished, Ms. Deitch obtained full-time employment with the Trenton Board of Education, thereby fulfilling her responsibility to seek to mitigate her damages. The parties have stipulated that her base salary for 2017-2018 in Trenton was $69,440. As noted, her anticipated salary for 2017-2018 as a full-time employee of Berlin Borough was $88,398, a difference of $18,958. In seeking relief for the violation of her tenure rights, Ms. Deitch also notes commuting costs of $8,677.27 associated with her employment in Trenton, that she contends were required by her loss of employment with the respondent, as well as medical expenses of $1,724.20, following the termination of

her health care benefits received from her employment with respondent, until she obtained new coverage through the Trenton Board. She received $4,268 in unemployment benefits.

It is clear that if Ms. Deitch could have expected full-time employment in 2017-2018 with the respondent her anticipated earnings would have exceeded those from the position she obtained in Trenton. However, given that the Board only had to create a part-time position to which she would have had entitlement, it is also clear that if she had been placed in the part-time position with the respondent that she applied for with the CCESC, or if she had been offered and had accepted the part-time position that this decision concludes the respondent was obligated to create in September 2017, the salary for that part-time position would obviously not have been the $88,398 that she anticipated she would have earned in a full-time position with the respondent in 2017-2018. According to the Stipulation, the CCESC pegged the salary for the part-time position advertised that summer as $34,272. According to a quote for services from the CCESC to the Board, this was to be for two days a week at $476 a day. Clearly, if all that Ms. Deitch could have expected to receive from respondent for a part-time position restored to the Board's rolls would have been this figure, her earnings in Trenton far exceeded this figure, and that is so even if the commuting and medical expenses are included as money to which she would be entitled in view of the violation of her tenure rights. Even if the two-day a week salary were measured against her anticipated full salary of $88,398, 40 percent of that salary, representing two of five work days, would total $35,359.20. Again, the earnings from Trenton far exceed this figure. Thus, I **FIND** that she suffered no financial damage from the Board's failure to create a part-time position for school year 2017-2018 to allow it to properly provide media specialist services in the absence of provision through the shared services arrangement. Of course, had the Board created the part-time position for that school year, it could have then chosen to abolish that part-time position and seek to fill it through a shared service arrangement with the CCESC for 2018-2019. In fact, while it did not create a position of its own for 2017-2018, it did succeed in obtaining shared service from CCESC for 2018-2019. But if it had an obligation to create this part-time position on its rolls for 2017-2018, it would have had to

formally abolish, or RIF, the position before it entered into a new shared service arrangement. Since it never created the part-time position that this decision concludes it was obligated to create, it of course never acted to abolish it. Thus, if Ms. Deitch, exercising her tenure rights, had taken the part-time position Berlin Borough should have created, in the absence of proper action to abolish the position, she would have been entitled to the part-time position for 2018-2019. Her anticipated salary for that year in Berlin Borough, at two days a week as per the work anticipated by part-time arrangement sought for 2017-2018, and based on 40 percent of the anticipated full-time salary of $89,198 would have been $35,679.20. Instead if three days a week were required, as was the case under the actual part-time arrangement filled by the CCESC for 2018-2019, the salary would have been approximately $53,518.80; 60 percent of the full salary. In reality, Ms. Deitch was riffed by Trenton at the end of 2017-2018, hired by the Millville School District, worked there from September 2018 through October 31, 2018, resigned and was rehired by Trenton, starting on November 2, 2018, through June 30, 2019. She received unemployment during the summer of 2018, totaling $3,977. She earned $8215.84 from Millville. Her salary with Trenton was $72,390, plus a $1,500 stipend for her dual certifications, totaling $73,890, a figure that was prorated for the time employed by Trenton starting November 2, 2018. While she again notes additional commuting costs related to travel to Millville and Trenton, it is obvious that once again her actual earnings exceeded any earnings she would have received from a part-time position with the Berlin Borough School District. As such, I **CONCLUDE** that despite Berlin Borough's failure to honor Ms. Deitch's tenure rights when it failed to restore a position of library/media specialist, as that obligation only involved the creation of a part-time position, she suffered no financial loss and thus no damages are warranted.

ORDER

There being no material facts in dispute and the evidence supporting Ms. Deitch's claim that under the tenure law she was entitled to a position with the Berlin Borough Board of Education, and that the Board failed to honor her tenure rights, **IT IS HEREBY**

ORDERED her motion for summary decision is **GRANTED**. However, she is not entitled to any monetary award.

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

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

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

June 24, 2019
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 6-24-19

Date Mailed to Parties: 6-24-19

mph

LIST OF EXHIBITS:

Joint Exhibits:

J-1 Stipulated Facts and Exhibits A through Q **NOTE:** The Stipulation states that Exhibit D contains the Board meeting minutes from April 27, 2017 and June 22, 2017, as well as the Board Resolution for the Reduction In Force. However, the judge's copy only has the April minutes attached. The June minutes are separate and are therefore labeled as Exhibit D-1

For petitioner:

None

For respondent:

R-1 Quote for Service Delivery, dated May 11, 2017

187-19

OAL Dkt. No. EDU 11919-17
Agency Dkt. No. 165-7/17

New Jersey Commissioner of Education

Final Decision

Heather Deitch,

Petitioner,

v.

Board of Education of the Borough of Berlin, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly expressed in the Initial Decision – that the petitioner was entitled to a restored, vacant part-time library/media specialist position by virtue of her tenure rights following a reduction in force. Nevertheless, the Commissioner further concurs with the ALJ that the petitioner suffered no financial loss as a result of the Board's failure to restore a position of part-time library/media specialist since the petitioner had already secured full time employment, with a higher salary, in a different school district.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted but she is not entitled to a monetary award.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/19
Date of Mailing: 7/22/19

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

New Jersey Commissioner of Education

Final Decision

Christine Skurbe,

Petitioner,

v.

Board of Education of the Township of Monroe, Middlesex County; Kathleen Kolupanowich, Board President; Steven Riback, Board Vice President; and Jill DeMaio, Board Member,

Respondents.

Synopsis

Petitioner – formerly the vice president of the Monroe Township Middle School Parent Teacher Organization (MTMS PTO), a parent organization that hosts fundraising activities for the benefit of students and staff – founded a second parent organization in 2018, the Monroe Township Middle School Parent Staff Association (MTMS PSA), of which she is president. A majority of members of the respondent Board voted to recognize the MTMS PSA at a meeting on August 22, 2018. Petitioner, however, believed that dissenting Board members would hold a second vote to revoke MTMS PSA's status as an organization over alleged violation of certain Board policies. A petition for due process was filed by petitioner in February 2019, in which she requested that the Commissioner investigate board members for allegedly retaliatory conduct and declare that the Board cannot revoke MTMS PSA's status. The Board filed a motion to dismiss for failure to state a claim upon which relief can be granted, asserting that the Commissioner does not have jurisdiction in this matter.

The ALJ found, *inter alia*, that: the Commissioner has jurisdiction to "hear and determine…all controversies and disputes arising under the school laws," *N.J.S.A.* 18A:6-9; in this role, the Commissioner adjudicates disputes and can review certain final decisions of a board of education to determine if it acted in and "arbitrary, capricious, or unreasonable manner"; the Commissioner does not have investigative powers, but rather has the power to review final rulings or actions of a board of education; as the Board in this matter has not moved to revoke the MTMS PSA's status as a parent organization, the issues raised by petitioner herein are not yet suitable for consideration by the Commissioner. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon review, the Commissioner concurred with the findings and conclusion of the ALJ, for the reasons thoroughly expressed in the Initial Decision. According, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition was dismissed.

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

July 22, 2019

188-19

OAL Dkt. No. EDU 05352-19
Agency Dkt. No. 35-2/19

New Jersey Commissioner of Education

Final Decision

Christine Skurbe,

Petitioner,

v.

Board of Education of the Township of Monroe, Middlesex County; Kathleen Kolupanowich, Board President; Steven Riback, Board Vice President; and Jill DeMaio, Board Member,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge – for the reasons thoroughly expressed in the Initial Decision – that this matter is not ripe for review. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/19
Date of Mailing: 7/22/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
SUMMARY DECISION
OAL DKT. NO. EDU 5352-19
AGENCY DKT. NO. 35-2/19

CHRISTINE SKURBE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY; KATHLEEN KOLUPANOWICH, BOARD PRESIDENT; STEVEN RIBACK, BOARD VICE PRESIDENT; AND JILL DE MAIO, BOARD MEMBER,
Respondents.

Christine Skurbe, petitioner, pro se

Robert M. Tosti, Esquire, for respondents (Purcell, Mulcahy, Hawkins, & Flanagan, LLC, attorneys)

Record Closed: June 11, 2019 Decided: June 27, 2019

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Prior to the 2018 school year in the Monroe Township Middle School, there was one-parent organization that hosted fundraising activities for the benefit of the students and its staff. It was the Monroe Township Middle School Parent Teacher Organization (MTMS PTO). Petitioner Christine Skurbe (Skurbe or petitioner) served as its vice president before founding her own organization, Parent Staff Association (MTMS PSA), of which she is the president. Respondent refused to recognize the MTMS PSA and requested to revoke its status as an organization because it violated some of the Board policies.

Skurbe argues her organization has not violated the relevant Board policies, and as such, there is not a valid basis for board members to consider revoking its Class I status. She alleges, therefore, that their discussions were "clearly retaliation," and asks that the matter be "looked into," "investigated," and "stopped."

On February 15, 2019, petitioner filed a petition for due process with the Office of Controversies and Disputes of the New Jersey Department of Education requesting that the Commissioner: (1) investigate board members for allegedly retaliatory conduct; and (2) declare that the Board cannot, consistent with its own policies, revoke the organization's Class I status. On April 18, 2019, the complaint was transmitted to the Office of Administrative Law for disposition.

In lieu of an answer, Monroe Township Board of Education (Monroe or respondents) filed a motion to dismiss the petition, for "failure to state a claim upon which relief can be granted." (R. 4:6-2(e).) They argue that even accepting the alleged facts as true, the Commissioner does not have jurisdiction to grant the requested relief. The question is whether the Commissioner of Education has jurisdiction to investigate a board of education and declare if it would violate its own policies if it voted in a certain way on a hypothetical matter.

FACTUAL DISCUSSION

The following facts are not in dispute and as such **I FIND AS FACT** that parent organizations host fundraising activities for the benefit of a school's students and its staff. In Monroe Township Middle School, before 2018, there was one such organization, the Parent Teacher Organization (MTMS PTO). Petitioner Christine Skurbe served as its vice president before founding her own organization, Parent Staff Association (MTMS PSA), of which she is the president. Her organization submitted the necessary paperwork to the Monroe Board of Education and asked that it be recognized and granted Class I user status. In August 2018, the Board considered that request.

District Policy 9210 governs the Board's relationship with parent organizations. It promises that the Board "will encourage and support" such organizations "whose objectives are to promote the educational interests of district pupils." District employees are thus required to treat "representatives of recognized parent organizations" "as interested friends of the schools and as supporters of public education." The Board, however, "reserves the right to withdraw recognition from any parent organization whose actions are inimical to the interests of the pupils of the district."

Organizations and individuals that wish to use school facilities are designated as either Class I or Class II users. The Class I status comes with certain benefits. District Regulation 7510 provides that, as between the two classes, "Class I users will be given priority for the use of school facilities." Class I users also do not need to pay a "fee or charge for custodial and service (fuel, water, and electricity) costs," whereas Class II users must do so. Regulation 7510 lists the eligible Class I users, including Parent Teacher Organizations and Parent Teacher Associations.

On this subject, the Board was not of one mind. The Board's President, Kathleen Kolupanowich, took the position that it should not grant MTMS PSA Class I status because there should be only one parent organization in the school. (Ms. Skurbe later filed an ethics complaint against Ms. Kolupanowich, which was dismissed by the School Ethics Commission on December 19, 2018.) Other members, including Ken Chiarella, disagreed. He argued that because the organization met the definition of a Class I user

under Regulation 7510, it should be designated as such. The number of parent organizations, he submitted, is the principal's concern, not the Board's.

On August 22, 2018, a five-member majority voted to recognize MTMS PSA and grant it Class I user status. Three members voted against the motion and one abstained. Months later, at its January 26, 2019 meeting, Ms. Skurbe alleges that two of the dissenting members expressed their desire to hold a second vote. The Board's president and vice president, she claims, "made it clear that they are looking for the Board to take another vote to take away Class I status" because its fundraising success had adversely affected the other parent organization's success.

Believing that such a vote was imminent, Ms. Skurbe filed a Petition of Appeal with the Commissioner of Education on February 15, 2019, naming the Board and the three dissenting members as respondents. On this record, the Board has not voted to revoke the organization's Class I status.

LEGAL DISCUSSION

In her petition, Skurbe maintains that her organization has not violated the relevant Board policies, and as such, there is not a valid basis for board members to consider revoking its Class I status. She alleges, therefore, that their discussions were "clearly retaliation," and asks that the matter be "looked into," "investigated," and "stopped." Again, liberally construed, the petition requests that the Commissioner: (1) investigate board members for allegedly retaliatory conduct; and (2) declare that the Board cannot, consistent with its own policies, revoke the organization's Class I status.

However, even accepting all the alleged facts as true, the Commissioner does not have jurisdiction to grant the requested relief and as such, the petition should be dismissed in full.

The Commissioner has jurisdiction to "hear and determine" "all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. In this role, the Commissioner adjudicates disputes. The Commissioner can, among other things, review certain final

actions of a board of education to determine if it acted in an "arbitrary, capricious, or unreasonable manner."

But the power to adjudicate does not include the power to investigate. The Office of Controversies and Disputes, within the Department of Education, is not an investigative agency, and the Legislature has not granted the Commissioner investigatory powers. For this reason, the Commissioner cannot investigate individual board members for allegedly retaliatory conduct. Neither can the Commissioner declare that the Board would violate its own policies if it revoked the organization's Class I status.

This matter is not justiciable. The Commissioner does not "render advisory opinions or function in the abstract." Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971); Milano v. Franklin Twp. Bd. of Educ., EDU 6797-06, Final Decision (July 24, 2008), https://njlaw.rutgers.edu/collections/oal/.

Respondents argue that petitioner lacks standing. In New Jersey, a litigant has standing if her "concern with the subject matter evidenced a sufficient stake and real adverseness." Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). The antecedent question, however, is whether this matter is ripe. If it is not, then no person has standing to pursue it; in this way, these justiciability doctrines overlap. See Trombetta v. Mayor & Comm'rs of City of Atlantic City, 181 N.J. 203, 223 (Law Div. 1981), aff'd, 187 N.J. Super. 351 (App. Div. 1982) ("The standing question bears close affinity to questions of ripeness, that is, whether the harm asserted has matured sufficiently to warrant judicial intervention.").

The "ripeness" doctrine "protects against deciding issues before they are necessary." Brodie v. Saddle Brook Twp. Bd. of Educ., 93 N.J.A.R. 2d (EDU) 694. The two relevant factors are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." ibid (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967.) Legal issues are suitable for resolution if "the ruling or action complained of is final." Ibid (citing Abbott Laboratories, 387 U.S. at 149).

In Brodie, 93 N.J.A.R. 2d (EDU) 694, a resident challenged the Board's decision to close a school before the Department of Education had approved the closure. The ALJ and Commissioner agreed that because the challenged action was not final, the claim was not ripe for review. "Each time a public entity, or official, determines to pursue a course of conduct," the ALJ observed, it "does not immediately give rise to a litigable issue." "Only after the approval has been given is a 'school law dispute' ripe."

In this case, the Board has not voted to revoke the organization's Class I status. If it chooses to do so, at that time, Ms. Skurbe would be aggrieved by a final action of the Board and could properly challenge it. Before then, however, she has not suffered any harm and the matter is not ripe for review because the Commissioner's decision would amount to an "advisory opinion."

Respondents offer two additional arguments for dismissal. Both lack merit and neither needs to be addressed if the case is dismissed on ripeness grounds.

First, respondents cite Jordan v. Bd. of Educ., No. A-4420-14T1, 2017 N.J. Super. Unpub. LEXIS 1865 (App. Div. July 21, 2017), for the proposition that "there is no authority that would require a Board to be bound by its own policies."

That case involved the Board's decision not to renew the contract of a non-tenured guidance counselor. Id. at *1-2. It provided notice of that decision after the date required by its policy but before the date required by the relevant statute. Id. at *10-11. In an unpublished opinion, the court noted that fact without further comment. Ibid ("While the Board failed to comply with its own policy providing notice of re-employment by April 24, the Board's action remained in compliance with N.J.S.A. 18A:27-10, as plaintiff received notice prior to May 15.").

Thus, if Jordan stands for anything, it is for the modest proposition that a Board's failure to follow its policies may be excused if it otherwise complies with statutory mandates. It does not stand for the more sweeping proposition, however, that a Board may ignore its policies without consequence.

Second, respondents argue that the petition is untimely under N.J.A.C. 6A:3-1.3(i). Known as the "ninety-day" rule, it provides that a 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, that is the subject of the requested contested case hearing."

Respondents contend that all the claims raised in the petition relate to the Board's meeting on August 22, 2018. Measured from that date, the petition—filed on February 15, 2019—would be untimely. But petitioner is not challenging any action taken at that meeting, and for good reason: The Board voted to recognize her organization and grant it Class I status, which is exactly what she requested.

Her claim instead relates to the January 26, 2019, meeting where certain members discussed holding another vote to revoke the organization's Class I status. The problem with this claim is not that its untimely. It is instead that the Board did not take any final action that would even trigger the ninety days to file under N.J.A.C. 6A:3-1.3(i). That, as previously explained, is a ripeness problem.

I FIND AS FACT that there are no genuine issues of material fact requiring a hearing. For the foregoing reasons, **I CONLUDE** Monroe's motion to Dismiss is **GRANTED**.

Having **CONCLUDED** that respondent Board's motion to dismiss is **GRANTED**. It is hereby **ORDERED** that the petitioner's appeal be **DISMISSED**.

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

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

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

June 27, 2019
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 6-27-19

Date Mailed to Parties: 6-27-19

mph

189-19E

OAL Dkt. No. EDU 08804-19
Agency Dkt. No. 150-6/19

New Jersey Commissioner of Education

Order on Emergent Relief

Catherine Coyle,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent,

and

Jersey City Education Association,

Intervenor.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted.[2] This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/19
Date of Mailing: 7/22/19

[1] The petitioner's exceptions to the recommended Order were not considered because the regulatory provisions do not provide for exceptions to Orders on Emergent Relief. *N.J.A.C.* 1:1-18.4.

[2] Despite the ALJ dismissing this matter for lack of jurisdiction, the Commissioner notes that dispositive determinations of this nature cannot be made in an Order on Emergent Relief and would, instead, require the issuance of an Initial Decision. *N.J.S.A.* 1:1-18.1.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 08804-19
AGY REF NO. 150-6/19

CATHERINE COYLE
Petitioner
v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY
Respondent

JERSEY CITY EDUCATION ASSOCIATION,
Intervenor

Elizabeth M. Andes, Esq., for Petitioner (McAndrew Vuotto, attorneys)

Lawrence Bluestone, Esq., for Respondent (Genova Burns, attorneys)

Michael J. Gross, Esq., for Respondent (Kenney, Gross, Kovats & Parton, attorneys)

Raymond M. Baldino, Esq., for Intervenor, (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: July 3, 2019 Decided: July 9, 2019

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a Petition with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on June 28, 2019, to be heard on an emergent basis.

Petitioner requests a ruling declaring a Memorandum of Understanding (MOA) negotiated between the Respondent Board and the Jersey City Education Association (JCEA) was done contrary to law and should be declared null and void. Petitioner seeks on an emergent basis a temporary restraining order and preliminary injunction against the implementation of the MOA.

JCEA submitted a motion to intervene on July 2, 2019. Oral argument on the motion was held on July 3, 2019 prior to oral argument on the request for emergent relief. The motion to intervene was granted on the record on July 3, 2019. A written Order was also entered on July 3, 2019.

The application for emergent relief was heard on July 3, 2019. Petitioner was given to July 9, 2019 to submit a supplemental brief to address jurisdiction and potential remedies. No reply from Respondent or Intervenor was permitted. Petitioner submitted her supplemental brief on July 9, 2019, whereupon the record was closed.

FACTUAL BACKGROUND

The Respondent herein, the Jersey City Board of Education, negotiated a MOA with the JCEA. This collective bargaining agreement took effect on July 1, 2019. Petitioner filed her petition with the Commissioner on June 27, 2019. It was transferred to the OAL on June 28, 2019, to be heard on an emergent basis. Petitioner alleges certain violations of the School Ethics Act in that some members of the Respondent Board had conflicts with the JCEA and should not have been involved in the negotiation process.

Last year the JCEA went on strike. Thereafter the Board created a Standing Committee on Labor Negotiations to manage the same. Labor counsel for the Board conducted a conflict analysis to identify non-conflicted members for participation on the standing committee. Any agreement negotiated by the standing committee is subject to Board ratification.

The Board determined thereafter that a majority of the Board was conflicted from matters involving collective bargaining with the JCEA. The Board determined that it needed to invoke the Doctrine of Necessity. On three separate occasions the Board read a resolution adopting the doctrine. The resolution was re-adopted by the Board at its meeting on April 29, 2019. The Board then voted to approve the MOA.

The SEC provided an advisory opinion to the Board on June 3, 2019. The SEC, in said advisory opinion, did not invalidate the Board's adoption of the Doctrine of Necessity.

Petitioner, in her petition, alleges three causes of action; Board president Sudhan Thomas and vice president Lorenzo Richardson engaged in improper negotiations in violation of the common law and the School Ethics Act, N.J.S.A. 18A:12-24; the Board's invocation of the Doctrine of Necessity on March 7, March 28 and April 29, 2019 was defective and in violation of N.J.S.A. 18A:12-21; and, the Board violated the School Ethics Act by failing to obtain full Board approval before negotiating with the JCEA.

LEGAL ANALYSIS AND CONCLUSION

The threshold question in the instant matter is one of jurisdiction: Does the Commissioner, and therefore the OAL, have jurisdiction to consider the petition herein.

The Commissioner of the Department of Education has jurisdiction over disputes "arising under the school laws." N.J.S.A. 18A:6-9.

Should there be jurisdiction a second question arises: can the remedy of a temporary restraining order on the MOA, and the voiding of the MOA be granted.

The answers to both questions clearly is no. The Commissioner, and therefore the OAL, does not have jurisdiction as the claims set forth in the petition all hinge upon alleged violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. The proper venue for the within matter would be the School Ethics Commission (SEC). N.J.S.A. 18A:12-27.

Further, the SEC has no authority to grant the relief requested in the petition. The SEC may impose the following sanctions pursuant to N.J.S.A. 18A:12-29(c):

> Upon completion of the hearing, the commission, by majority vote, shall determine whether the conduct complained of constitutes a violation of this act, or in the case of a board member, this act or the code of ethics, or whether the complaint should be dismissed. If a violation is found, the commission shall, by majority vote, recommend to the commissioner the reprimand, censure, suspension, or removal of the school official found to have violated this act, or in the case of a board member, this act or the code of ethics. The commission shall state in writing its findings of fact and conclusions of law. The commissioner shall then act on the commission's recommendation regarding the sanction.

Further, should the Commissioner have jurisdiction on some other area of school law, which I cannot determine exists, there is no authority for the Commissioner under any area of school law that permits the issuance of a temporary restraining order or injunctive relief of the MOA, which is a collective bargaining agreement.

As stated in the Statement of the Case and Procedural History, the undersigned permitted Petitioner to submit a supplemental brief regarding jurisdiction and potential remedies. In her supplemental brief, submitted this date, Petitioner argues several areas that would allow for jurisdiction herein. All fail.

Initially, Petitioner argues that the Respondent Board is formed pursuant the School Law and is only authorized to act under the School Law. Petitioner further argues that much of what the Board does is done pursuant to the School Law. N.J.S.A. 18A:1-1 to 76-4. While this argument rings true, it avoids the real issue herein: The entire petition was brought under alleged violations of the School Ethics Act.

Petitioner then argues that the Commissioner, and therefore the OAL, has jurisdiction under the Transition Plan. The Transition Plan was issued by the New Jersey Board of Education after it transferred control of the schools of Jersey City back to the local Board of Education. Nothing contained in the Transition Plan provides jurisdiction to the Commissioner, and therefore the OAL, to hear a petition arising under the School Ethics Act.

Lastly, Petitioner claims the Commissioner has incidental jurisdiction as she alleges that the Respondent Board violated the Open Public Meetings Act for not properly noticing all its meetings pursuant to N.J.S.A. 10:4-9, and for not keeping all meetings open to the public at all times in violation of N.J.S.A. 10:4-12. Petitioner cites Gardner v. Board of Education of the City of Hackensack, Bergen County, OAL Dkt. No. EDU 09421-12, 2013 WL 2467918, at *6 (OAL May 1, 2013), citing Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184, 187 (App. Div. 1979).

It is important to note that Petitioner did not make any claim in the petition based upon a violation of the Open Public Meetings Act. To suggest she did assert such a claim is not accurate. In Gardner the incidental jurisdiction of the Commissioner is based upon a controversy under the school laws. In the instant matter there is a claim of jurisdiction under the School Ethics Act.

To the extent that Petitioner, in her supplemental brief, requests the opportunity to submit an amended pleading to allege a violation of the Open Public Meetings Act, it is **DENIED**.

As to Petitioner's arguments regarding the remedy requested in her petition, those arguments are generic and not based upon any statutory or case law that is relevant herein. Accordingly, they will not be addressed.

Having determined that there is no jurisdiction of the Commission to hear this matter, and therefore no jurisdiction for the OAL to hear it, the matter should be dismissed. However, as the issues presented in the petition were argued I will do an analysis under Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1.

The four factors ("the Factors"), include:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

As the following analysis will show, Petitioner has failed to establish any of the four elements to be successful. Petitioner asserts that she, and the other residents of Jersey City, will suffer irreparable harm from Respondent's failure to abide by the ethical rules governing conflicts of interest and failure to abide by the ordinary and proper procedural and substantive rules and law governing the negotiation of public collective bargaining agreements. No concrete harm, irreparable or otherwise, has been demonstrated. Further the harm argued is, at best, speculative, and therefore does not satisfy this element of Crowe.

The second element of Crowe is that the legal right underlying petitioner's claim is settled. While it may, or may not, be accurate that some members of the Board were conflicted and that the invocation of the doctrine of necessity was done improperly, a hearing on the same would be required. However, the relief requested is not within the powers of the Commissioner, and therefore, the OAL. Injunctive relief on a negotiated MOA cannot be granted in this venue. The proper venue is the Superior Court of New Jersey.

Further, the alleged breaches of the School Ethics Law by certain members of the Board should have properly been filed with the SEC.

Likewise, Petitioner has not demonstrated that there is a likelihood of success on the merits. The facts, as outlined in the petition and supporting affidavits, are hotly contested by Respondent. There is no showing in the moving papers, or at oral argument, that petitioner is likely to succeed. In fact, given the current facts as outlined in all the moving papers, it seems Respondent is more likely to prevail.

The last element of Crowe, 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, does not weigh in petitioner's favor. The MOA took effect on July 1, 2019. The Board and the JCEA negotiated the MOA over a lengthy period. To enjoin the agreement would, at this point, place the District budget in question and could quite possible effect individual's employment. Clearly, when the equities are balanced Respondent would suffer greater harm if the requested relief is granted.

Based upon the foregoing I **CONCLUDE** that petitioner's request for emergent relief be **DENIED**; and that the petition should be **DISMISSED** with prejudice as there is no jurisdiction to hear this matter.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED**; and, It is further **ORDERED**, as there is no jurisdiction to hear the underlying claim in the petition, that the petition is dismissed with prejudice.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended

order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 9, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency July 9, 2019

Date Mailed to Parties:

APPENDIX

List of Moving Papers

For Petitioner:

Petition

Affidavit of Matthew Schapiro with Exhibits A through O

Brief in support of application for temporary restraints and preliminary injunctive relief

For Respondent:

Letter brief addressing jurisdictional and procedural issues

Letter brief in opposition to emergent relief

For Intervenor:

Letter brief in opposition to emergent relief

190-19SEC

Agency Dkt. No. 163-7/19

New Jersey Commissioner of Education

Final Decision

In the Matter of Michael Gaimari,
Hopewell Township Board of Education,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed the training after the issuance of its May 3, 2019, Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/19
Date of Mailing: 7/22/19

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

Before the School Ethics Commission
Docket No.: T16-18
Decision for Failure to Complete Mandatory Training Requirement

I/M/O Michael Gaimari,
Hopewell Township Board of Education, Cumberland County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at a special meeting on May 2, 2019, and mailed on May 3, 2019, via regular and electronic mail, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC mailed on May 3, 2019, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of twenty (20) days, the Commission would proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33, and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in Hopewell Township, Cumberland County. As a result of his position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance IV training program by December 31, 2018.

On March 5, 2019, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2018, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent, and to his Business Administrator, from NJSBA. More specifically, an e-mail was sent to all board members about mandated training, including Respondent, on August 3, 2018, August 16, 2018, October 2, 2018, and February 13, 2019, reminding them of the annual training requirement and the December 31, 2018, deadline. On January 15, 2019, NJSBA sent an e-mail to

Respondent advising him that he had not completed Governance IV, and provided a link to the online training module.

Additional notifications were sent to the Hopewell Township School District's Business Administrator on November 29, 2018, December 20, 2018, December 28, 2018, January 8, 2019, January 18, 2019, January 29, 2019, and March 14, 2019, advising that, as of those dates, Respondent had not completed training. Notwithstanding all of these communications with Respondent and/or the Business Administrator for the Hopewell Township School District, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, on March 7, 2019, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2018. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County dated March 8, 2019, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 18, 2019, via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on May 3, 2019.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2018, and did not complete the training prior to the issuance of the Commission's OTSC. However, and after being served with the OTSC, Respondent completed his training requirement on May 13, 2019, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2018.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at a special meeting on June 19, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file

exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.*, within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 20, 2019

I hereby certify that this decision was duly adopted by the School Ethics Commission at a special meeting on June 19, 2019.

Kathryn A. Whalen, Director

Resolution Adopting Decision in Connection with T16-18

Whereas, Michael Gaimari, Respondent, is a board member on the Hopewell Township School District Board of Education; and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance IV training program by December 31, 2018; and

Whereas, at a special meeting on May 2, 2019, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2018, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement on May 13, 2019, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2018; and

Whereas, at a special meeting on June 19, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at a special meeting on June 19, 2019, the Commission recommended that the Commissioner of Education impose a penalty of **reprimand**; and

Whereas, at a special meeting on June 19, 2019, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on June 19, 2019.

Kathryn A. Whalen, Director

NEW JERSEY DEPARTMENT OF EDUCATION

Agency Docket No.: 57-3/19
Ralph H. Colflesh, Jr., Esq.
Arbitrator

IN THE MATTER of TENURE CHARGES AGAINST

JILL MARIA

by

THE LAWRENCE TOWNSHIP SCHOOL DISTRICT in the COUNTY OF MERCER

Appearances
For the District:
Jeffrey R. Caccese, Esq.
Comegno Law Group
Moorestown, New Jersey
For Jill Maria:
Edward Cridge, Esq.
Melk & O'Neill
Hopewell, New Jersey

DECISION AND AWARD

Pursuant to NJSA 18A:6-16 the undersigned Arbitrator was appointed to hear and determine the above captioned matter which was appealed to arbitration by Jill Maria ("Ms. Maria") after the Lawrence Township School District Board of Education ("the District" or "the Board") terminated her for reasons of law.

A hearing was conducted on May 13, 2019 in the offices of the District, Lawrence, New Jersey. At that time and place, both parties had an opportunity to call and confront witnesses and

produce non-testimonial evidence. There being no procedural objections material to the case, this matter is ready for adjudication on its merits.

Background:

There are no disputed facts in this matter. Ms. Maria was hired as a special education teacher by the District (NT 71), and she was granted tenure on or about September 1, 2005. She has taught sixth grade special education the last three years at the Lawrence Township Intermediate School. On December 18, 2018 she was placed on administrative leave after the District was told she had been arrested. Although Ms. Maria had not informed the District of her arrest, the District believed reporting was required by law. At the time she was placed on leave she had only taught for about two months in the 2017-2018 school year, having returned from an approved leave of absence to attend her son's severe disabilities which include cerebral palsy. (NT 73).

By her own admission Ms. Maria had been arrested on or around January 7, 2017 in Pennsylvania. (NT 25 74). It is uncontroverted that the District has a policy requiring teachers to report arrests. (NT 51; BX 7) and that Ms. Ms. Maria had signed for receipt or knowledge of the policy. (NT 99-100). However, at hearing she explained she did not believe a report was necessary and that to avoid possible loss of her job she followed her criminal attorney's advice and accepted a plea agreement on August 7, 2018 (NT 74, 75). The plea agreement was also not reported.

Unfortunately, on December 3, 2018 Ms. Maria was stopped again by police in Pennsylvania, this time for a traffic violation. (NT 76). After being stopped, she was detained for a violation of her earlier plea agreement that required her to meet with her probation officer as scheduled. *(Id.)*. That failure had prompted a bench warrant for her arrest. (NT 78). Although the bench warrant was only discovered by police after they did a look up (NT 82), it was also found that Ms. Maria was driving on a suspended license. (NT 84).

Ms. Maria was released from jail the following morning. *(Id.)*. She did not report this arrest to the District, either. (NT 89). As with her first arrest, Ms. Maria explained her failure was due to the fear that if she reported the incident arrest, she would be fired. (NT 89).

Ms. Maria's legal difficulties eventually reached Sean Fry ("Mr. Fry")), the District's Director of Personnel and Administrative Services, who was informed in early December 2018 by Ms. Maria's principal. (NT 17). After contacting both the District's Superintendent and the leadership of Ms. Maria's union (NT 17), Mr. Fry met with Ms. Maria, a union representative named Lori Boggs ("Boggs), and Ms. Maria's principal, Cindy Westhead ("Westhead") on December 19, 2018. (NT 19). After a very brief time with Mr. Fry, the latter three left his office. Boggs soon returned with Ms. Maria and announced the latter would not be answering any questions at that time, but wanted the opportunity to consult with legal counsel. (NT 21; 41, 42) Apparently undeterred, Mr. Fry told Ms. Maria he needed her to tell him if she had recently been arrested and if there were any prior arrests that she had not reported. (NT 21, 23). Mr. Fry told Ms. Maria that if she did not answer he would suspend her. When Ms. Maria continued to refuse (NT 23)[1], Mr. Fry notified her she was suspended with pay, pending the District's investigation. (NT 22; BX 2). He further agreed to meet her request and schedule a second meeting to which she could bring representation. (NT 44). Despite a written assurance from Mr. Fry, that meeting never was scheduled. (NT 44; 53; 55).

The District's review of Ms. Maria's arrest and court records disclosed she had been arrested on January 7, 2017 and agreed to a plea arrangement for simple assault. Additional charges of unlawfully possessing a controlled substance, use or possession of drug paraphernalia, and harassment were not prosecuted. (NT 25; BX 3). The District also examined and took into consideration certain letters of discipline critical of her in-school conduct that were in Ms. Maria's personnel file (NT 31-32, 35, 37; BX 6). Contemporaneous with those letters and at all times of record, Ms. Maria' annual evaluations and performance reports all documented satisfactory or proficient work (NT 40; RX 1-17), and the record discloses no issue with Ms. Maria's care for student safety or any complaints from parents about her in-school performance. (NT 65-66).

Nevertheless, once Mr. Fry had confirmed her arrests, the instant tenure charges were filed with the Board.

[1] At hearing, Ms. Maria testified that she had been advised not to answer Mr. Fry's questions by her Union representatives. (NT 91).

The Tenure Charges Brought by the Board:

The District brought three charges against Ms. Maria's tenure status on February 22, 2019 based on three grounds provided in NJSA 18A: 6-10:

1. Other Just Cause for tenure removal because Ms. Maria failed to report her arrest and conviction for the 2017 offense and, by the District's information and belief, also failed to report her 2018 detention as required by law;
2. Conduct Unbecoming by (a) being insubordinate in refusing to answer Mr. Fry's questions on December 19, 2918; (b) having a prior disciplinary history that included insubordinate conduct with the District;, and, (c) being untrustworthy in regard to her obligation to be truthful and her overall professional judgment.
3. Incapacity by virtue of the previously stated acts of nonfeasance and malfeasance.

On March 13, 2019 the Board upheld the Charges and suspended Ms. Maria without pay, pursuant to NJSA 18A: 6-14. On March 18, 2019 the Board delivered the Charges, with a related Statement of Evidence, a Certificate of Determination, and Proof of Service upon Ms. Maria to the New Jersey Department of Education, Office of Controversies and Disputes. On March 27, 2019 Ms. Maria's counsel filed an Answer to the charges with the Office, and on April 8, 2019 the Office notified all parties that the Charges and Statement of Evidence were enough, if true, to warrant dismissal or reduction in salary, subject to the determination of the undersigned.

Arguments of the District:

The District begins by characterizing tenure as a measure designed to protect against arbitrary dismissal rather than a fortress that defies termination for all but extremely serious infractions. *Spiewak v. Rutherford Bd. of Educ.*, 90 NJ 63, 73 (1982). In no way was tenure intended to protect staff from improper performance, according to the Board. *In re Tenure Hearing of Giglio,* EDU 11457-2003, Initial Decision (August 9, 2004). In the instant case, the

Board argues, the removal of Ms. Maria's tenure is founded upon her failure to report an arrest, conviction, and sentence---and on her insubordination, poor judgment and deceit.

Turning to its charge of unbecoming conduct, the District recognizes it is an elastic term that includes behavior which tends to destroy public respect for public employees and confidence in public services. *Giglio, supra*; *Karins v. Atlantic City*, 152 NJ 532, 554 (1998), The Board claims that no particularized rule needs to be violated for unbecoming conduct to be found. Rather, unbecoming conduct occurs when implicit standards of good behavior are violated by one who is supposed to observe best practices and behavior as a function of his or her office. (*Id.*, citing *Hartman v. Police Dep't. of Ridgewood*, 258 N.J. Super. 32, 40 (App Div. 1992).

In this case, the Board says that Ms. Maria violated NJAC 6A:9B-4.3 (c) (1) which expressly requires teachers to inform districts of their arrests within fourteen days of the occurrence, and any disposition within seven days. NJAC 6A: 9B-4.3 (c)(2). Failure to comply with either directive is just cause for revocation of certification. NJAC 6A:9B-4.3(c).

The Board points out that such failure has been found to constitute conduct unbecoming even when, as in this case, there was evidence the accused did not know of the reporting obligation. *In the Matter of the Tenure Hearing of Bessellieu*, (EDU 4766-12, Initial Decision (December 3. 2011), *modified on other grounds*, Comm., (January 15, 2013). The same is true, the District points out, even where there is evidence that the employee did not believe an arrest had been effectuated. *In the Matter of Tenure Hearing of Guarni*, EDU 08705-06, Initial Decision (June 5, 2007), *adopted,* Comm. (July 23, 2007). And, even failure to report on the advice of counsel has been found a violation of the regulations. *Fikentscher v. Ramapo College*, HEC 03339-09, Initial Decision (Dec. 14, 2009).

In Ms. Maria's case, she raised no such defenses. Instead, she said she had gotten the District's policy requiring compliance with the regulations, was aware she had been arrested, and remained silent not on the advice of an attorney but because she feared for her job.

The District's next charge, insubordination, is substantiated the District says, on two factual grounds, both of which amount to just cause for tenure removal under NJAC 6A:9B-4.3(c). *Guarini, supra*; *Bessellieu, supra*; *Fikentscher, supra*. The District points out that no overt disrespect or disobedience is necessary for a finding of insubordination, *Tenure Hearing of*

Duran, EDU 6754-06 and EDU 6957-06, Initial Decision (May 17, 2007), *adopted*, Comm., (July 5, 2007) and that a simple non-compliance with regulations or lawful orders constitutes insubordination. *In the Matter of the Tenure Hearing of Toorzani*, EDU09713-11 Initial Decision, (December 28, 2011), *adopted* (February 9, 2012). Consequently, the District argues, Ms. Maria's failure to report her arrests, although passive in nature, were acts of insubordination.

Similarly, however, the District notes that Ms. Maria engaged in active insubordination when she refused Mr. Fry's instruction at their December 19, 2018 meeting to admit or deny she had been arrested. The District cites *Bessellieu, supra*, for the proposition that advice from her union representative not to answer cannot protect Ms. Maria from a finding of insubordination. The fact is, the, District says, she admittedly did not report her arrests out of concern that she would lose her job and even her claim that she was uncertain about the status of her detention in 2018 is insufficient to excuse her for not obeying Mr. Fry's command. *Guarni, supra.*

Finally, the District asserts, Ms. Maria's conduct has proven an incapacity to serve as a teacher and therefore should her tenure should be revoked. Although the status of incapacity is not precisely defined, *In re Grossman*, 127 NJ Super. 13, 28 (App. Div. 1974), the District says the term should be given a reasonable and sensible interpretation and considered in conjunction with just cause for tenure removal. *Grossman, supra.* Among factors to be considered in weighing incapacity is the effect a teacher's presence in the classroom might have on students. The District holds that Ms. Maria's arrest, the fact of her non-disclosure, her insubordination, *Grossman, supra*, and her failure to tell the truth when asked renders her incapable of being a trusted classroom presence.

Moreover, the District would have entries in her disciplinary file reinforce the notion of her incapacity to work as a teacher because those entries—which Ms. Maria admittedly did not contest—make reference to her "poor judgment," "issues of insubordination [and] leaving students and the school grounds." These notations, the District argues, affirm the view that Ms. Maria simply lacks the capacity to be an education employee.

In light of the foregoing, the District contends that removal is the only appropriate response. The District asserts there is evidence Ms. Maria cannot be rehabilitated and that her present conduct is so serious as to merit termination. *In re Hermann*, 192 NJ 19, 33 (2007)

("progressive discipline is not a necessary consideration...when the misconduct is severe, when it is unbecoming to the employee's position, or when application of the principle would be contrary to the public interest"); *In re Stallworth*, 208 NJ 182, 196-197 (2011). The District again points to the four letters of discipline in Ms. Maria's file, this time as evidence that the District had imposed progressive discipline in the form of written warnings or counselings, all of which put Ms. Maria on notice that she had to conform to all of the District's directives and policies. Those progressive measures put her on notice that the District would not tolerate non-compliance with its lawful requirements, thus serving the purposes of progressive discipline which are to admonish and offer an opportunity for reform. That having occurred, the District reasons, there is no place for any penalty here but removal.

Arguments of Ms. Maria:

Countering the District's position that tenure can be lost for less than the gravest failings, Ms. Maria emphasizes that tenure can *only* be removed for inefficiency, incapacity, unbecoming conduct, or other just cause, NJAS 18:A6-10, and these must be found by a preponderance of competent, credible evidence. *Atkinson v. Parkesian*, 37 N.J. 143, 149 (1962). There being no record nor charge of inefficiency, Ms. Maria focuses on the District's reliance on unbecoming conduct and insists that before such a finding can be entered, a tribunal must examine the nature and gravity of the alleged offense, the impact of the offense on the teacher's career, any extenuating or aggravating circumstances, and the harm the conduct may have had on the administration of the teacher's district. *In re Falcomer*, 93 NJ Super. 404, 422 (App. Div.1967). Where unbecoming conduct is discerned, the penalty must turn on whether the teacher can continue working without harm to the operation of the school district. *Grossman, supra*; *In re Young,* 202 NJ 50, 66 (2010). The decision on all these matters is for the trial tribunal "de novo", Ms. Maria avers, without deference to the Board's own findings contained in its Statement of Evidence.

Ms. Maria also urges the application of progressive discipline, a concept she cites as having been approved both administratively and judicially. *West New York v. Bock*, 38 N.J. 500 (1962); *IMO Tenure Hearing of Owen Newson, State Operated School District, City of Newark*,, DOE Dkt. No. 276-9/12; *In re Arnold Borero, City of Newark*, 2009 WL 3816616 (NJ Admin).

Here, Ms. Maria observes, the District has adopted progressive discipline in its own policies. (RX 20).

Continuing on that theme, Ms. Maria cites a number of decisions where teachers were not stripped of their tenure even in cases of flagrant misbehavior such as striking pupils, *Boyd, supra;* utterance of racially insensitive remarks, *IMO the Tenure Hearing of George Mamunes, Pascaack Valley Regional School District,* Comm. Of Ed. Dec. No. 208-00; *In the Matter of the Tenure Hearing of Barbara Emri,* Comm. Of Ed. Dec. No 371-02; reference to a parent in front of a class as a "dyke," *IMO the Tenure Hearing of Poston,* Comm. Of Ed. Dec. No. 362-06; displays of temper, *IMO Tenure Hearing of Adam Mierzwa*, Comm. Of Ed. Dec. No. 283-08; *IMO Tenure Arbitration of Richard Vicenti*, DOE DKT. No. 255-14; sexually inappropriate discussions or words, *IMO Tenure Hearing of Kimberlh Geurds*, Comm. Of Ed. Dec. No. 267-10 *IMO Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, Comm of Ed. Dec. No. 96-00; leaving pupils unattended, *IMO Tenure Hearing of Victoria Jakubiak*, Comm. Of Ed. Dec. No. 33-99; *IMO Tenure Hearing of Carmen Quinones*, 1996 NJAR 2d (EDU) 649).

Ms. Maria especially focuses on *IMO Tenure Hearing of Martin Lieb, School District of the Town of West Orange, Essex County,* 1985 SLD 933 where a teacher was not removed after a conviction for lewd conduct and *IMO Tenure Removal Hearing of Brenda Bruni*, NJ DOE No. 207-9/17 where a teacher was arrested for possession of drug paraphernalia.

Finally, turning to incapacity, Ms. Maria argues that charge is restricted to an inability to perform and not to situations in which a district simply claims the teacher is unwanted or unsatisfactory. There is no evidence she is incapable of teaching; in fact, Ms. Maria says, the collection of observations and annual evaluations in evidence speaks loudly to her competence. (RX 1-17). Turning to the four letters of reprimand in her file, Ms. Maria notes their exclusion from the record in terms of proof of what they assert and the absence of any testimony about the events underlying their issuance as well as the lack of any further discipline based on their alleged events. In all years of record, she emphasizes, she received satisfactory or proficient summative evaluations.

Turning more specifically to the charges, Ms. Maria concedes only her <u>failure to report</u> one arrest, in contravention of NJAC 6A: 9B-4(3). She underscores that the regulations merely provide that such a failure "*may* be deemed just cause." NJCA 6A:9B-4.4, a clear indication that a tribunal is free to ignore a district's decision to terminate an employee for such a failure.

Although she admits she did not report her 2017 arrest, she argues the arrest, which occurred in Pennsylvania, had no nexus with her work as a New Jersey teacher and should be seriously discounted in importance.

As for her second encounter with Pennsylvania police, in December 2018, Ms. Maria characterizes that as a detainment—not an arrest--because she had not complied with a term of her probation and therefore had become the subject of a bench warrant. Despite being taken into custody and jailed for several hours before being released the next day, Ms. Maria argues there was no arrest—within the meaning of the regulation—to report. Of note, she maintains, there was no criminal complaint lodged against her that precipitated the 2018 jailing, and therefore the incident was outside the reporting requirements of NJAC 6A:9B-4.3 (c) which requires reporting of arrests "for any crime or offense."

Addressing the charge of insubordination, Ms. Maria says that although she was not prepared to speak to Mr. Fry at their meeting on December 19, 2018, she asked him for a second meeting that day and was assured that a second meeting would be arranged at which she would have counsel. (BX 2). Instead, she was charged and suspended without pay without being given a chance to speak again with anyone in the District since the second meeting was never conducted. Further, Ms. Maria sees Mr. Fry's representation of a second meeting as a form of condonation of her silence on December 19, 2018, a silence she says she was prepared to break at their second meeting. She argues she cannot be found to be insubordinate as to her refusal to answer Mr. Fry's inquiries on December 19, 2018 when he gave the clear indication a second meeting would be conducted.

Denying the incapacity charge, Ms. Maria points out that the only ground for that accusation is her failure to report as required by NJAC 6A:9B-4.3 (c). That failure, even if upheld by the undersigned, she reasons, does not render her in any fashion incapacitated from serving the District's students. The District's attempts to buttress this charge with inadmissible letters of reprimand from her personnel file fail because the District never claimed the contents of the letter, if true, touched on her capacity to teach.

Lastly, Ms. Maria returns to the *Fulcomer* case to argue that it presents "factors" which must be considered before a teacher is terminated for a disciplinary infraction. The first factor is the gravity of the teacher's offense, a quality that is missing here, Ms. Maria argues, because there was no harm done to the District by her failure to report and nothing about that failure that would threaten the operation of the District. Second, under the *Falcomer* analysis for the sufficiency of just cause, the impact of the offense on the District and on the teacher's career should be weighed. Ms. Maria says her failure should have no impact on the District but termination would destroy her ability to work in her profession, possibly leading to the suspension or revocation of teaching certificates by the State. In addition, she would be ineligible to benefit from pension contributions made by or obligated from the State. Third, as held in *Falcumer*, there is an extenuating circumstance that influenced her decision not to report her 2017 arrest and that was the humiliation and shame she would surely suffer and her fear she would lose her job. Additionally, Ms. Maria continues to claim she did not know of the District's reporting requirement or the regulations mandating the same. Fourth, Falcomer requires an examination of the impact the teacher's delinquency had on the district. Here,Ms. Maria contends, her failure to report had absolutely no effect on the operation of the District and the District has offered no proof that it had.

Opinion:

My review of the record convinces me this case turns on only one of the District's charges, *viz,* that Ms. Maria was guilty of unbecoming conduct by failing to report her arrest on January 7, 2017[2] *and* her arrest on December 18, 2018. Further, it is also clear that pursuant to her earlier arrest, she had not reported her entry of plea and sentence of 24- months probationary supervision to the District. As recited above, the failure to report arrests and disposition of criminal charges is a violation of NJAC 6A:9B-4.3 (c) (1), and the failure to report an arrest *may* be grounds for termination according to NJAC 6A: 9B-4.4.

[2] At the time the Charges were drawn, the District only had information and belief that the January 7, 2017 arrest had occurred. The record amply demonstrates that it did in fact occur, and I believe the Charges can be read as incorporating the failure to report that arrest and disposition of charges on which the arrest was made as an fact in this proceeding.

There is no question that she did not report either arrest, and that she knew she was to report at least the first arrest and disposition.

The responsibilities attending Ms. Maria's second arrest are not as glaringly obvious but only because it was pursuant to a bench warrant issued for her failure to appear as scheduled before her probation officer. Although Ms. Maria refers to the December 18, 2018 incident as a detainment, it had both the hallmarks of and justification for an arrest because the existence of a bench warrant required police to arrest her. Moreover, she was held in a cell for at least several hours after being taken into custody. It is difficult to consider this incident as something less than an arrest within the meaning of NJAC 6A:9B-4.3(c) (1) and having observed Ms. Maria's testimony at hearing I am persuaded she is more than smart and knowledgeable enough to know she had, in fact, been arrested.

As for the District's other charges of conduct unbecoming and incapacity, there is nothing in the record to support either as an independent or even related cause for her termination.

The unbecoming conduct allegation is explained in the Board's charges as insubordination, an offense which the Board correctly argues does not necessarily have to include a direct, personal, and public refusal to follow orders. Yet the very fact that the concept of insubordination exists indicates it is a separate offense from others and cannot be sustained solely because a rule has been violated. Moreover, aside from the failure to report her arrests, the District rests its insubordination charge on four disciplinary notices placed in her record. Yet no competent admissible evidence was presented as to the underlying complaints in the notices. It is hornbook law that although hearsay and other evidence that would be inadmissible before a court can be admitted for limited purposes in administrative proceedings, such evidence cannot be considered when offered to prove a dispositive fact. Here, the District attempts to not only prove a dispositive fact but attempts to then extend that fact to the conclusion that Ms. Maria is deceptive, lacks professional judgment, and is an untrustworthy guardian of children. This conflation is unreasonable even were the letters of reprimand admitted. This is especially obvious considering that in each school year in which the letters were filed the District evaluated her as satisfactory or efficient and refrained from withholding a salary increment.

The other branch of the District's insubordination charge is Ms. Maria's failure to respond to Mr. Fry's question at their meeting on December 19, 2018. I fully concur with the District that Mr. Fry had a right (and obligation) to question Ms. Maria, and she had a responsibility to answer him. However, given that her failure to answer at that time was insubordinate, that fault was immediately expiated when Mr. Fry agreed to re-schedule the meeting so Ms. Maria could confer with and be accompanied by counsel before answering his questions. This certainly signals a strong implication that she could defer answering. Having suspended her with pay, Mr. Fry would be expected to schedule the next meeting, but that was never done. To have implied Ms. Maria had a chance to answer later and then not give her that chance, the District cannot be heard to accuse her of insubordination for not answering on December 19.

Similarly, the incapacity charge is meritless. Like insubordination, incapacity has a special meaning and is generally restricted to situations in which a teacher cannot perform because of physical limitations, confinement, or legal restraints on performance such as a loss of licensure. As with the insubordination charge, the incapacity complaint is a conflation of Ms. Maria's failure to report her arrests and disposition with the letters of reprimand in her file, and the incapacity charge must fall for the same reason as the insubordination charge.

That leaves the question of what penalty is appropriate for failing to report the two arrests and disposition. At hearing I resisted efforts by the District's counsel to explore the underlying causes of Ms. Maria's arrests, fearing that inquiries into them would distract from the essential question of her guilt or innocence on the precise charges brought by the Board against her tenure. At this juncture, however, it is necessary to refer to those charges for the very reason District counsel so eloquently urged their consideration at hearing.

As District counsel argued, the public policy behind the arrest and disposition regulation is the need to know behavioral tendencies that might render public school employees unsuited for their positions. This is of utmost importance given the nature of pupil-teacher relationships and responsibilities teachers have for their students. Having entered the teaching profession, teachers take on a willingness to have their out-of-school conduct examined where there is

evidence of some wrongdoing. This is not a gratuitous extension of control over out-of-school life; it is necessary safeguard when alarms are sounded.

Arrests are such alarms, and although a district has no right to suspend or terminate simply based on an arrest, the fact of arrest alerts a district to possible jeopardy and justifies an inquiry into the basis for the arrest. A district cannot fulfill this responsibility without knowledge the arrest has occurred. Thus, NJAC 6A:9B-4.3 (c) (1) was adopted and NJAC 6A:9B-4.4 provides enforcement for failure to comply with the former regulation and provides a district *may* deem a failure to report as just cause for tenure removal.

The question is whether such removal is justified in this case. At this point, I think not, based on the totality of the circumstances and the guidance provided under *Fulcomer, supra.*

The circumstances are gleaned from the reports of Ms. Maria's arrests and disposition of the first one. That arrest was for a number of charges, all but one—simple assault—having been dropped by the Commonwealth of Pennsylvania.

The nature of the 2017 assault charge is not of record, but a sentence of 24 months reporting probation strongly suggests that the underlying conduct was not of a serious nature. The second arrest was on a bench warrant for not complying with the terms of her probation to which she had agreed in connection with her first arrest. That non-compliance consisted of Ms. Maria's failure to meet with her probation officer at an appointed time.

There is no suggestion in the record that either the first or second arrest was for conduct that involved children. However, as stated above, the District had a right to know the nature of Ms. Maria's assault charge so that it could properly evaluate her continuation as a teacher and—if necessary—bring charges against her based on what it found.

Application of the *Fulcomer* factors guide my application of the above circumstances to the question of removal. Two of the four factors clearly favor dismissal: (1) the nature and gravity of the offense and (2) the harm or injurious effect the conduct may have had on the District. As explained above, the failure to disclose the first arrest denied the District a timely opportunity to investigate the bases for the arrest. That denial was serious given the District's responsibility for the safety of its youngsters and vigilance over inclinations that might make staff members unqualified to care for pupils. The other two *Fulcomer* factors weigh against dismissal because I find Ms. Maria's long and evidently acceptable service to the District an

important mitigating factor and further find dismissal to pose an absolutely destructive effect on her career and future employment opportunities.

Based on the foregoing considerations of the charges presented to the Commissioner, I do not find that Ms. Maria's tenure should not be removed on the charges as written, notwithstanding her unacceptable failure to report her arrests and probation status. Instead, she should be reinstated without backpay or benefits as of the first day similarly situated staff members are to report for the 2019-2010 school year. Further, upon her return to service whatever yearly increment would be owed her for service in the 2019-2020 school year shall be withheld.

Nothing herein should be construed as denying the District the right to bring charges based on unbecoming conduct grounded in the conduct that led to Ms. Maria's arrest in January 2017. That conduct was not the subject of the instant charges, most likely because Ms. Maria refused to disclose it when questioned in December 2018, and the District's desire to promptly act on that refusal and the other allegations presented in the above charges.

Award:

Ms. Maria's tenure shall not be removed on the charges presented to the Commissioner. She should be regarded as having been suspended without pay or benefits until the first day of the 2019-2020 school year on which similarly situated staff are to report. At that time she shall be reinstated without backpay or benefits and whatever yearly increment would be owed her for service in the 2019-2020 school year shall be withheld.

7/22/19

Ralph H. Colflesh, Jr., Esq. (digital signature)
Ralph H. Colflesh, Jr., Esq.

DONNA J SAUNDERS
Notary Public
State of New Jersey
My Commission Expires Mar 6, 2021

197-19LM

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July 26, 2019

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Re: *K.K-M. on behalf of minor children A.W. and R.M. v. Board of Education of the City of Gloucester, Camden County, OAL Dkt. No. EDU 2505-18; Agency Dkt. No. 18-1/18; Commissioner Decision No. 305-18.*

Dear Counsel:

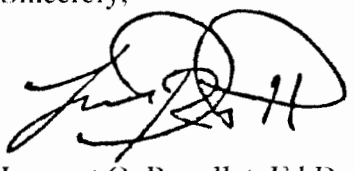
I have reviewed the materials filed in connection with petitioner's July 1, 2019 motion to stay the Commissioner's October 4, 2018 decision in the above-captioned matter. In the October 4, 2018 decision, I found that A.W. and R.M. were not entitled to attend school in the Gloucester City School District. Upon review of the parties' submissions, I find that the petitioner has not satisfied the criteria necessary to warrant a stay of the October 4, 2018 decision.

Under *N.J.A.C.* 6A:3-1.15(a), "[a]ny party may make a motion for stay of a Commissioner's decision pending an appeal to the Appellate Division of the Superior Court. Such motion shall be made subsequent to, or concurrent with, the filing of a notice of appeal with the court, but within 45 days of the filing of the Commissioner's decision." Here, the petitioner filed her motion for a stay almost nine months after the October 4, 2018 decision.

Moreover, pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted: where necessary to prevent irreparable harm; where the legal right underlying the movant's claim is settled; where there is a likelihood of success on the merits; and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134. In the submissions filed by the petitioner in support of the stay request, the petitioner failed to address any of the *Crowe* standards. Instead the petitioner cited to the fact that there are numerous issues pending on appeal before several different judicial forums, and that a stay would have public policy benefits.

Therefore, I find that the motion for a stay was untimely filed and that the *Crowe* factors necessary for the granting of a stay were not established by the petitioner. Accordingly, the petitioner's request for a stay of the October 4, 2018 decision is hereby DENIED.[1]

Sincerely,



Lamont O. Repollet, Ed.D
Commissioner

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[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

198-19

New Jersey Commissioner of Education

Final Decision

Tamaika DeFalco,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner, a tenured Spanish teacher employed by the Hamilton Township Board of Education (Board), appealed the Board's determination that she had committed an act of harassment, intimidation and bullying (HIB) pursuant to the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board found that petitioner committed HIB against a student classified to receive special education services when, in the presence of other students and an in-class aide in her Spanish class, she inappropriately directed the classified student to visit the child study team or guidance office if he was unable or unwilling to perform work in her class. Petitioner requested that the Commissioner enter an order vacating the Board's determination of HIB. The Board contended that it acted in a reasonable manner, and that – under the legal standard governing the Commissioner's review of the action of a local school board entrusted to determine HIB matters – its action was not arbitrary, capricious or unreasonable. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: petitioner's argument that the Board failed to provide her with due process because she had no opportunity to cross examine witnesses relied upon by the Board when deciding she had committed an act of HIB, is without merit as – pursuant to the Act – due process in an HIB inquiry does not require a full evidentiary hearing before the Board or the ability to cross examine witnesses; petitioner admitted that she made statements to a classified student in her class, directing him to visit the child study team, caseworker, or In-School Alternative Program; this statement was made in front of the class and had the distinct capacity to point out to the other students the actual or perceived characteristic of the classified student's mental or sensory disability; petitioner knew, or should have known, that her comments would have the effect of 1) placing the student in reasonable fear of emotional harm, 2) insulting or demeaning him, and 3) creating a hostile educational environment. The ALJ concluded that the Board's determination that petitioner committed an act of HIB was not arbitrary, capricious or unreasonable. Accordingly, the petition was dismissed.

Upon review, and finding the petitioner's exceptions to be unpersuasive, the Commissioner concurred with the ALJ's findings and conclusions in this matter. Accordingly, the Initial Decision of the OAL was adopted as the final decision for the reasons well stated therein. The petition was dismissed.

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

July 26, 2019

198-19

OAL Dkt. No. EDU 2365-18
Agency Dkt. No. 9-1/18

New Jersey Commissioner of Education

Final Decision

Tamaika DeFalco,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) been reviewed and considered, as have the exceptions filed by the petitioner, Tamaika DeFalco, pursuant to *N.J.A.C.* 1:1-18.4. The respondent, the Hamilton Township Board of Education (Board), did not file a reply.

This matter concerns an allegation of harassment, intimidation, and bullying (HIB) committed by a teacher against a student. The Administrative Law Judge (ALJ) found that due process in an HIB inquiry does not require that a staff member be afforded a full evidentiary hearing before the Board or the ability to cross examine witnesses. Regarding the substance of the allegation, the ALJ noted that petitioner admitted she made statements to a classified student in her class, directing him to visit the child study team, caseworker, or the In-School Alternative Program; such a statement, made in front of the class, had the distinct capacity to point out to the other students the actual or perceived characteristic of the classified student's mental or sensory disability. The ALJ found that the petitioner knew, or should have known, that her comments would have the effect of 1) placing the student in reasonable fear of emotional harm, 2) insulting or demeaning him, and

3) creating a hostile educational environment for him. As such, the ALJ found that the Board's determination that the petitioner committed an act of HIB was neither arbitrary nor capricious.

In her exceptions, the petitioner argues that a finding of HIB mandates constitutionally adequate due process protections, including the right to cross examine witnesses. The petitioner contends that the HIB finding constitutes a "badge of infamy" accompanied by "enormous reputational loss." The petitioner cites to *Matter of Allegations of Sexual Abuse at East Park High School*, 314 *N.J. Super.* 149 (App. Div. 1998) for the proposition that allegations against a teacher must be the subject of a hearing in which the teacher has the opportunity to challenge evidence, cross examine witnesses, and present evidence of her own. The petitioner argues that although boards of education are not required to conduct plenary hearings regarding HIB allegations, such a hearing must be available – at the Office of Administrative Law (OAL) – before a final order becomes effective. The petitioner claims that because no such hearing was conducted by the ALJ, the Initial Decision must be rejected.

Next, the petitioner contends that the standard for HIB findings against teachers is a preponderance of the evidence, rather than the arbitrary and capricious standard applied to HIB findings against students. The petitioner claims that the Board stands in a different role in relation to its teachers than it does to its students, and that teachers are subject to reputational loss, direct employment consequences, and the potential foreclosure of future employment opportunities, while students are afforded confidentiality protections under federal and state privacy laws and cannot be denied access to a free an appropriate public education as the result of an HIB finding. As such, according to petitioner, review of an HIB allegation against a teacher under an arbitrary and capricious standard is constitutionally inadequate.

Finally, the petitioner argues that there is a significant factual dispute as to whether her statements fell within the acceptable scope of the student-teacher relationship. The petitioner cites to *S.A. and C.A. o/b/o G.A. v. Moorestown Bd. of Ed.*, Commissioner Decision No. 125-18,

decided April 23, 2018, in which the Commissioner found that a teacher's conduct – checking a classified student's work and test scores in the presence of other students – was not motivated by the student's status as a special education student and was a required part of her job as a special education teacher. The petitioner claims that the limited scope of the Initial Decision's review improperly foreclosed inquiry into the details of how a teacher should assist a student in accessing special education services.

Upon review, the Commissioner concurs with the ALJ that the Board's procedures, as applied in this case, complied with the due process requirements of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, and that the Board's determination that the petitioner had committed an act of HIB was not arbitrary, capricious, or unreasonable.

The Commissioner has previously addressed the question of the nature of a board of education's hearing regarding an HIB allegation and concluded that the Act does not require trial-type adversary proceedings. *L.K. and T.K., obo A.K. v. Mansfield Bd. of Educ.*, Commissioner Decision No. 107-19 (April 22, 2019). The Act provides that "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." *N.J.S.A.* 18A:37-15(b)(6)(d). Provisions for discovery, cross-examination, or other procedures more judicial in nature could have been included by the Legislature in the Act, but were not, and the Commissioner declines to require such procedures when they are not supported by the plain language of the statute.

The Commissioner finds unpersuasive the petitioner's argument that a plenary hearing must be conducted at the OAL. When a contested case is transmitted to the OAL, the proceedings are conducted pursuant to the New Jersey Uniform Administrative Procedure Rules, under which motions for summary decision are permitted. *N.J.A.C.* 1:1-12.5. The standard for granting a motion for summary decision is well-established by *Brill v. Guardian Life Insurance*

Company of America, 142 *N.J.* 520, 540 (1995), and the ALJ followed that standard in determining that there are no material facts in dispute, given that petitioner admitted to making public statements that referenced a student's special education status.

Staff members accused of committing an act of HIB are entitled to the due process guaranteed by the Act, including the same right to a hearing before the Board that is provided to parents or guardians of students. *Gibble v. Hunterdon Central Bd. of Educ.*, Commissioner Decision 254-16 (July 13, 2016). Nothing in the Act suggests that staff members are entitled to due process protections that exceed those provided to students involved in HIB investigations. As such, the standard of review to be applied is the same for both students and teachers. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration [,]" such that the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184 (1973). Here, the Board followed the procedures required by the Act by making the petitioner aware of the charges and the evidence on which they are based, and by offering the petitioner the opportunity to present evidence to the Board – an opportunity of which she availed herself. Following those procedures, the Board determined that the petitioner had committed an act of HIB. Nothing in the record indicates that the Board, in making that determination, operated in an arbitrary, capricious, or unreasonable manner.

Regarding the petitioner's argument that a factual dispute exists about whether her conduct fell within the normal student-teacher relationship, the Commissioner agrees with the ALJ that this issue is a "red herring." Initially, District Policy 2466 – which is attached as an exhibit to petitioner's exceptions – clearly states, "The Board of Education guarantees the privacy provided by

law that no pupil with a disability be labeled publicly," and sets forth procedures for "coding" this type of information, including referring to special education classes by the teacher's name. The petitioner's conduct is contrary to this policy and thus cannot be construed to fall within the normal student-teacher relationship. Moreover, as the ALJ noted, it is difficult to believe that the petitioner did not understand that she could privately contact the student's caseworker if she were concerned about his ability to complete the work in her class.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter and the petition is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/19
Date of Mailing: 7/26/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2365-18
AGENCY DKT. NO. 9-1/18

TAMAIKA DE FALCO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP HAMILTON,
Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Joseph D. Castellucci, Jr., Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: May 23, 2019 Decided: June 25, 2019

BEFORE **JEFF S. MASIN,** ALJ (Ret., on recall):

The Hamilton Township Board of Education (Board) found that Tamaika DeFalco committed an act of Harrassment, Intimidation and Bullying (HIB) in violation of Board "Policy 5512 Harassment, Intimidation and Bullying." By Verified Petition, she seeks to have the Commissioner of Education overrule the Board's decision. The Board responds that it acted in a reasonable manner, and that under the legal standard governing the Commissioner's review of the action of a local school board entrusted to determine HIB matters, its action was

neither arbitrary, capricious nor unreasonable and therefore must be upheld. The Board moves for summary decision, as authorized by N.J.A.C. 1:1-12.5.

The Board notified Ms. DeFalco of its decision on October 9, 2017. She filed her Verified Petition on January 16, 2018. The Board filed an Answer on February 5, 2018. The contested case was transferred to the Office of Administrative Law on February 13, 2018. A prehearing conference was held by Administrative Law Judge Patricia Kerins on July 16, 2018. A Protective Order was issued on July 17, 2018. The Board moved for summary decision on March 27, 2019. The contested case was transferred to this judge on April 9, 2019. Ms. DeFalco responded to the Board's motion on April 29, 2019. Oral argument was held on May 23, 2019, following which the record for the motion closed.

According to the Board's Statement of Undisputed Facts, Ms. DeFalso is a tenured Spanish teacher. B.L. is a student classified to receive special education services who was in Ms. DeFalco's Spanish class in the 2016-2017 school year. Lisa Kowalski is an education assistant employed by the Board who served as an in-class aide in DeFalco's class. On June 7, 2017, in the presence of several students and Ms. Kowalski, DeFalco directed B.L. to visit the child study team or guidance office if he was unable or unwilling to perform classwork. According to the Board, this action directed attention to B.L.'s status as a special education student. DeFalco e-mailed a school counselor, Barbara Arora, and the learning consultant on the child study team, Lisa Scaringelli, advising them that B.L. had his head on the desk and, as a result, she had asked B.L. to visit the nurse, the school counselor, or his caseworker. DeFalco also advised that when B.L. refused all of these options, she "told him he should go down to [the In-School Alternative Program ("ISAP") if he wants to lay on a desk, as it is not permitted in the class." She then requested the e-mail address of B.L.'s case manager. On June 8, 2017, B.L.'s special education teacher, Jessica Sawicki (formerly Jessica Zipko) e-mailed Principal Brian Smith, reporting "Petitioner's inappropriate behavior toward B.L." Sawicki found the incident had broken confidentiality and "truly embarrassed B.L." On June 12, 2017, Ms. Kowalski advised Mr. Smith that DeFalco told B.L. that "if he [did not] feel well he could go to the nurse." He declined to go to the nurse or to complete his work and DeFalco then "asked him if he wanted to talk to someone in child study or guidance because if he [did not] like being there or if the work was too difficult[,] then maybe they could help him or put him

in a different class." When he refused to visit the child study team or guidance office, "he was asked to go sit in ISAP and he could sleep there."

On June 14, 2017, B.L. reported to Robin Gesuelli, the anti-bullying specialist or HIB coordinator and student assistance counselor, that DeFalco's comments made him feel "uncomfortable and embarrassed." A.V., a student who witnessed the incident, provided a statement corroborating B.L.'s statement. A letter was then sent to DeFalco notifying her of the allegation that she had committed an act of HIB and that an investigation would be conducted by the school's anti-bullying coordinator, Nathan Webber, within ten school days of the written report. B.L.'s mother was also notified of the investigation.

The Board's Statement of Undisputed Facts details the investigation that followed. For the present, it is sufficient to note that various witnesses were interviewed, as was Ms. DeFalco. At the conclusion of the investigation on June 27, 2017, the Superintendent of Schools determined that DeFalco's conduct had caused "substantial disruption or interference with orderly operation of school or the rights of other students." The Superintendent wrote that B.L. believed that DeFalco "insulted his intelligence" and "an adult witness verified that . . . [Petitioner]" made the alleged statements. "The adult witness also verified that "the personal conversation continued after the student left and that the class was laughing due to the conversation in class." The superintendent found that DeFalco's conduct was "[r]easonably perceived as motivated by actual or perceived characteristic" and "was insulting or demeaning to B.L. because [DeFalco] was aware of B.L.'s IEP." B.L. suffered emotional harm given that the other students in the class were made aware of B.L.'s disability and laughed after DeFalco stated "If you are struggling in this class, I can write you a pass to child study and you can be removed" and B.L. refused to return to the class. In the Superintendent's opinion, DeFalco's conduct created a hostile educational environment because it caused B.L. emotional harm and led the other students to perceive the classroom environment as not a supportive educational environment. Given this, the Superintendent determined that the incident involved a violation of the Board's HIB Policy.

On July 27, 2017, Ms. DeFalco was notified by letter that the results of the HIB investigation had been reported to the Board and would remain on file. Her file would include a letter noting the incident and "[u]pon returning to school on September 1, 2017, [DeFalco] will

be required to participate in remedial training on HIB and building positive relationships in the classroom." On September 17, 2017, the Board conducted a hearing at DeFalco's request regarding the Superintendent's report. At that hearing, DeFalco "denied making any disparaging or demeaning comments towards B.L in her class." On October 9, 2017, the Board affirmed the Superintendent's decision and found that "the investigation demonstrated a preponderance of the evidence that [DeFalco] engaged in a harassing and disparaging act toward . . . the classified student on or about June 7, 2017 at the Hamilton High School West."

In moving for summary decision, the Board invokes the standard of review that governs the Commissioner's consideration of the action of a local board of education determining that an act of HIB has occurred. That standard requires that the Commissioner affirm the local board's action unless the party challenging the board's determination demonstrates that the board acted in an arbitrary, capricious or unreasonable manner. As the board is by statute the body designated to make the discretionary decision regarding whether an HIB violation has occurred, its discretionary action "will not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. Of Educ., 60 N.J. Super. 288, 294-96 (App. Div. 1960). Thus, if there "is room for two opinions, action is [not arbitrary or capricious] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Worthington v. Fauver, 88 N.J. 183, 204-05 (1982). As the court noted in Thomas v. Morris Twp. Bd. Of Educ., 89 N.J. Super 327, 332 (App. Div. 1965), the Commissioner will not substitute his or her judgment for that of the Board, as its action is entitled to a presumption of correctness and may not be disturbed unless shown to be arbitrary, capricious or unreasonable. In the Board's view, its action cannot be successfully shown to be tainted by such arbitrariness or unreason, and, given that the material facts relevant to determining that question are not in genuine dispute, summary decision in its favor is warranted and Ms. DeFalco's petition must be dismissed. N.J.A.C. 1:1-12.5; Brill v Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In response to the Board's motion, Ms. DeFalco claims that this traditional review standard cannot be applied to the Board's determination that an HIB incident occurred. She argues that the hearing process that the Board utilized at the "purported 'Board Level' hearing" did not afford Ms. DeFalco constitutional due process, as she was denied the right to cross-examine the witnesses who provided information in the investigation. Indeed, the Board did

not hear from the alleged victim of the comments, or from any of the student or adult witnesses. Instead, it only had before it the school administration's recitation of the investigatory findings and conclusions. Noting what in her view is the due process constitutionally required in the case of a teacher, someone with "liberty and property interests" that are different than those of students accused of HIB infractions (and without considering in her appeal the constitutionality of such process vis-a`-vis students so accused), DeFalco contends that since the basic constitutional due process to which she was entitled was not provided, the application of a deferential "arbitrariness" standard in reviewing the issue of whether DeFalco committed an act of HIB would be improper. In fact, the very process utilized by the Board was itself arbitrary. Additionally, the Board made its decision without having before it "any competent (i.e., first-hand) evidence other than the statements of Ms. DeFalco, and, as such, its decision was made without any "rational basis for its crediting those statements over the first-hand statements of Ms. DeFalco." Given these fundamental deficiencies, the Board must be required to prove its case against her in this forum. Thus, the motion for summary decision should be denied.

In addition to her due process argument, Ms. DeFalco argues that on the facts, her conduct cannot be a violation of the HIB statute or the Board's HIB Policy. In this regard, she claims that the Board decision

> ignored and failed to consider a critical issue: specifically, the circumstances and manner in which a teacher may appropriately refer a classified student to receive special-education services during the school day. In the absence of this information, there is no established legal principle underlying the Board's determination that Ms. DeFalco's referral of the student for such services constituted an act of HIB.

The Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.1 to –32 (Act) prohibits harassment, intimidation or bullying of students, whether such conduct emanates from students or teachers or school administrators. The prohibited acts are defined thusly,

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that

> takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > **a.** a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> > **b.** has the effect of insulting or demeaning any student or group of students; or
> > **c.** creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

While local boards of education are authorized to adopt policies to implement the legislation, the investigation of a complaint of HIB conduct must be carried out in accordance with the requirements of N.J.S.A. 6A:37-15, which dictates certain time limits that must be met for the investigation and determination of such complaints. There is no allegation here that the investigation of this complaint did not meet these time requirements. Here, the Board adopted Policy 5512, addressing "Harassment, Intimidation and Bullying."

The Due Process Issue

In arguing that the Board failed to provide Ms. DeFalco with the due process required by the Due Process Clause of the Sixth Amendment to the United States Constitution, she focuses upon the lack of any ability afforded to her to cross-exam the witnesses who the Board apparently relied upon in deciding that she had committed a prohibited act of HIB. More broadly, her contention that she could not cross-exam means that she could not confront her accusers, including the student allegedly harassed and the student and adult witnesses seen as supporting the allegation. Traditionally, the right of confrontation, including as it may the right to cross-examine, has been guaranteed in criminal matters, as a "fundamental aspect of procedural due process." Jenkins v. McKeithen, 395 U.S. 411, 428 (1969). The ability to cross-examine has been viewed historically as "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970) (quoting 5 Wigmore § 1367); see also Pointer v. Texas, 380 U.S. 400, 404,

85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965); State v. Branch, 182 N.J. 338, 348 (2005). However, while a criminal defendant is guaranteed such confrontation by the Amendment, the applicability of that right has been generally restricted to the criminal law. Here, counsel for Ms. DeFalco asserts that caselaw has nevertheless argued for its applicability in administrative cases, such as this, where property rights are in jeopardy and the accused individual is threatened with a "badge of infamy" if the charge of HIB conduct is upheld. In order to determine if Ms. DeFalco suffered a constitutional deprivation, it is necessary to review the cases upon which counsel bases his argument that the right exists in this administrative context.

The general proposition that the due process clause's promise of "fundamental fairness" applies to administrative proceedings in which significant property rights are in jeopardy cannot be doubted. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). However, the nature of that due process that conforms to constitutional requirements can vary depending upon the context. Thus, the criminal context, wherein the liberty interest is generally seen as in the most jeopardy, requires the highest level of due process. That due process which is "due" in the civil, and especially in administrative, area can be less stringent.

> Administrative hearings in contested cases may conform to procedural due process standards that are less restrictive than those imposed in court proceedings . . . The issue is whether he received a hearing conforming to principles of fundamental fairness. The determination of whether principles of basic fairness have been afforded in contested administrative cases requires an examination of the facts in each case, giving great weight to the effect of the decision on the agency's public policy.
>
> [In re Kallen, 902 N.J. 14, 26 (1983)]

None of the cases cited by counsel have explicitly held that the ability to cross-examine witnesses is an essential element of the fundamental fairness to which one facing an administrative hearing is entitled. In Greene v. McElroy, 360 U.S. 474 (1959), a case arising from the administrative revocation of a security clearance from an engineer which led to his discharge from employment, the Supreme Court discussed the question. The context of national security considerations raised issues of the inherent authority of the President in such matters. The Court explained

> [4] Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., Mattox v. United States, 156 U.S. 237, 242-244; Kirby v. United States, 174 U.S. 47; Motes v. United States, 178 U.S. 458, 474; [*In re Oliver, 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. e g., Southern R. Co. v. Virginia, 290 U.S. 190; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292; Morgan v. United States, 304 U.S. 1, 19; Carter v. Kubler, 320 U.S. 243; Reilly v. Pinkus, 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. Joint Anti-Fascist Committee v. McGrath, 341 U.S. 168-169 (concurring opinion).
>
> Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:
>
> > For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
>
> Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally.

The Court ultimately did not determine "whether those procedures under the circumstances comport with the Constitution . . . ." Nevertheless, it said

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e. g., ... These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.
>
> In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Thus, in a Cold War-era national security-related case where the petitioner's job was terminated and his "work opportunities . . . severely limited," the Supreme Court determined that a procedure that deprived him of confrontation and cross-examination was "fundamentally unfair," even if perhaps not unconstitutional. As such, the case cannot be read as defining the due process constitutionally required in all administrative cases, as indeed even in McElroy, the Court appears to have left open the possibility that had the President or Congress explicitly authorized the process involving a denial of confrontation and cross-examination, the process might meet constitutional standards. And in the other cases cited by the Court in the above-quoted paragraph for the proposition that the protection of "confrontation"might apply in the administrative context, the Court has also not decided the issue squarely. In Southern R. Co. V. Virginia, 290 U.S. 190 (1933), the state's corporation commission required that the railroad construct an overhead bridge. The Court summarized thusly

> As authoritatively interpreted the challenged Act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination, unless what the Supreme Court denominates "arbitrary" exercise of the granted power can be shown.
>
> [Southern R., at 194].

The Supreme Court concluded that

> After affirming appellant's obligation to comply with the Commissioner's order, the court below said: "The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand." But, by sanctioning the order directing the Railway to proceed, it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily "arbitrary." There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.
>
> The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed.
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> [Southern R. at 198-99].

Once again, the case reflects on the need for fairness, notice and hearing. But the Court did not address the exact nature of such a hearing, other than that the opponent of the proposed governmental action be advised, in advance, of the nature of the action proposed and given the opportunity to be heard in opposition to such action. These requirements were also emphasized in Morgan v. United States, 304 U.S. 1 (1938), a case testing "the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yard." Morgan, at 13, where the Court spoke to the need for a "full and fair hearing" and the need for such to provide the "fundamental requirements of fairness." Chief Justice Hughes explained

> a "full hearing"—a fair and open hearing—requires . . . The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command . . . Congress, in requiring a "full hearing," had regard to

> judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

Perhaps the case that comes closest to addressing the issue of whether the right to cross-exam is a constitutionally mandated element of the basic fundamental fairness required in administrative proceedings is Reilly v. Pinkus, 338 U.S. 269 (1949). The Postmaster General ordered that the respondent's use of the mails be restricted due to alleged fraudulent activity. Federal law provided authority for such restriction. The alleged fraud involved advertisements promoting kelp as an aid to weight loss. There was at least some dispute over the scientific value of kelp and iodine for such purposes. Although the Court was convinced that there was sufficient evidence to support the findings that the advertisements misrepresented the respondent's anti-fat treatment based on kelp, the Court nevertheless determined that the order could not stand. In the administrative hearing held before the Postmaster issued the order, cross-examination was permitted, but restrictions were placed upon the respondent's ability to cross-exam doctors testifying for the government who had based at least some of their opinions on medical texts and publications, about which cross-examination was not allowed. The Court noted

> We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books . . .
>
> The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. And what we have said is not to be taken as removing this discretion or as a compulsory opening of the gates for floods of medical volumes, even where shown to be authoritative. But in this kind of case as in others, one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue

> of his purpose to deceive. And in this case any holding of harmless error is precluded by the fact that the assistant solicitor presiding at the hearings adopted the prosecutor's view that respondent was to be barred from using the mails "regardless of the question of good faith, even if the respondent believed in all of his representations . . . if they were false as a matter of fact."

Thus, in Reilly, the Supreme Court, in reviewing a case in which cross-examination was permitted, balked at the limits imposed on that cross. While the decision may be read to hold that cross-examination must, as a general rule, be permitted, at least in cases of "serious charges of fraud," the case does not appear to stand for the proposition that in any administrative proceeding involving any level of possible sanction, the right to cross-examine in an essential part of "fundamental fairness" or of constitutional due process.

With this background concerning the cases that the McElroy Court cited for the proposition that even in administrative and regulatory proceedings a party had the right to "be confronted with the witnesses against him," we must look to recent statements of the Commissioner and Appellate Division concerning the nature of the HIB hearing. In Gibble v. Board of Education of the Hunterdon Central Regional School District, Hunterdon County, http://njlaw.rutgers.edu/collections/oal/final/edu02767-15_1.pdf, the Commissioner explained that staff members of boards of education had the same rights to receive written information about HIB investigations concerning their alleged conduct as students and parents of students investigated for possible HIB infractions had. "It is only reasonable that this due process protection also includes the same right to a hearing before the Board that is provided under N.J.S.A. 18A37-15(b)(6)(d) to parents or guardians of students involved in HIB investigations." This position was endorsed on appeal by the Appellate Division, S.G. v. Board of Educ. of the Hunterdon Cent. Reg'l Sch. Dist., A-5199-15T3 (March 1, 2018)(unpublished). There, the Court added, that while it did not have to detail the exact nature of the scope of such a hearing to decide the case before it, nevertheless, "we point out that the hearing should be meaningful and should be consistent with the procedures for hearings involving students." However, the Commissioner has rejected an argument which the Commissioner characterized as calling for an expansion of "the investigatory process and the HIB determination procedures to mirror discovery and trial-type adversarial proceedings," because such were not within the "intent of the Act." L.K. and T.K., on behalf of minor child, A.K. v. Board of Education of the Township of Mansfield, Burlington County. In her initial decision in the L.K. case, Acting Chief Administrative

Administrative Law Judge Lisa James-Beavers noted that while petitioners therein argued for an "evidentiary" hearing, the statute, N.J.S.A. 18A:37-15(b)(6)(d) provides that "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." The Legislature could have added the word "evidentiary" had it wanted to direct a more judicial-type process, but it did not do so. L.K., Initial Decision at http://njlaw.rutgers.edu/collections/oal/html/initial/edu07067-16_1.html.

While it would no doubt be more satisfactory to some if HIB determinations by school boards were made after a full trial-type, judicialized hearing process with full rights to cross-examine witnesses, I **CONCLUDE** that there is simply no constitutional, statutory or case law support for the proposition that in a proceeding such as a Board HIB determination a right to cross-examination exists. The absence before the Board of any direct testimony by the accuser or other witnesses relied upon by the investigator and the Superintendent does not present a ground for finding the process in violation of due process or fundamental fairness. The due process/fundamental fairness requirement in an HIB inquiry is met by a process in which the staff member is made aware of the charges and evidence upon which the charge is based before the Board hearing and is then able to present to the Board such documents, witnesses and testimony and argument as the staff member may offer. The Board may then evaluate this evidence and determine if an incident of HIB occurred. Given the nature of the legislativwe command and the limited sanctions, which do not involve the loss of tenure, employment or future employment (the first two not without additional processes that would, at least in the tenure situation, involve an full arbitration process), a more "judicialized" process is not mandated.

Did Ms. DeFalco Engage in an Act of HIB?

Turning to the substantive question of whether Ms. DeFalco's comments did violate the HIB prohibition and therefore gave the Board sufficient legal grounds to find an HIB violation, in her response to the Board's statement of what the Board asserts are undisputed facts, paragraph 4, she admits that there was a conversation in which she, "in the presence of students and Ms. Kowalski, directed B.L., a classified student in her class who receives special education and related services, to visit the child study team or guidance office if he is unable

or unwilling to perform classwork." She specifically denies the remainder of the paragraph, which claims that her admitted statement to B.L. "direct[ed] attention to B.L.'s status as a special education student." Indeed, it may be that this last, disputed section is not a direct statement of fact, but a conclusion concerning the purported effect of the admitted statement. In her e-mail of June 7, DeFalco reported that she offered B.L. a choice of going to his "counselor or case manager." As for the Board's paragraph 5, she admits that she told B.L. "he should go down to the In-School Alternative Program ("ISAP") if he wants to lay on a desk as that is not permitted in the class." Ms. Kowalski reported the incident in an e-mail of June 12, 2017, wherein she notes that DeFalco asked B.L. if he "wanted to talk to someone in child study or guidance because if [B.] didn't like being there or if the work was too difficult then maybe they could help [B.] or put [B]. in a different class." In his written statement, B.L. reported that he had his head down and Ms. DeFalco first said she was writing him a pass to the nurse, to which he said, "No" and then she said that she was writing a pass "to child studies and I want you to tell them you are struggling in my class." After he said that "I will skip," she told him to go to ISAP and he said "fine." B.L. reported that he felt that Ms. DeFalco had "insulted my intelligence." He felt "ridiculed" and "disrespected."

While there may be some divergence as to the exact words spoken by DeFalco to B.L., the basic fact that she at the very least admits that she openly told the special education student to go to his case manager when he refused to do his work is undisputed. Given that she does not dispute this comment, her contention as to why the Board's decision to find that she had committed an act of HIB, aside from the due process argument, was arbitrary and capricious is that the Board has failed to address the "mechanisms by which a student can be referred to special education services, and the confidentiality procedures, if any, which exist to maintain student privacy with such referrals." It seems that DeFalco is claiming that her words suggesting that B.L. might go to the child study team or guidance office were, possibly in the absence of Board-supplied guidance, simply an acceptable means of referral of the child to the team for the team's support, guidance or for, perhaps, a change in the child's IEP. Frankly, this "defense" appears to be nothing other than a "red herring." There is no question that there can be times when a teacher may observe that a special education student's current IEP may need to be re-evaluated, when a particular class or means of support may not seem to be effective in delivering a child the benefits of an appropriate educational experience (FAPE). In such instances, it would be expected that the teacher would contact the case manager to raise

the concern. But to anyone familiar with the confidentiality elements inherent in the special education context, as well as anyone familiar with and acting with awareness of the HIB strictures, it could not be reasonable to believe that a public statement to a classified student that he should go to the child study team due to a perceived inability or unwillingness to do the classwork is an acceptable form of reference to the child study team or for the purpose of enabling that student to receive assistance with needed special education services. Such a statement, made in front of other students, has the distinct capacity to point out to the other students the actual or perceived characteristic of the subject student's mental or sensory disability. If Ms. DeFalco truly believed that the student's ability to handle the work in her class was in doubt due to issues related to his special education status, it is hard to imagine that she would not have understood that she could privately contact the case manager or other responsible child study team member and raise her concern. Indeed, in her e-mail of June 7, she specifically asked Ms. Scaringelli for the name of the case manager. The claim that the Board has not provided information about how to appropriately refer a student ignores the fact that no reasonable teacher aware of the need for confidentiality and trained concerning HIB would choose to publicly announce her concern or her direction to the student in front of his peers, an action that reasonably could be foreseen as embarrassing and demeaning to the student. Thus, as I **FIND** that the Board was well aware of the evidence of Ms. DeFalco's comments, as reported in the investigation by her, by Ms. Kowalski, who was present when they were made, and by B.L., it could quite reasonably found that

A) DeFalco knew, or should have known, that her comments would have the effect of placing this special education student in reasonable fear of emotional harm;
B) had the effect of insulting or demeaning him; and
C) created a hostile educational environment for B.L.

As such, as I **FIND** that there are no material facts in dispute, I **CONCLUDE** that the Board's decision was neither arbitrary nor capricious.

ORDER

IT IS HEREBY ORDERED that the contested case is **DISMISSED**.

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

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

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

June 25, 2019
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 6-25-19

Date Mailed to Parties: 6-25-19

mph

LIST OF EXHIBITS:

For petitioner:

Exhibit A	Respondent's Answers to Interrogatories and Request for Production of Documents
Exhibit B	Policy 2466-Needless Public Labeling of Pupils with Disabilities

For respondent:

Exhibit A	Letter dated December 29, 2017
Exhibit B	Target/Accused/Witness Interview Statement of B.L.
Exhibit C	Interview of Ms. DeFalco, dated June 22, 2017
Exhibit D	Interview of Lisa Kowalski, June 19, 2017
Exhibit E	Interview of Jessica Zipko, June 19, 2017
Exhibit F	E-mails from T. DeFalco, June 7, 2017
Exhibit G	E-mail from Jessica Zipko to Brian Smith, June 8, 2017
Exhibit H	E-mai, from Lisa Kowalski to Brian Smith, June 12, 2017
Exhibit I	Letter dated June 14, 2017
Exhibit J	Superintendent's HIB Report
Exhibit K	Letter dated July 27, 2017
Exhibit L	Letter dated October 9, 2017
Exhibit M	Policy 5512 Harassment, Intimidation and Bullying

New Jersey Commissioner of Education

Final Decision

C.G., on behalf of minor child, G.G.

Petitioner,

v.

Board of Education of the Township of Morris, Morris County,

Respondent.

Synopsis

The Commissioner previously issued a decision in this case, concurring with the ALJ that G.G. was not domiciled in Morris Township between January 20, 2017 and February 2, 2018, and was therefore ineligible for a free public education in the school district during this period. The matter was remanded to the Office of Administrative Law (OAL) for the sole purpose of calculating the correct amount of tuition due to the school district for the period of G.G.'s ineligible attendance. Subsequent to the remand, the Board submitted a letter stating that the petitioner, C.G., had filed for bankruptcy. The Board requested that the Commissioner consider issuing a final decision based solely on the determination of G.G.'s residence in order to avoid the waste of judicial resources that would occur if the ALJ were to proceed with the recalculation of tuition.

Accordingly, the Commissioner affirmed the Initial Decision insofar as it concluded that G.G. was not domiciled within the Morris School District. *C.G. on behalf of minor child, G.G. v. Board of Education of the Township of Morris, Morris County*, Commissioner Decision No. 35-19, decided January 30, 2019. Further, the Commissioner rejected the Initial Decision's calculation of tuition and conclusions related thereto, as the Board effectively withdrew its counterclaim prior to the ALJ's issuance of the Initial Decision on Remand. 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.

July 26, 2019

200-19R

OAL Dkt. No. EDU 02768-19
(EDU 07231-18 On Remand)
Agency Dkt. No. 98-4/18

New Jersey Commissioner of Education

Final Decision

C.G., on behalf of minor child, G.G.

Petitioner,

v.

Board of Education of the Township of Morris, Morris County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In the previous decision in this matter, the Commissioner concurred with the Administrative Law Judge (ALJ) that G.G. was not domiciled in the District between January 20, 2017 and February 2, 2018. *C.G. on behalf of minor child, G.G. v. Board of Education of the Township of Morris, Morris County*, Commissioner Decision No. 35-19, decided January 30, 2019. However, the Commissioner remanded the matter to the OAL to calculate tuition costs because there was insufficient evidence in the record regarding the number of school days in the relevant time period and the per diem tuition rate for each school year at issue. Following the remand, the Board submitted a letter dated March 11, 2019, recognizing that the petitioner had filed for Chapter 7 bankruptcy and, as such, it would be "a waste of judicial resources for the ALJ to proceed, on remand, to re-calculate the sum the petitioner owes

to the District..." Therefore, the Board requested that the Commissioner "consider issuing a final decision based solely upon the determination of G.G.'s residency."

Accordingly, the Commissioner affirms the Initial Decision insofar as it concludes that G.G. was not domiciled in the district, which is consistent with *C.G. on behalf of minor child, G.G. v. Board of Education of the Township of Morris, Morris County*, Commissioner Decision No. 35-19, decided January 30, 2019. The Commissioner rejects the Initial Decision's calculation of tuition and conclusions related thereto, as the Board has effectively withdrawn its counterclaim for tuition prior to the ALJ's issuance of the Initial Decision on Remand. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/19
Date of Mailing: 7/26/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02768-19
AGENCY REF. NO. 98-4/18

C.G. ON BEHALF OF MINOR CHILD, G.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,
Respondent.

ON REMAND
OAL DKT. NO. EDU 07231-18

C.G., Parent of **G.G.**, Petitioner, pro se

Janelle Edwards-Stewart, Esq., for Respondent (Porzio, Bromberg & Newman, attorneys)

Record closed: May 6, 2019 Decided: June 27, 2019

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

STATEMENT OF THE CASE

Petitioner C.G. challenges the "Notice of Final Determination of Ineligibility" dated April 3, 2018, (R-12) rendered by the Morris Township School District (Morris Township B.O.E. or District), which determined that C.G. was ineligible to attend Morris Township Schools during the period from January 20, 2017, through February 2, 2018. Petitioner

C.G. also seeks an Order relieving her from any obligation to pay for tuition for her daughter, G.G., to the Morris Township School District.

PROCEDURAL HISTORY

On January 24, 2018, the Superintendent of the Morris Township School District (the District) sent a "Notice of Initial Determination of Ineligibility" (R-11) to C.G. advising her that the District determined that she and her daughter, G.G., did not reside in in the District based on its investigation, including an interview of C.G. at her home in Randolph Township. The District offered C.G. the opportunity to appear at a hearing before the Morris Township Board of Education to contest the District's determination. C.G. declined the offer of a hearing and withdrew G.G. A short time later Rosemary Strelec, a friend of C.G. who resided in Morristown (a town within the Morris Township School District) sought and obtained an Order (R-20) from the Superior Court, Chancery Division granting residential custody of G.G. to her with liberal visitation rights for C.G. Strelec re-enrolled G.G. in the District's school. The District conducted a second investigation which confirmed its previous opinion that neither C.G. nor G.G. was domiciled in the District.

C.G. filed a Residency Appeal on April 18, 2018, with the Department of Education, which was transmitted to the OAL on May 17, 2018, and filed on May 18, 2018, under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23 for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9.

An initial telephone conference was held on June 29, 2018, and a Pre-Hearing Order was issued on that date. On or about July 20, 2018, the Tribunal received correspondence from C.G. stating that she wished to withdraw her appeal. The Tribunal processed this as a withdrawal, closed the file, and returned the file to the Department of Education. On August 24, 2018, counsel for the BOE brought the

provisions of N.J.A.C. 6A:22-6.2 to the Tribunal's attention and demanded the right to a hearing to present its proofs for the charging of tuition against C.G. On October 18, 2018, the Tribunal held a telephone conference on the record with C.G. and Janelle Edwards-Stewart, Esq., counsel to the District. During that telephone conference the ALJ explained that he had erred when he processed the withdrawal and closed the file. The ALJ set the hearing date for November 13, 2018. The ALJ warned the parties that failure to appear at the hearing on November 13, 2018, would result in an adverse verdict for the non-appearing side, that is, a marking of "Failed to Appear," and that the presentation of proofs by the appearing side would take place. On November 13, 2018, the hearing was held, but neither C.G. nor anyone else appeared for the Petitioner's side. The BOE presented its proofs at that hearing. On the date of the hearing the Tribunal was not aware of any bankruptcy petitions filed by the Petitioner.

On December 21, 2018 the Tribunal issued its Initial Decision affirming the action taken by the Morris BOE and ordering C.G. to pay tuition for the time during which G.G. Attended school in Morris Township while being ineligible to attend. That period of time included January 18, 2017 through February 2, 2018.

On January 30, 2019, the Commissioner of Education issued Decision No. 35-19 in which he concurred with the ALJ that C.G. was nor domiciled in Morris Township and was therefore ineligible to attend school in Morris Township from January 18, 2017 through February 2, 2018. However, the Commissioner remanded the case back to the OAL for the purpose of obtaining information needed for the re-calculation of tuition payable, including information regarding the *per diem* tuition rate for the 2016-2017 school year and the 2017-2018 school year, as well as ascertaining the correct number of school days between January 18, 2017 and February 2, 2018.

On April 5, 2019 the Tribunal asked the parties for the information regarding the respective tuition rates and school day information. On April 26, 2019 the BOE's counsel provided the 2016-2017 *per diem* tuition rate and the 2017-2018 *per diem* tuition rate. The BOE's counsel also provided the school calendars for the school year 2016-2017 and for the school year 2017-2018. Since no further information was forthcoming, the record closed on May 6, 2019.

The computations for the days of ineligible attendance in the 2016-2017 school year and in the 2017-2018 school year and the calculations of tuition re-imbursement owed are set forth on the Findings of Fact and Conclusions sections of this Initial Decision.

TESTIMONY

The following is not intended to be a verbatim recitation of the testimony, but rather only highlights of the testimony, which the ALJ found especially relevant and important.

Testimony of Debora Engelfried

Debora Engelfried (Engelfried) presented a binder of twenty-two tabbed documents and utilized most of them during her testimony. Engelfried testified that the Morris Township School District contains the towns of Morristown and Morris Plains. Persons between the ages of five and twenty years of age who are domiciled in those towns are eligible to enroll in the District's public schools. The Morris Township Board of Education is the body that presides over and operates the District.

Engelfried testified that when students enroll in one of the District's schools his or her parents or legal guardians are asked to provide various documents which would prove that they are domiciled in the District. These can include documents such as the child's birth certificate, utility bills, leases, deeds, mortgages, etc.

Engelfried testified that there is a recurring problem of people who attempt to enroll their children in the District's schools even though they are not bona fide domiciliaries of the District. She testified that when non-domiciliaries enroll in the District's schools, they use resources that should be utilized for students who are bona fide District domiciliaries. The District's efforts to detect the enrollment of people who are not domiciled in the District often involves utilizing the services of a private detective, named Jeffrey Oster.

In regard to G.G.'s enrollment in one of the District's schools, Engelfried testified that the parent of one of G.G.'s classmates alleged that G.G. and her mother, C.G. were no longer living in the District and provided the address of their actual residence in Randolph Township, which has its own school district. Engelfried testified about social media posts by C.G. (R-17), which demonstrated that C.G. and G.G. moved into their Randolph home on January 18, 2017.

Engelfried testified that the District initiated an investigation. Using the address information supplied by C.G. when she enrolled G.G., the District discovered that they were no longer living in their former apartment on Village Drive in Morristown. A search at the Morris County Registry of Deeds and Mortgages revealed that C.G. purchased a home in Randolph Township on January 18, 2017. (R-22 is a copy of C.G.'s Deed to the Randolph home.) Utilizing the surveillance services of Private Investigator Jeffrey Oster (Oster or the detective), Engelfried testified that the District obtained information from him that C.G. and G.G. resided in Randolph in January 2018. Specifically, on January 23, 2018 C.G. admitted to Oster that she and G.G. resided at the Randolph home. (See R-6.)

Engelfried testified that she communicated with C.G. regarding whether she and G.G. were properly domiciled in the District or whether they had changed their domicile to Randolph Township. In the interim, the Board of Education issued its "Notice of Initial Determination of Ineligibility," dated January 24, 2018 (R-11), in which it informed C.G. that G.G. was improperly enrolled in the District's school and it asked C.G. to either withdraw G.G. from the District's school voluntarily or opt for a hearing before the Board of Education. Engelfried testified that she and C.G. spoke about the investigation and that C.G. decided to withdraw G.G. and enroll her in the Randolph schools on February 2, 2018. However, Engelfried further testified that only a short time later, C.G. asked her how long it would take to re-enroll G.G. in the District's school, an inquiry which Engelfried thought was peculiar. Engelfried testified that shortly thereafter Rosemary Strelec (Strelec), C.G.'s friend, who was domiciled in Morristown, procured an Order from the Morris County Superior Court, Chancery Division on March 19, 2018 (see R-20), which granted residential custody of G.G. to Strelec and granted liberal visitation

rights to C.G. On March 19, 2018 Strelec submitted paperwork to re-enroll G.G. in the District's school and G.G. was re-enrolled on April 9, 2018.

Engelfried testified that paperwork from the Randolph Township school system stated that as of February 2, 2018, (the date that C.G. enrolled G.G. in the Randolph School system) C.G. stated that she had sole custody of G.G. She further testified that Strelec gave a copy of the Court Order to the Morris Township BOE and informed the BOE that G.G. has lived with her since March 19, 2018. She testified that the change of custody in such a short time and the statement that G.G. lived with Strelec only since March 19, 2018, were among the circumstances which led her to initiate a second investigation to find out if G.G. was actually residing with Strelec in Morristown or was still residing with her mother in Randolph. Again, Oster's services were utilized. Engelfried testified that Oster's surveillance indicated that G.G. was not residing with Strelec and that G.G. continued to reside with her mother in Randolph. (See R-6, R-7 and R-8.) As a result of this investigation the BOE decided that neither C.G. nor G.G. were domiciliaries of the District, that G.G. was not entitled to a free public education in the Morris Township School District and that per diem tuition would be sought.

Testimony of Jeffrey Oster, Private Detective

Jeffrey Oster testified that he was a licensed private detective and was a retired detective sergeant from the Mine Hill Police Department.

Oster testified that he went to the Randolph home on January 23, 2018 and spoke with C.G. about the investigation into whether she and G.G. were domiciled in Morris Township. C.G. admitted that she was the owner of the Randolph home and stated that she moved into the home in the Summer of 2017, but that G.G. sometimes stayed overnight with Strelec in Morristown. Oster mentioned that C.G. did not mention anything about sharing custody of G.G. with Strelec. Oster reported this information to the District. (R-6.)

Oster testified that on March 26, 2018, he was asked by the BOE to conduct a second investigation. He was aware of the Court Order granting residential custody of

G.G. to Strelec. He testified that he conducted surveillance of Strelec's home on March 27 and 28, 2018, both of which were school days, and reported that no child came out of Strelec's residence on either day. (R-8.)

Oster testified that he was aware that G.G. was re-enrolled into the District school on April 5, 2018. He testified that he conducted surveillance of the Randolph home on April 11, 12, and 13, 2018, (all of which were school days) and on those dates he observed C.G. and G.G. leave the Randolph home in the early morning (from 6:45 a.m. to 7:15 a.m.) and drive away in C.G.'s car. He also took several photographs of C.G. and G.G. exiting the home and entering C.G.'s car. Oster testified that on each day he contacted the District and learned that G.G. was in school.

Oster testified that he believes that C.G. became aware of his surveillance activities. During surveillance conducted on April 16, 17 and 18, 2018, he did not see G.G. leave the Randolph home. He testified that he had spoken directly with C.G. at her home on January 23, 2018, and so she already knew who he was. Oster testified that he conducted surveillance on April 25 and 26, 2018. Both were school days. He testified that on April 25, 2018, he saw C.G. leave her home with G.G. and enter a new Land Rover car, which was registered to her. On this occasion C.G. stopped her car near Oster's car and looked straight at him. The next morning, April 26, 2018, C.G. left her home without G.G. Oster testified that he spoke with the District and learned that G.G. was in school on both days. (See R-9 and R-10.) In his report to the District dated April 26, 2018, (R-10) he concluded that G.G. was not residing with Strelec in Morristown and that she was residing with her mother, C.G., in the Randolph home.

FACTUAL DISCUSSION

No one appeared at the hearing on behalf of C.G. Therefore, the testimony of the witnesses for the Morris Township Board of Education was received without objection in its entirety, as summarized above.

FINDINGS OF FACT

Having had the opportunity to examine the documents presented and to hear the witnesses and to assess their credibility, I make the following **FINDINGS of FACT**:

1. C.G. and G.G., formerly of Morristown, moved into their new home in Randolph, NJ on January 18, 2017. (See R-17 and R-22.)

2. C.G.'s social media post of January 18, 2017, (R-17) constitutes an admission that she and her daughter, G.G., resided in the Randolph home from January 18, 2017, forward.

3. G.G. remained enrolled in a Morris Township school after January 18, 2017.

4. Upon information from a school parent, officials from the Morris Township BOE conducted an investigation into whether C.G. and G.G. were domiciled in Morris Township. That investigation resulted in the BOE concluding that C.G. and G.G. were no longer domiciled in Morris Township as of January 18, 2017. (See R-11.)

5. As a result of the BOE's investigation and of the issuing of the "Notice of Initial Determination of Ineligibility" by the District, C.G. withdrew G.G. from the Morris Township school in which she had been enrolled and registered her in a Randolph Township school.

6. Rosemary Strelec, who is domiciled in Morristown and who is a friend of C.G., initiated an action to obtain residential custody of G.G. On March 19, 2018, the Superior Court of New Jersey, Chancery Division, Morris County issued an Order entered on March 22, 2018, granting residential custody to Strelec and granting liberal visitation rights to C.G.

7. Having been granted residential custody of G.G. by the Chancery Division, Strelec submitted paperwork to re-enroll G.G. in school in Morris Township and G.G. was re-enrolled on April 9, 2018.

8. Due to unsettled facts and apparent inconsistencies in the facts as related by C.G., the BOE decided to, once again, verify the actual domicile of C.G. and G.G. The BOE undertook a second investigation which involved surveillance of Strelec's home and C.G.'s home. The testimony of the BOE's private investigator, Jeffrey Oster, along with clear and convincing photographic evidence, convinces this Tribunal that G.G. resided almost exclusively with her mother, C.G., at the Randolph home and that she did not leave for school on school days from Strelec's home.

9. As a result of the second investigation the BOE sent a "Notice of Final Determination of Ineligibility" dated April 3, 2018, to C.G. (R-12.)

10.The BOE proved by a preponderance of the credible evidence that C.G. sent her daughter G.G. to school in Morris Township during period of time, Specifically January 18, 2017, through February 2, 2018, when they were not domiciled in Morris Township.

11. Several days after the November 13, 2018, hearing the Tribunal received Information (a letter from an attorney representing C.G.) that C.G. had filed for bankruptcy.

12. From the information provided, I **FIND** that between January 18, 2017 and June 16, 2017 (the last day of the school year for the 2016-2017 school year) there were ninety-eight (98) school days; however, I **FIND** that due to the fact that the BOE may only recoup money for one year prior to the filing of the appeal, the BOE may only recoup from April 4, 2017 forward to June 16, 2017, a total of forty-seven (47) days. Thus, I **FIND** that the number of recoupable ineligible days for the 2016-2017 school year comes to forty-seven (47) days.

I also **FIND** that between September 6, 2017 (the first day of the 2017-2018 school year) and February 2, 2018 (the last date on which G.G. attended) there were ninety-seven (97) school days, all of which are recoupable.

Thus, I **FIND** that the total number of recoupable ineligible days of attendance totals 144 school days.

I also **FIND** that the *per diem* tuition rate for the 2016-2017 school year was $81.93 and that the *per diem* tuition rate for the 2017-2018 school year was $84.55.

APPLICABLE LAW

N.J.S.A. 18A:36-19a provides "the school district shall obtain proper identification of any new student such as a certified copy of the student's certificate of birth." N.J.S.A. 18A:36-25.1(a) provides "When a child is enrolled in a school district for the first time, the superintendent shall require the child's parent or legal guardian to provide a certified copy of the child's birth certificate or other proof of the child's identity, within 30 days of enrollment."

Public schools are free to persons over five and under twenty years of age who are domiciled within the school district or are kept in the home of another person domiciled within the school district and supported by such other person *gratis* as if he were such other person's own child. N.J.S.A. 18A:38-1(a). If the school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by such person *gratis* as if the child was the person's own child, the superintendent or administrative principle may apply to the Board of Education for the removal of the child. N.J.S.A. 18A:38-1(b)(2). The parent or guardian is entitled to a hearing before the board and, if in the judgment of the board, the parent or guardian is not domiciled within the school district or the child is not kept in the home of another person domiciled within the school district and supported *gratis*, the board may order the transfer or removal of the child from school. Ibid. The parents or guardian may contest the board's decision before the commissioner within 21 days of

the date of the decision and is entitled to an expedited hearing. Ibid. The parent or guardian has the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. Ibid.

Pursuant to N.J.A.C. 6A:22-3(1)(a)(1), a student is eligible to attend a school district if he or she is domiciled within the school district, and a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

"Domicile" is defined as "the place where [a person] has [his or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning." C.B.W. ex rel. A.W. v. Bd. of Ed. of the Township of Belleville, Essex County, 1998 N.J. AGEN. LEXIS 122, Agency Docket number 159-5/96, 1998 WL 668678 (N.J. ADM. JUNE 18, 1998). As the court noted in Collins v. Yancey, 55 N.J. Super. 514, 520-21 (Law Div. 1959), a person may have several residences or places of abode, but only one domicile at a time. Ibid.; D.L. v. BD. of Educ. of Princeton Reg'l Sch. Dist., 366 NJ Super. 269, 273-74 (App. Div. 2004).]

N.J.A.C. 6A:22-6 governs the tuition rate; and N.J.A.C. 6A:28-2.10 governs the calculation of tuition charged.

N.J.A.C. 6A:22-6.1 governs tuition assessments where no appeal is filed; and N.J.A.C. 6A:22-6.2 governs tuition assessments where an appeal is filed.

N.J.A.C. 6A:22-6.2(a) states:

> If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement, agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school

> district prior to the appeal's filing and including the 21-day period to file an appeal.

N.J.A.C. 6A:22-6.1(a) reads similarly to 6.2(a). Thus, for both 6.1(a) and 6.2(a) there is a one-year limitation on the amount of tuition a school district can recoup.

CONCLUSIONS

The Tribunal is satisfied that the factual record demonstrates that, during the time period proven by the BOE, specifically, January 18, 2017, through February 2, 2018, G.G. resided with her mother, C.G. at the Randolph home. Moreover, there was little or no factual evidence presented in support of Petitioner's allegation that G.G. resided during the school term with Rosemary Strelec in Morristown and/or that Rosemary Strelec supported G.G. *gratis* as if she were Rosemary Strelec's own child. It follows, and I **CONCLUDE** that from January 18, 2017, through February 2, 2018, G.C. was domiciled and resided in Randolph Township, which is not within the Morris Township School District. Moreover, I **CONCLUDE** that C.G. and G.G. did not meet the requirement set forth in N.J.S.A. 18A:38-1(a) of G.G. being "kept in the home of another person domiciled within the school district and supported by such other person *gratis* as if she were such other person's own child." The Petitioner having failed to carry her burden of proving that G.G. was domiciled in the Morris Township School District, I **CONCLUDE** the Morris Township Board of Education acted properly when it removed G.G. from its school. Moreover, I **CONCLUDE** that the Morris Township Board of Education has proven by a preponderance of the credible evidence that during the time of G.G.'s attendance in the Morris Township School District, she was not domiciled in the Morris township School District and therefore the BOE is entitled to collect from G.G.'s parent, C.G., an amount of per diem tuition.

I **CONCLUDE** that the BOE is allowed to collect *per diem* tuition from C.G. for only the period of one year before the filing of C.G.'s appeal according to the limitations set forth in N.J.A.C. 6A:22-6.2(a). I **CONCLUDE** that, counting backwards from April 3, 2018 (the date of the appeal) for one year (365 days), the District is precluded from

recouping money before April 4, 2017, but may recoup money from C.G. for the period covering from April 4, 2017 to April 3, 2018.

I **CONCLUDE** that the number of recoupable school days ineligibly attended between April 4, 2017, and June 16, 2017 (the last day of the 2016-2017 school year), comes to forty-seven (47) school days and that when the applicable *per diem* tuition rate of $81.93 is applied, the total due the District is $3,850.71 for the applicable days in the 2016-2017 school year.

I **CONCLUDE** that the number of school days ineligibly attended between September 6, 2017(the first day of the 2017-2018 school year) and February 2, 2018 (the last school day attended) comes to ninety-seven (97) school days and that when the applicable *per diem* tuition rate of $84.55 is applied, the total due the District is $8,201.35 for the 2017-2018 school year.

I also **CONCLUDE** that C.G., by failing to appear at the hearing, failed to prove that she is entitled to an Order relieving her from any obligation to pay for the tuition for G.G.'s attendance in the District's school.

ORDER

It is hereby **ORDERED** that the action taken by the District to remove G.G. from its school is hereby **AFFIRMED**. It is hereby **ORDERED** that C.G. shall pay to the Morris Township Board of Education the sum of $12,052.06, which **ORDER** shall be stayed under the laws of the United States of America concerning bankruptcy, until the Trustee in Bankruptcy authorizes the payment or until the conclusion of the bankruptcy proceedings.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 27, 2019
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: June 27, 2019

Date Mailed to Parties: June 27, 2019
db

ADDENDUM

List of Witnesses

For Petitioner:

None

Respondent's Witnesses:

Debora Engelfried, Supervisor of Strategic Planning and Student Information Management

Jeffrey Oster, Private Investigator

List of Exhibits

Tribunal's Exhibit:

C-1 The Tribunal's Letter to the Parties dated October 18, 2018

C-2 Respondent's counsel's April 26, 2019 letter with attached copies of the 2016-2017 school year calendar and the 2017-2018 school year calendar

Petitioner's Exhibits:

None

Respondent's Exhibits:

R-1 through R-5 Not admitted into evidence

R-6 Initial Report of Residency Investigation, dated January 24, 2018

R-7 Initial Report of Residency Investigation, dated 3/29/18

R-8 Report of Residency Investigation, dated April 13, 2018

R-9 Report of Residency Investigation, dated April 18, 2018

R-10 Report of Residency Investigation, dated April 26, 2018

R-11 Notice of Initial Determination of Ineligibility, dated January 24, 2018

R-12 Notice of Final Determination of Ineligibility, dated April 3, 2018

R-13 Not admitted into evidence

R-14 Email chain between C.G. and Engelfried, dated February 1. 2018

R-15 Email chain between C.G. and Engelfried, dated March 28, 2018

R-16 Not admitted into evidence

R-17 Email chain amongst Superintendent Prendergast, Engelfried, Donna Karr, Carla Walker, and Sandra Wall, dated February 2, 2018

R-18 Randolph Township Schools registration forms completed February 2, 2018

R-19 Morris School District registration form completed March 19, 2018

R-20 Court Order entered on March 22, 2018, concerning custody hearing of March 19, 2018

R-21 Not admitted into evidence

R-22 C.G.'s Deed dated January 18, 2017, to her Randolph home

202-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Lakewood, Ocean County,

Petitioner,

v.

New Jersey Department of Education,

Respondent.

Synopsis

In June 2019, the Board of Education of the Township of Lakewood (Lakewood) filed an application for emergent relief and a petition seeking, *inter alia*, state aid of approximately $30,000,000 to enable the Lakewood school district to provide its students with a thorough and efficient education. Such funding had been included in the Governor's proposed budget for 2019-2020, but was eliminated from the final budget as approved by the Legislature and signed by the Governor. Lakewood argued that the promised funding was required to meet its anticipated shortfall for the 2019-2020 school year. The Department contended that Lakewood's petition was procedurally deficient and failed to state a claim upon which relief can be granted, thereby requiring dismissal of the petition. Following a June 26, 2019 hearing on the matter, Lakewood announced it was shutting down the school district effective July 1, 2019, despite the fact that its underlying petition indicated that the school district had sufficient funds to cover operations through March 2020. The Department subsequently argued that the within matter is now moot, because on July 1, 2019, the Commissioner certified to the State Treasurer that Lakewood required $36,033,862 to enable it to meet its constitutional obligations, and the State Treasurer subsequently approved a loan in that amount to the district.

The ALJ found, *inter alia*, that: although Lakewood failed to file the required formal motion for emergent relief, and instead combined a request for an emergent hearing with a petition seeking final relief, an accommodation for the procedurally deficient filing was allowed because of the importance of the issue herein; however, such accommodation must not be construed as precedent for accepting other procedurally deficient filings; Lakewood has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6; further, on July 1, 2019, the Commissioner certified to the State Treasurer that Lakewood required $36,033,862 to enable it to meet its constitutional obligations; and the State Treasurer subsequently approved a loan in that amount to the district, which has rendered the matter moot. Accordingly, the ALJ granted the Department's motion to dismiss the petition.

Upon a comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

August 6, 2019

In reply, the Department asserts that the Initial Decision denying Lakewood's request for emergent relief and granting the Department's motion to dismiss should be adopted as the final decision in this matter. First, the Department contends that the ALJ properly found that Lakewood failed to establish any of the *Crowe* factors required for entry of emergent relief. Specifically, the Department stresses that Lakewood failed to timely approve its budget and ceased operations, which was a self-created emergency that does not constitute irreparable harm, particularly in light of Lakewood's admission that it had funds available to meet its obligations through March 2020. As the ALJ stated, "[t]he failure of the district to produce a budget by the statutory date does not create an emergency warranting immediate relief when it represents that it has funds to operate." (Initial Decision at 8). Additionally, Lakewood cannot choose to cease district operations over the State's political budget process, and then claim that any hypothetical harm to the students it serves is irreparable. The Department also addressed and replied to Lakewood's exceptions in connection with the remaining *Crowe* factors.

Regarding the viability of Lakewood's underlying claim, the Department agrees with the ALJ that, to the extent Lakewood is seeking consequential relief in the form of revenue to cover any alleged shortfalls in its FY2020 operating budget, the matter is moot. Despite Lakewood's contention that the matter is not moot because the original issue presented [is] the removal of $30,000,000 in State aid from the Governor's budget, the ALJ correctly rejected Lakewood's efforts to have the OAL "interject itself into the political process of state budget approval." (Initial Decision at 11). The Department further argues that the Commissioner lacks the authority to provide Lakewood with aid that the Legislature did not appropriate. Lakewood has received aid in the amount that it requested in its petition, which are sufficient funds to provide its students with a thorough and efficient education. Therefore, the Commissioner

should adopt the ALJ's determination that Lakewood's claims are now moot and adopt the Initial Decision as the final decision in this matter.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that Lakewood has failed to demonstrate an entitlement to emergent relief pursuant to *Crowe*, *supra*. Notably, the essence of Lakewood's irreparable harm argument is that without the State aid promised in the Governor's budget, Lakewood was unable to comply with *N.J.S.A.* 18A:7F-5(c) as it lacked the financial resources to submit a budget sufficient to provide a thorough and efficient education. Lakewood further alleges that its inability to comply with *N.J.S.A.* 18A:7F-5(c), forced it to shut down services on July 1, 2019. Yet, Lakewood admittingly had the funds necessary to meet its obligations to provide a thorough and efficient education through March 2020, so clearly no financial shortfall was imminent. Moreover, on July 1, 2019, the Commissioner, consistent with his practice of prior years, certified to the State Treasurer that Lakewood required $36,033,862 to enable it to meet its constitutional obligations. The Commissioner likewise agrees with the ALJ's determination that Lakewood did not establish any of the remaining *Crowe* factors.

The Commissioner is also in accord with the ALJ's determination that the underlying petition should be dismissed as moot. As discussed above, on July 1, 2019, the Commissioner certified to the State Treasurer that Lakewood required $36,033,862 to meet its constitutional obligations. As the ALJ succinctly stated, "[t]he Commissioner has acted within the limits of his statutory authority to ensure that the district will have sufficient funding to provide its students [with] a thorough and efficient education. The State Treasurer has complied and has approved the loan to the district." (Initial Decision at 11). Further, to the extent

Lakewood is seeking a political remedy – i.e. recourse for the disparity between the Governor's recommended budget and the budget passed by the Legislature – this forum does not have any authority to rule on that request. Finally, the Commissioner is not persuaded that the exceptions filed by Lakewood dictate a different result, because the objections outlined therein were previously raised before the ALJ and were clearly taken into account by her in denying emergent relief and determining that Lakewood's underlying claim is now moot. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.[7]

IT IS SO ORDERED. [8]

COMMISSIONER OF EDUCATION

Date of Decision: 8/06/19
Date of Mailing: 8/06/19

[7] The Commissioner concurs with the ALJ's determination that Lakewood's request for records is too vague and that the request for costs is not available in this forum.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(INCORPORATING MOTION FOR EMERGENT RELIEF)
OAL DKT. NO. EDU 08386-19
AGENCY DKT. NO. 142-6/19

BOARD OF EDUCATION OF LAKEWOOD TOWNSHIP, (OCEAN COUNTY),
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq., appearing for petitioner

Lauren Jensen, Deputy Attorney General, appearing for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 3, 2019 Decided: July 3, 2019

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

Petitioner, the Board of Education of Lakewood Township (Board or district), filed this action against respondent, the New Jersey Department of Education (DOE), as an emergent-relief request and petition, including a request that the petition also be accepted as an application for emergent relief in lieu of a more formal petition. Lakewood seeks that the DOE provide any and all requested records/documents previously requested as to the [DOE] budget and the budget proceedings; that the DOE take any and all steps to provide necessary and definitive and secure funding to the Board; that the DOE take whatever action is required to allow the district to complete its budget; that the DOE immediately advise the Board that public-school children will be provided with a thorough and efficient education and the source of funding; that the DOE forego collecting any and all previous loans/State-aid advances as it knew or should have known that the monies were required to provide a thorough and efficient education and were not able to be paid back; that the DOE reimburse the Board for any and all costs and fees associated with the application; and any and all other relief deemed appropriate and just.

The DOE contends that the petition is procedurally deficient and also fails to state a claim on which relief can be granted, thereby requiring dismissal of the petition. Further as of July 1, 2019, when the Commissioner provided the state aid advance sought by the petitioner, the DOE contends the case is moot.

BACKGROUND AND PROCEDURAL HISTORY

On or about June 19, 2019, the petitioner filed an "Emergent Relief Request and Petition" with the DOE. The Commissioner of Education transmitted the matter as "emergent" to the Office of Administrative Law (OAL), where it was filed on June 20, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The petitioner supplemented its filing on June 26, 2019.

On June 26, 2019, the DOE filed a motion to dismiss. Oral argument was held on June 26, 2019.[1] The respondent was given until July 1, 2019, to respond to the petitioner's supplemental exhibits, and the district was given until July 3, 2019, to respond, if necessary. On July 1, 2019, before the DOE could respond, the district filed two supplementary briefs and exhibits. The DOE was given additional time to respond to these new filings, and replied on July 1 and 2, 2019. The district filed additional supplementary letters and exhibits on July 1, 2, and 3, 2019.[2] The record closed on July 3, 2019.[3]

FACTS

Lakewood is a unique school district within New Jersey: it is comprised of approximately 6,000 enrolled public-school students, as well as approximately 31,000 non-public-school students. State aid to the district is based on the number of public-school students. This calculation impacts the amount of funds that remain available for the district to provide its enrolled students with a constitutionally-mandated thorough and efficient education, because Lakewood also has a statutory mandate to pay for the transportation and special-education costs for the non-public-school students.

Lakewood has been under the supervision of a State monitor since 2014. In addition to School Funding Reform Act funding, the district has received nearly $47 million in advance State-aid payments since the 2015–2016 school year. Under the School District Fiscal Accountability Act (SDFAA), N.J.S.A. 18A:7A-54 to -60, the Commissioner of Education can recommend to the State Treasurer that an advance State-aid payment should be made to a school district for which a State monitor has been appointed. The Commissioner's recommendation is based upon whether the payment is necessary to ensure the provision of a thorough and efficient education. N.J.S.A. 18A:7A-56(a).

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[1] The district bused approximately 100 students, including young special-education students, to the hearing in Trenton. While hearings at the OAL are generally open to the public, and while the interest of the children is understandable, the presence of children is not necessary to impress upon this tribunal the seriousness of this matter.

[2] These pleadings contained additional requests for relief not contained in the original application.

[3] See list of exhibits.

In 2015–2016, the Commissioner recommended, and the district received, $4,500,000; in 2016–2017, the Commissioner recommended, and the district received, $5,640,183; and in 2017–2018, the Commissioner recommended, and the district received, $8,522,678.[4] Most recently, the Commissioner recommended, and the district received, approximately $28,000,000 in advance aid for the 2018–2019 school year. Under the SDFAA, such aid is to be repaid by the school district through automatic reductions in the State aid provided to the school district in subsequent years. N.J.S.A. 18A:7A-56(b).

As the Governor prepared his proposed State budget for fiscal year 2019–2020, an additional $30,000,000 (approximately) was earmarked for the district. However, by June 20, 2019, the Legislature had approved and submitted a budget to the Governor that eliminated this provision. Notwithstanding that these funds had already been removed from the legislatively approved budget (appropriations act), the Board approved its budget for 2019–2020 on June 24, 2019, but made it contingent upon the receipt of the "promised" funds.

The Board states that it requires the $30,000,000 to meet its anticipated shortfall for school year 2019–2020 to meet its constitutional obligations to the public-school students to provide a thorough and efficient education, and to the non-public-school students for whom it is statutorily mandated to provide services.[5] At oral argument, Lakewood represented that the relief it was seeking was an order compelling the Commissioner to write a letter to the State Treasurer to obtain the $30,000,000 in advance aid the district claims is necessary to complete its budget for the upcoming school year, and for that amount to be forthcoming from the State.[6]

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[4] For fiscal year ending June 30, 2018, the letter was not sent from the Commissioner to the Treasurer until November 11, 2017.

[5] The basis for the $30,000,000 in aid has not been disclosed as part of these proceedings other than that the state fiscal monitors employed by the district have certified that this amount is necessary to provide Lakewood students a thorough and efficient education.

[6] Transcript at 67:

> *The Court:* So what you're saying is what you're really looking for is another letter, like the four previous letters that have been sent from the Commissioner to the Treasurer saying "Lakewood needs X dollars because it needs it to get a T&E"?
> *Mr. Inzelbuch:* Exactly.

Following oral argument on June 26, 2019, the Board advised that because the budget signed by the Governor on June 30, 2019, did not include the $30,000,000, the budget the Board had approved earlier that week was null and void, the district had no operating budget in place, and it was shutting down services effective July 1, 2019.[7] On July 1, 2019, the Board shut down the school district.

On July 2, 2019, the DOE advised that on July 1, 2019, the Commissioner had written a letter to the State Treasurer requesting that $36,033,862 be provided to the district in the form of advance aid for school year 2019–2020, and that the State Treasurer had approved the request. The DOE urges that this matter is now moot and must be dismissed. The Board has not consented to the dismissal because the removal of the funds from the governor's budget was "political" and the loan of approximately $36,000,000 recommended by the Commissioner and approved by the State Treasurer is not the same as receiving $30,000,000 in direct aid.

As of July 3, 2019, the district represents that it is the only one in the state without a certified budget and that it requires an additional $16.9 million in aid for the coming school year.

LEGAL ANALYSIS AND CONCLUSION

I. Procedural Issues

The DOE has initially raised a procedural issue, namely, that the application that was filed is not in conformity with N.J.A.C. 6A:3-1.6(a), which provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.

[7] The underlying "petition" indicated that Lakewood had sufficient funds to cover the school district through March 2020.

Here, the petitioner filed an "Emergent Relief Request and Petition." If this application is considered as a "petition," then no motion seeking emergent relief accompanied it. If the application is considered as a "motion for emergent relief," then no underlying petition seeking final relief accompanied it.

The DOE is correct that procedurally the filing is deficient. However, given the importance of the issue, the application will be treated as both a petition seeking final relief and as a motion for emergent relief without the necessity of the petitioner filing a formal motion for emergent relief, or filing supplemental pleadings.[8]

II. Emergent Issues

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

> 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.
>
> [See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on its motion. See Crowe, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cty. Reg'l High Sch. Dist. & USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester Cty. Reg'l High Sch. Dist. Bd. of Educ. & USA Elec. Contractors, Inc., OAL Dkt. No. EDU 10833-95, Order Denying Emergent Relief (December 6, 1995),

[8] This accommodation, however, is not to be construed as precedent for accepting any other procedurally deficient filings.

adopted, Comm'r (December 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm)).

The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012); Waste Mgmt. of N.J. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed:

1. Whether petitioner will suffer irreparable harm if the application is not granted.

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioner. Crowe, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

The district alleges that its students will suffer irreparable harm if the relief sought is not granted, namely that the Commissioner be compelled to certify to the State Treasurer that it requires $30,000,000 to meet its funding obligations.

Under N.J.S.A. 18A:7F-5(c), "[a]nnually, on or before March 4, or on or before March 20 in the case of a school district with an annual school election in November, each district board of education shall adopt, and submit to the commissioner for approval, together with such supporting documentation as the commissioner may

prescribe, a budget that provides for a thorough and efficient education."[9] Neither the statutes nor the regulations governing school budgets specifically address the consequences of a school district's failure to adopt, or submit for approval, a budget within the prescribed time limits. In particular, and important to this matter, there is an absence of statutory or regulatory authority addressing whether a school district that fails to adopt a budget for an upcoming school year may, or must, shut down and cease all operations upon the start of the school year.

The Board did not approve its budget until the eleventh hour—and a contingent budget at that. By not having a budget, the Board is asserting that irreparable harm will occur because it cannot pay for services to its students. However, the petition alleged that the district has funds available to meet its obligations through March 2020, so no financial shortfall has yet occurred. While without a budget, the district may continue to operate if it so chooses. The district is seeking a remedy that is in the form of monetary relief. The failure of the district to produce a budget by the statutory date does not create an emergency warranting immediate relief when it represents that it has funds to operate.

2. Whether the legal right underlying petitioner's claim is well settled.

The Board claims that the legal right underlying its claim is well settled, but it is not. The school funding formula has been found to be constitutional.[10] The Board contends that the district cannot spend money if it does not have an approved budget in place for the 2019–2020 school year, but it has provided no law in support of that position except to note that as State law requires the State to shut down non-essential services if it does not have an approved budget, so must the district.

The regulations concerning the budget process were designed to give districts more than adequate time to arrange for budget review and approval with the DOE. Were the district's position correct, then districts acting with a monitor across the state

[9] The date was adjusted by the Commissioner to March 12, 2019.
[10] Abbott ex rel. Abbott v. Burke, 199 N.J. 140 (2009). In a separate action pending in the OAL, other petitioners allege that the school funding formula is unconstitutional as applied to Lakewood.

could decline to adopt budgets in accordance with the regulations and then claim an emergency to compel the DOE to fund its services.

The district also claims that because the State monitors certified the amount necessary for the district to provide a thorough and efficient education, that the Commissioner should accept that amount without further review or analysis. But the Commissioner can review any requests for additional aid to cover budget deficiencies in order to determine whether a district is entitled to grants or loans. The Board has certainly availed itself of this procedure in the years preceding this application. Indeed, for fiscal year 2017-2018, the Board passed its budget but the requested letter from the Commissioner was not issued until November 2017.

Accordingly, this prong of Crowe has not been met.

3. Whether petitioner is likely to be successful on the merits of its claim.

The Board did not demonstrate at the emergent hearing that it is likely to prevail on the merits as the Commissioner had not yet determined whether to provide financial assistance to the district for the 2019–2020 school year. The district has not shown that relief is mandated in these circumstances. Moreover, no law or regulation requires the Commissioner to be ordered to grant additional aid to the district, although as the record closed, the DOE advised that the Commissioner did in fact send a letter to the State Treasurer to request that the advance State aid be sent to the district in the amount of $36,033,862, and further, that the treasurer has approved the request.

4. Whether the petitioner will suffer greater harm than respondent if the requested relief is not granted.

No doubt the issues raised by the district are substantial, but the harm is not necessarily greater to the district than to the DOE. Indeed, if relief were granted here, it could act as precedent for other monitored districts facing a budgetary shortfall to withhold complying with the budget regulations and to file for orders to compel the Commissioner to provide funds to them. Such a result could cause chaos in the school

funding and budget procedures. Moreover, the district has not demonstrated that it would suffer greater harm if the relief requested were not granted, although undoubtedly, children would suffer greater harm if they could not attend school.

Conclusion

After weighing the Crowe criteria, the district has not proven clearly and convincingly that it has satisfied Crowe's four prongs or that the district is entitled to emergent relief. Accordingly, the request for emergent relief must be denied because it is moot. The district received the relief it requested.

III. The Underlying "Petition"

The "petition" filed in this matter, while essentially seeking emergent relief, is also being treated as an original petition. (See Section I.) Here, the district seeks the following:

1. Compel the DOE to provide any and all requested records/documents previously requested as to the budget and the budget proceedings;

2. that the DOE take any and all steps to provide necessary and definitive and secure funding to the Board;

3. that the DOE take whatever action is required to allow the district to complete its budget;

4. that the DOE immediately advise the Board that public-school children will be provided with a thorough and efficient education and the source of funding;

5. that the DOE forego collecting any and all previous loans/State-aid advances as it knew or should have known that the monies were required to provide a thorough and efficient education and were not able to be paid back; and

6. that the DOE reimburse the Board for any and all costs and fees associated with the application; and any and all other relief deemed appropriate and just.

The DOE moves to dismiss the petition for failure to state a claim on which relief can be granted and, further, because the matter is moot. Indeed, this matter is now moot. On July 1, 2019, the Commissioner, consistent with his practice of prior years, certified to the State Treasurer that the Board required $36,033,862 to meet its constitutional obligation. The Commissioner has acted within the limits of his statutory authority to ensure that the district will have sufficient funding to provide its students a thorough and efficient education. The State Treasurer has complied and has approved the loan to the district.[11]

The request for records is too vague for relief to be granted. The request for costs is not available in this forum. The remaining prayers for relief were resolved, as counsel for the Board represented at the hearing that the letter from the Commissioner that has now been provided would resolve this matter. The district would like this forum to interject itself into the political process of state budget approval and the disparity between the Governor's recommended budget and that passed by the Legislature (but later signed by the Governor). As the district seeks a political remedy, this forum is without authority to rule on those issues. Accordingly, the matter is now moot. "Courts should not decide cases where judgment cannot grant relief," or when the court's decision can have no practical effect on the existing controversy. Plainfield v. Dep't of Health & Senior Servs., 412 N.J. Super. 466, 483–84 (App. Div. 2010).

The petition shall be dismissed.

[11] The district argues that this advance should be an outright grant and not a loan.

ORDER

The Board having failed to meet the four-pronged test of Crowe, the application for emergent relief is **DENIED**.

As to any underlying claims not disposed of in the emergent application, they are moot. Accordingly, the respondent's motion to dismiss the petition is hereby **GRANTED**. The petition is **DISMISSED**.

I hereby **FILE** this order on application for emergent relief and this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

July 3, 2019
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ
(Ret., on recall)

Date Received at Agency: July 3, 2019

Date Mailed to Parties: July 3, 2019 (via fax)

SMS/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

June 20, 2019	Petition with Exhibits A – E
June 25, 2019	Supplemented Petition with Exhibits A – L
June 26, 2019	Opposition to Motion to Dismiss
June 26, 2019	Email with Exhibits
June 27, 2019	Correspondence
June 27, 2019	Correspondence with Exhibits A – D
June 27, 2019	Correspondence with Flash Drive
June 28, 2019	Correspondence with Exhibits A – E
July 1, 2019	Correspondence with Exhibits
July 1, 2019	Correspondence with Exhibits and Flash Drive
July 1, 2019	Emails (3:28 p.m., 3:34 p.m. and 3:43 p.m.)
July 2, 2019	Correspondence with Certifications
July 2, 2019	Emails (1:24 p.m., 4:14 p.m. and 4:20 p.m.)
July 2, 2019	Correspondence with Exhibits
July 3, 2019	Correspondence with Exhibits A – I

For respondent:

June 25, 2019	Motion to Dismiss – Brief and Certification
July 1, 2019	Correspondence
July 2, 2019	Emails (11:57 a.m. and 1:22 p.m.)

Berdecia, Christina

From: Berdecia, Christina
Sent: Wednesday, July 03, 2019 1:16 PM
To: Bloom, Randye; Greco, Margaret; Jennifer Killough; Karin Molnar; Rick Keiser
Subject: EDU 08386-19 Lakewood Twp. BOE v. New Jersey DOE (Initial Decision)
Attachments: EDU 08386-19 Lakewood Twp. BOE v. New Jersey DOE (Initial Decision).docx

Importance: High

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Sincerely,

Christina A. Berdecia, Judicial Assistant 1
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619
Fax No. (609) 689-4100

Judge Mary Ann Bogan Tele. No. (609) 689-4050
Judge Sarah G. Crowley Tele. No. (609) 689-4053
Judge Susan M. Scarola (Ret., on recall) Tele. No. (609) 689-4051

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

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6121	Memory TX	*917329055872	P. 13	OK	

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Trenton, NJ 08625

FAX TRANSMISSION

TO: Michael I. Inzelbuch, Esq. Fax No. (732) 985-5872
Lauren A. Jensen, DAG Fax No. (609) 943-5853

FROM: Christina Berdecia for Susan M. Scarola, ALJ (Ret., on recall)
Telephone No. (609) 689-4051

RE: Lakewood Twp. BOE v. NJDOE
OAL Dkt. No. EDU 08386-19

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FAX TRANSMISSION

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Lauren A. Jensen, DAG Fax No. (609) 943-5853

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STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

BRIDGEWATER-RARITAN TOWNSHIP REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION, SOMERSET COUNTY

Petitioner,

-and-

STEPHEN MICHAELE,

Respondent.

AGENCY DOCKET
NO.: 69/4-19

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

Nicholas Celso, Esq.
The Busch Law Group, LLC
400 Main Street
Metuchen, New Jersey 08840

For the Respondent:

Edward A. Cridge, Esq.
Melik O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

This matter comes before me on tenure charges brought under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, et seq., by Petitioner Bridgewater-Raritan Township Regional School District, Board of Education, Somerset County (the "District) against Respondent Stephen Michaele. The tenure charges at issue here were certified to the Bureau of Controversies and Disputes by the District on or about March 13, 2019. I was appointed the arbitrator to adjudicate this matter on May 2, 2019.

In this proceeding, I heard testimony from twelve witnesses over 3 days – June 5, 13 and 14, 2019 -- at the offices of the District in Bridgewater, New Jersey. Both sides

were represented by counsel and were afforded the opportunity to call witnesses, present evidence and to cross-examine witnesses offered by the opposing party.

The District presented the testimony of Superintendent Russell Lazovick, Principal Charles Ezell, eight students and one parent. The District placed 31 exhibits into evidence, consisting of documents and a video recording. Respondent testified in his own behalf and placed five exhibits in evidence. All witnesses were sworn and the testimony of all but one witness was recorded by a court reporter; the parties agreed to accept the Arbitrator's notes as the official record of the first witness' testimony. The parties submitted post-hearing briefs prior to July 26, 2019. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

BACKGROUND INFORMATION COMMON TO ALL CHARGES

1. Mr. Michaele has been employed by the Board as a High School Business Teacher since on or about September I,201,3. As a member of the teaching profession and an employee of this District, he is at all times expected to conduct himself professionally in accordance with the law, school policies, regulations and provisions; to exhibit high standards of ethical behavior and sound judgment, as well as to refrain from inappropriate socialization, contact and fraternization with students. Further, Mr. Michaele is obliged, among other things, to serve as a role model to this District's students and maintain a high degree of self-restraint and controlled behavior.

2. Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part:

> ... the Board recognizes there exists a professional responsibility for all school staff to protect a student's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all students attending the school district.
>
> In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all students. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-student professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward students.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to students or about students and shall not engage in inappropriate language or expression in the presence of students. School staff shall not engage in inappropriate conduct toward or with students. School staff shall not engage or seek to be in the presence of a student beyond the staff member's professional responsibilities ...

Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to students or for public display.

A school staff member is always expected to maintain a professional relationship with students and to protect the health, safety and welfare of school students. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

3. Board Regulation, 3281 - Inappropriate Staff Conduct, states plainly that "Inappropriate conduct by a school staff member will not be tolerated by the Board of Education. Policy No. 3281 and this Regulation have been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate conduct and conduct unbecoming a school staff member to pupils" (emphasis supplied). The Regulation also provides more specific guidance concerning the nature of "inappropriate conduct":

(5.) "Inappropriate comments" includes, but is not limited to, comments of a sexual nature, sexually oriented humor or language, inappropriate comments about a pupil's clothing or physical appearance, comments with sexual overtones, comments regarding a pupil's dating partner or comments about the staff member's personal life that are not relevant to the professional responsibility of the school staff member.

(6.) "Inappropriate conduct" includes, but is not limited to, sexual misconduct, a request by a school staff member to a pupil for a social relationship outside the school staff/pupil relationship, sexually harassing conduct, inappropriate touching by the staff member to a pupil or permitting a pupil to inappropriately touch a staff member, corporal punishment, requesting a pupil to expose private parts of their body, other than for school medical purposes, and a staff member exposing their own private parts of their body to a pupil. Inappropriate conduct also includes physical contact between a staff member and pupil that is beyond the staff member/pupil professional relationship. This contact includes, but is not limited to, kissing, touching or feeling private parts of the body, holding hands or arms, and other contact that typically shows a sign of affection beyond the staff member/pupil professional relationship. "Inappropriate conduct" does not include a hug initiated by a pupil as a sign of the pupil's appreciation to a school staff member at a school sponsored activity such as school banquets, school recognition programs, graduations, etc.

(7.) "Inappropriate language or expression" includes, but is not limited to, the use of any profanity, obscene language, public lewdness or the use of public lewdness, comments with sexual overtones, distribution and/or discussion of any pornography.

(8.) "Inappropriate staff conduct" is any conduct prohibited by this Policy and corresponding Regulation including any other conduct deemed by the Commissioner of Education, the State Board of Education, statute, administrative code, and/or the judicial case law to be inappropriate conduct and/or conduct unbecoming a school staff member.

4. Board Policy 3280, "Liability for Student Welfare" states in pertinent part that:

Teaching staff members are responsible for supervision of students and must discharge that responsibility with the highest levels of care and prudent conduct.

***

(2.) The exchange of gifts between staff members and students is discouraged. . .

(4.) Staff members will not knowingly socialize . .. verbally except on matters initiated by the staff member that pertain to school-related matters. . .

(15.) Staff members will not associate with students at any time in any situation or activity which could be considered sexually suggestive ...

Staff members must be cognizant of the intent of this policy and should not put themselves in any position that could be perceived as a violation of said policy. Any violation of this policy may result in disciplinary action up to and

including dismissal.

5. Board Policy 5751, and its cognate Regulation, make it plain that the Board of Education also will not tolerate sexual harassment of students by school employees.

6. All Board Policies and Regulations, including the foregoing, are available on the District's public website.

7. Importantly, as more fully set forth below, Mr. Michaele's conduct is not an isolated incident, but rather involves a pattern of inappropriate conduct directed at a number of female students at various points in time. The incident initially giving rise to the Administration's investigation herein, involved the unwanted and uninvited kissing of a female student, "J.M.", by Mr. Michaele. However, further investigation revealed that Mr. Michaele has been engaged in a pattern and course of conduct over a period of time in which he has engaged in repeated acts of misconduct in violation of the foregoing policies and regulations, as well as the standard of conduct imposed by the Commissioner of Education upon every public school teacher in this State.

FACTS COMMON TO ALL CHARGES

8. During the 2018-2019 school year, student "J.M." was enrolled in Mr. Michaele's macroeconomics class.

9. On or about September 17, 2018, in the lobby of the 100 Building, at approximately 2:20 p.m., Mr. Michaele placed his arm around the shoulders of "J.M.", pulled her towards him and kissed her on the cheek. This action was observed and anonymously reported by a "concerned staff" member.

10. The foregoing incident was recorded on the School security camera. The High School Principal, Charles Ezell, and Assistant Principal, Laura Zamrock, reviewed the video. Upon observing the reported conduct, the Principal contacted the New Jersey Department of Children and Families ("DCF"), as well as the police.

11. Following completion of the DCF investigation, Principal Ezell undertook his own administrative investigation, in which, among other things, several students were interviewed and provided the statements annexed to the accompanying Sworn Statement of Evidence.

12. When the Principal's investigation was completed, he determined that Mr. Michaele's conduct was consistent with hostile environment sexual harassment and unbecoming conduct, warranting dismissal, subject to completion of an affirmative action investigation.

13. On or about January 4, 2019, Mr. Ezell notified the District's affirmative action officers of what he had found.

14. In due course, an affirmative action investigation was initiated by Dr. Gina Villani and Ms. Karen Jones, the District's Affirmative Action Officers.

15. On or about January 29, 2019, Mr. Michaele and his attorney, Edward Cridge, Esq., participated in a meeting with the Affirmative Action Officers.

16. At the aforesaid meeting, after reviewing the information that had been obtained through Mr. Ezell's investigation and interviews with students, Mr. Michaele admitted to engaging in most of the conduct, and said he could not either confirm or deny the remainder of the allegations against him. The allegations are set forth in the Affirmative Action Officers' report to the undersigned which is annexed to the accompanying Sworn Statement of Evidence in support of the within Tenure Charges.

17. The Affirmative Action Officers' report to the undersigned, dated January 30, 2019, sets forth the investigation results and recommendations.

18. In the above referenced correspondence, the Affirmative Action Officers determined that there was evidence of hostile environment sexual harassment, and recommended that the Board consider tenure charges.

19. After giving due consideration to all of the evidence set forth in the Sworn Statement of Evidence, the reports and findings of Principal Ezell and the Affirmative Action Officers, I hereby charge Stephen Michaele with conduct unbecoming a teaching staff member and/or other just cause for dismissal, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10. As more specifically set forth below, it is clear that Mr. Michaele has exhibited a careless disregard for the professional and ethical standards imposed upon him as a member of the professional staff and has been engaged in a pattern and course of conduct that demonstrates that he is no longer fit to perform his duties as a public-school educator and an employee of this Board. I simply cannot, in good conscience, return Mr. Michaele to the classroom and take the chance that Mr. Michaele will continue in the manner described or even worse.

SPECIFICATION OF CHARGES

CHARGE I
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal (Student "J.M.")

20. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

21. On or about September 17, 2018, in the 100 Building lobby, at approximately 2:20 p.m., Stephen Michaele put his arm around student "J.M." As she attempted to pull away, he pulled her back towards him and kissed her on the cheek.

22. The foregoing physical contact was initiated by Mr. Michaele, was uninvited and unwelcomed by the student, and forced on her against her will.

23. The afore described conduct by Mr. Michaele violates Board Policy and Regulation 5751, Sexual Harassment of Students.

24. The afore described conduct by Mr. Michaele violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

25. The afore described conduct by Mr. Michaele violates Board Policy 3280, Liability for Student Welfare.

26. The afore described conduct by Mr. Michaele constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE II
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal
(Student "E.A.")

27. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

28. During the 2017-2018 school year, "E.A." was as student in Stephen Michaele's class.

29. On at least one occasion during the 2017-2018 school year, when "E.A." raised her hand to ask a question during class, Mr. Michaele approached and then put his hand on her shoulder while answering the question. She recalls observing Mr. Michaele do this with other students on various occasions.

30. On the day of the Advanced Placement Macroeconomics Exam, "E.A." extended her hand to "high five" Mr. Michaele prior to taking the Exam. In response, he "leaned in" and kissed her forehead.

31. "E.A.'s" friends were confused when they observed the kiss.

32. "E.A." describes Mr. Michaele as "super friendly."

33. "E.A." describes other "awkward" encounters with students, including "long handshakes" and compliments about appearances.

34. "E.A." states that, to "many," Mr. Michaele's displays of affection were "seen as creepy."

35. "E.A." states that Mr. Michaele bought candy for students.

36. The afore described conduct by Mr. Michaele violates Board Policy 3289, Liability for Student Welfare.

37. The afore described conduct by Mr. Michaele constitutes conduct unbecoming a teaching staff member and/or other just cause warranting dismissal.

CHARGE III
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal
(Student "J.G.")

38. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

39. During the present school year, in Career Exploration, Stephen Michaele approached student, "J.G." at the end of the period and stated, "You look good in basic black," or words to that effect.

40. "J.G." was taken aback and replied, asking, "What"?

41. Whereupon, Mr. Michaele moved closer and whispered in her ear, repeating the comment.

42. "J.G." felt "very uncomfortable," especially since Mr. Michaele is a male teacher to whom she never speaks.

43. "J.G." telephoned her mother who told her to report the incident to her guidance counselor.

44. "J.G." reported the foregoing incident to Guidance Counselor, Evan Seavy, the period following the incident.

45. The afore described conduct by Mr. Michaele violates Board Policy and Regulation 5751, Sexual Harassment of Students.

46. The afore described conduct by Mr. Michaele violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

47. The afore described conduct by Mr. Michaele violates Board Policy 3280, Liability for Student Welfare.

48. The afore described conduct by Mr. Michaele constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE IV
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal
(Student "S.S")

49. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

50. During the course of the present school year, Mr. Michaele frequently engaged in interactions with student "S.S." not directly related to his duties as a teacher.

51. During the relevant time period, Mr. Michaele participated in conversations with "S.S." about other classes and "other things going on in ... .[their] lives."

52. In or about the time of the Christmas Holiday, "S.S." and her friends bought Mr. Michaele a onesie, so that they "... would all have matching animal onesies."

53. The afore described conduct by Mr. Michaele violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

54. The afore described conduct by Mr. Michaele violates Board Policy 3280, Liability for Student Welfare.

55. The afore described conduct by Mr. Michaele constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE V
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal
(Student "M.L")

56. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

57. At some time in or about the beginning of the current school year, Stephen Michaele commented to student M.L. that she was "looking healthy."

58. The afore described conduct by Mr. Michaele violates Board Policy and Regulation 5751, Sexual Harassment of Students.

59. The afore described conduct by Mr. Michaele violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

60. The afore described conduct by Mr. Michaele violates Board Policy 3280, Liability for Student Welfare.

61. The afore described conduct by Mr. Michaele constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE VI
Unbecoming Conduct - Pattern and Course of Misconduct over a Period of Time

62. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

63. The afore described misconduct of Stephen Michaele has occurred with multiple

students over an extended period of time; it is not an isolated incident of poor judgment or a mistake.

64. It is well established that the Commissioner of Education and the Courts recognize that the totality of a pattern of conduct may constitute unbecoming conduct, even when the individual acts comprising it, standing alone, may not. See, e.g. Cowan v. Bernardsville Bd. of Ed; Tenure Hearing of Greg Young/South Plainfield Bd. of Ed., and Tenure Hearing of Donald Dudley/Neptune Bd. of Ed.).

65. The course of misconduct set forth herein constitutes such a pattern of conduct unbecoming a teaching staff member.

66. This pattern and course of unbecoming conduct during an extended period of time, manifestly demonstrates Mr. Michaele's unfitness to continue to serve in a position of trust as a public teaching staff member, warranting his immediate dismissal.

ISSUE PRESENTED

Whether the Board has demonstrated by a preponderance of the credible evidence that the Respondent has engaged in conduct unbecoming a teaching staff member. If so, what shall be the penalty?

FACTUAL BACKGROUND

These tenure charges were brought against Respondent, a tenured high school teacher, after the administration at Bridgewater-Raritan Township Regional School District (District) initiated an investigation of an incident that occurred on September 27, 2018. During the investigation, as will be described below, the District learned of other conduct on the part of Respondent during the 2017-18 school year. There is virtually no factual dispute about any of the charged conduct; there is, however, a substantial dispute about (1) the context of each of the charged incidents, (2) their effect on the student body, and (3) the content and extent of training provided to Respondent by the District. There is also substantial dispute about the appropriateness of the penalty imposed by the District upon this teacher. Accordingly, I review the allegations in some detail below.

Grievant. Grievant came to teach at the District as a second career. Having attended Catholic parochial schools in the Bronx in his youth (Tr. III at 84), he attended Manhattan College where he graduated in 1980 with a double major in computer information systems and finance. He did graduate work in these fields, receiving an MBA in computer information systems and marketing in 1985, also from Manhattan College, and an MSE in Management of Technology from Wharton in 1999. Finally, he got a graduate certificate in project management from George Washington University. (Tr. III at 3-4)

With this educational background, Respondent pursued a career in IT in the business world, starting as a programmer at AT&T, where he initially spent 9 years. He moved up in the company, eventually becoming a manager over a group doing IT architecture for consumer services. In 1989, he left AT&T and spent the next 4 years consulting. In 1993 AT&T called him back to continue some work on a project that he had been working on when he left. He stayed with A&T this second time until 2002, becoming director of strategy and innovation at AT&T Broadband. (Tr. III at 5-6)

After leaving AT&T for the second time, Respondent was employed between 2002 and 2013 as the chief information officer at Direct Marketing Association, a fairly large trade association in New York. Thereafter he worked briefly as the Chief Information Officer at a small consulting firm. (Tr. III at 6)

At some point Respondent made a decision to leave the corporate world and become retrained as a teacher. He and his wife no longer needed the income, since two of their children had graduated from college and the third had a scholarship, and he found the corporate world wasn't fun anymore: he felt worn out by the traveling and commuting. (Tr. III at 6) His wife suggested that he find something "less stressful" and

suggested teaching. Because he had enjoyed teaching in the corporate world but did not want to teach at the college level, he looked into high schools. The District had one of the largest business departments in the area, so he began to work as a substitute teacher there. When a business teacher retired from the high school, creating an opening, Respondent applied. (Tr. III at 7)

He pursued an alternative path to certification, enrolling in a program at Raritan Valley Community College on Saturdays. (Tr. III at 56) Initially he completed a 24-hour course to get a temporary certificate. Then he was sponsored by the District to take additional courses while going through a first year of teaching, at the end of which he received certification. (Tr. III at 8) Respondent was hired as a teacher by the District for the 2013-14 school year. He took an approximately 50% pay cut to work as a school teacher, starting with a salary of $60,035 (SD. 19 at BRRSD 72) as compared with his salary in the private sector of $130-140,000. (Tr. III at 7) He achieved tenure.

Personnel record. During the five years that Respondent worked for the District, he never received any form of discipline. Each year he received an overall rating as Effective; for 2017-18, (SD 19 at 206); 2016-17, (Id at 234); 2015-16, (Id. at 289); 2014-15, (Id. at 302); 2013-14, (Id. at 333). Each year, the rating was accompanied by praise, for example, for:

- his hard work "to build a professional and personal rapport with the students and staff of the district (See, e.g., Id. at 333);
- creating a warm, safe, and exciting learning environment for his students (See, e.g., Id. at 258);
- building a teacher/student rapport "based on his abilities, knowledge and natural authority" (See, e.g., Id. at 224);

- demonstrating "patience, compassion, and humor while interacting with students" (See, e.g., Id. at 231);
- communicating with students in a way that "was positive, encouraging and he demonstrated a genuine concern for the students and their well-being." (See, e.g., Id. at 323)

Respondent is repeatedly described in his annual evaluations as a "kind and caring teacher." (See, e.g., Id. at 224, 347) He is also repeatedly praised for "going above and beyond" both within his department and throughout the high school, for example, by sponsoring student activity groups. (See, e.g., Id. at 206.)

In a letter to Respondent dated February 2, 2018, Superintendent Russell Lazovick commended him for his contributions to school staff, by teaching a workshop during a District-sponsored professional development activity day on a technological solution – GoogleApps –that "promoted independent learning.' Dr. Lazovick was effusive with praise for Respondent's workshop that "spoke to the hearts and minds of those who took it." He praised Respondent for throwing "caution to the wind and shar[ing] your passion with your colleagues," and concluded by urging him to "continue to *take the lead,*" stating "thank you for sharing your light with the rest of us." (SD 19 at 99)

Letters from students. Respondent placed in evidence thank-you notes from approximately 23 students over several years. The notes mention how much the students enjoyed his class (R. 3e), how much fun they had in class (R. 3-a), how supportive they found him in and out of class (R. 3d), how he reduced their stress levels (R. 3d), and how he was one of their favorite teachers. (R 3a-k)

The incident giving rise to the investigation and charges herein. On September 24, 2018, District high school Principal Charles Ezell, who had just started as principal July 1, 2018 (Tr. II at 10), received an anonymous letter in his mailbox. (Tr. II at 14) The letter stated:

> I feel that it is necessary for me to bring this insident [sic] to you as it still bothers me after a few days of thought. I do however wish to remain anonomous. [sic]
>
> On Monday 9/17 I and another teacher witnessed a teacher, [Respondent], kiss a student. It was on the cheek, and it was clearly unwanted physical contact on the part of the girl student. This teacher pulled her in by the shoulders and she clearly looked like she already wanted to pull away. This happened in the 100 building lobby right by where the parents sell the food afterschool. It happened at approximately 2:20 pm. I feel extrememly [sic] unconfortable [sic] with the situation.
>
> I just wanted to bring it to light.
>
> Thank you
> Concerned staff

(SB 1)

Dr. Ezell went to his Assistant Principal, Dr. Godown, and asked him to locate the security video that would show this location. (Tr. II at 19) The video was found and watched by the two administrators. (Id. at 20) It was also produced in this hearing, played for me, and is in evidence as SB 31. (Tr. II at 113) The video shows a group of three students walking through the lobby and moving toward the building exit. There is a table nearby where adults are selling food. Respondent is seen walking through the lobby with a piece of pizza in one hand. He notices the students and walks over to them and greets them. He puts his free arm on the shoulder of one of the students and kisses her on the cheek. Watching the video again in preparing this Opinion, I did not observe that the student "clearly looked like she already wanted to pull away;" the author of the

anonymous letter may, however, have had a different vantage point. The students' testimony about this incident is discussed below.

After this encounter, the students left the building. (Tr. II at 23-4) There is a second piece of video tape that was provided to me on a flash drive as part of SB 31. It was not played in the hearing. It shows Respondent and the three students outside, together walking away from the building. Respondent still has his pizza in his hand. He and the three students are walking side by side, talking. There is no touching.

With the help of his Assistant Principals, Dr. Ezell was able to identify at least two of the three students in the video. Dr. Ezell deemed the video to corroborate an interaction between Respondent and a student that could be "understood to be institutional abuse." Accordingly, he called the police and contacted the Department of Children and Families (DCF). He also reported the incident to Superintendent Lasovick and suspended Respondent pending investigation. (Tr. II at 26)

The police conducted a quick investigation and declined to press charges. (Tr. II at 27) DCF's investigation took longer. By letter dated November 2, 2018, which was received by the District on November 12, 2018, DCF made a finding that "Sexual abuse/sexual molestation is not established." (Tr. II at 28, SB 30) Subsequent to our hearing, on July 2, 2019 DCF issued a letter stating that its finding in the investigation was changed from "not established" to "unfounded." That letter was entered into evidence, without objection, to supplement the record. (R. 5)

The District's investigation into Respondent's conduct. After receiving the results of the DCF investigation, Dr. Lasovick decided that the District needed to conduct its own investigation into Respondent's behavior. He discussed the matter with the principal, Dr. Ezell, who conducted the investigation.

Dr. Ezell began by asking the student who was kissed in the video to come see him. He asked one of his assistant principals, Laura Zamrock, the 12th grade administrator, to assist him because the student involved was a 12th grader. He followed up by asking every student who was named by another student to also come down and see him. He had each student, individually, write a statement about her interactions with Respondent. He did not tell the students what to write, but followed the same framework with each one: (1) He told them the teacher's name; (2) he stated that the student may have information that would be useful for us to know; (3) he asked if the student was aware of any interactions that would be unusual or noteworthy." Then the students sat by themselves and wrote their statements. Afterwards, he and Ms. Zamrock questioned the students to clarify their states of mind and impressions: what did you think, how did you feel. The interviews all took place in early December 2018. Altogether, Dr. Ezell collected statements from 8 students, all of whom testified before me; their statements were all entered into evidence. (SB 3-10)

At the conclusion of his investigation, Dr. Ezell wrote up his findings in a memorandum addressed to Superintendent Lazovick. (SB 11) Dr. Ezell's conclusions and recommendations formed the basis for the tenure charges at issue here.

Charged Misconduct. Below I review the specific charges. I group the allegations by similar conduct.

Kisses on the cheek. There are charges, supported by testimonial evidence, concerning three different times when Respondent kissed students on the cheek or forehead. Four students testified to these incidents.

JH. Age 17, Senior. This was the student seen in the video being kissed on the cheek by Respondent. Her testimony matched her written statement:

- Respondent was her teacher for AP macroeconomics during the 2017-18 school year. She sat in front of the class with her friend, AJ. She had a "normal teacher student relationship" with Respondent, engaging in "friendly conversation during the year."
- At the end of the year, at the suggestion of AJ, the two took a photo with Respondent; after that Respondent kissed both her and AJ "on the cheek, quickly;" (SB 3, Tr. I at 74)
- JH was "surprised" by the kiss, but not "uncomfortable" or "alarmed;" (Tr. I at 76); she discussed it with AJ: "We both said that we were surprised but neither of us felt like anything wrong I guess had happened. Neither of us felt like anything bad was happening." (Tr. I at 77) Her relationship with Respondent "is casual and normal, I was not uncomfortable at any point." (SB 3)
- JH also wrote and testified that in her senior year, the fall of 2018, she saw Respondent walking to the parking lot while she was with SS; they had a "brief conversation" and he gave her a "kiss on top of the head." (SB 3, Tr. I at 81-82) She does not recall that Respondent put his arm around her or touched her in any way. (Tr. I at 82) She testified that it was the first time she had seen Respondent this year, "so we said hello and it was just friendly like a greeting." (Tr. I at 83)

AJ. Age 17, Senior. She had Respondent as her teacher for AP macroeconomics during her junior year. (Tr. I at 93) Her testimony matched her written statement:

- On the last day of school of her junior year (2017-18), she and her friend, JH, asked for a picture with Respondent. They took a "selfie" "it seemed pretty normal." (SB 5)
- After the picture, Respondent kissed JH and AJ on the cheek "in that order. (SB 5, Tr. I at 96) "It was just a light peck" (SB 5)
- She and JM both agreed that "it was strange but we didn't think too much about it at the time." (Tr. I at 97) Her feelings about the kiss changed, and she came to regard it as "more serious" after school administrators questioned her about it. (Tr. I at 98)
- She thought Respondent had an arm around her and JM for the picture but does not recall him touching either of them during the kiss (Tr. I at 102-3);

EA. Age 18, Senior. She was in Respondent's 2017-18 AP macroeconomics class.

- When the AP macroeconomic students were lined up outside the gymnasium to go in to take their AP exam, Respondent, like other teachers normally do, accompanied them, sending them off "like marching into war." (SB 7, Tr. I at 23) Normally teachers will be saying "good luck" and answering last minute questions, and that is what Respondent was doing: giving students "high fives" and being encouraging. (Id.) EA "high fived" Respondent, and he then kissed her on the cheek. She thinks he said, "good luck on the test." (SB 7, Tr. I at 23-4)
- To EA, "it wasn't a big deal;" (TR. I at 23) She thought Respondent was trying to be "comforting." (Tr. I at 42) She thought Respondent was "showing affection like a friendly grandpa but to many this was seen as creepy." (SB 7) Her friends in the class "were a little confused about what just

occurred." (SB 7) She did not tell anyone about what had happened. (Tr. I at 28) She continued to feel comfortable around him. (Tr. I at 44)

- EA enjoyed Respondent's class: "I thought it was a fun class. He was a good teacher. (Tr. I at 42)
- EA was very anxious and emotional while testifying. She told us that she had started taking medication for her anxiety, which had gotten worse during high school; all of her teachers knew about this, and she thought Respondent was trying to be supportive of her. (Tr. I at 42) At more than one point during the hearing, she asked to be excused to regain her composure. One of those times, I went outside and spoke with EA and her father, after which I put their comments on the record (Tr. I at 30):

> While I was with the student and her father in the hallway trying to get her calmed down, he said, so I wanted to report what he said, that she was very upset because she felt badly for the teacher. She thought he hadn't done anything wrong and she felt badly about being called to testify.

JV, Age 17, Senior. She was another student in Respondent's 2017-18 AP macroeconomics class. She is a friend of EA.

- The class was outside the gym where the AP exams take place waiting to be called in and Respondent, since he was their teacher, was there "wishing us luck giving us high-fives." EA was there, and Respondent "just like kissed her, not on the lips, just like on the face. It was really brief. She didn't really react to it." (Tr. I at 56, SB 6)
- JA remembers this event clearly: "I found it very out of place and unexpected. EA brushed it off and did not make a scene. It was time to enter the gym and take our AP Exam, so that was basically the end of it." (SB 6)

Respondent's testimony. Respondent testified that he has given students "what I would call a peck on the cheek." (Tr. III at 26) He specifically recalled giving students JM and AJ kisses on the cheek after they asked to take a "selfie" with him. He kissed them as a way of saying "a thank you for a good school year and the selfie. I don't have a lot of students asking me to take selfies with them." Tr. III at 31)

Respondent did not recall giving EA a kiss going into the AP exam, although he does not deny it. He recalls that EA was nervous about all the tests, and he told her "don't worry about it, you know, she will do fine." (Tr. III at 35)

He watched the video of himself giving JM a kiss. As he recalls the incident, it was the end of the day; they were all leaving school. She had been his student the prior year and was a very good student. She had given him a gift of fountain pens, which he found very thoughtful, because he collects fountain pens. It was the first time he had seen her this year, so "that was just a, hey, JM, how are you doing? How was your summer? It was welcome back." (Tr. III at 32-3)

When asked where he got the idea that it was appropriate to kiss students on the cheek, he stated there were two influences on him:

(1) It was a part of his Italian upbringing: "growing up just in family situations and with friends, that was something that we regularly did. It was a sign of respect. It was a sign of sometimes affection, sometimes it's a hello, sometimes it's a good luck. That was my experience." (Tr. III at 27)

(2) Teachers gave students kisses on the cheek in his parochial schools, both elementary and high school. "As tough as they were, there were teachers that were very approachable, very kind to the students." Twice each year, his French teacher would give each student kisses on both cheeks in celebration of the 6-month anniversary of Bastille Day and the anniversary of VE day. (Id.)

Touching students. The District presented evidence of two kinds of inappropriate touching of students: touching them on the shoulders or arms while talking to them and giving "long high-fives."

2017-18 Macroeconomics class: placing a hand on students' shoulders or arms while talking to them. More than one student observed JG place a hand on the shoulder or arm of a student while he stopped to address that student's questions. Other students did not observe this behavior.

- SS testified that Respondent touches the shoulders of students and would linger with a hand on their shoulder when talking to them. (Tr. I at 136) This happened many times, when SS or other students had a one-on-one question. (Tr. I at 138, 151) Respondent did it with both male and female students. (Id. at 151) It did not make SS uncomfortable. (Id. at 150)
- JV recalls that during AP class Respondent would approach students to answer their questions "by putting his hand on their shoulder and then proceeding to answer their question. This happened to my classmates and me." (SB 6, tr. I at 61-2) This happened to her and she observed it with one other female student a couple of times for each of them. No one ever commented about it; the other students never told her they thought it was weird. (Tr. I at 62-3)
- JH does not recall ever seeing Respondent put a hand on a student's shoulder while addressing that student. (Tr. I at 85)
- JA never observed Respondent touching a student by placing a hand on the student's shoulder while talking to the student and does not know of anyone complaining about that. (Tr. I at 104)

Respondent does not dispute the student accounts, but was unaware of this behavior. (Tr. III at 22)

Giving a long "high-five" to students. ML, a student in the AP macroeconomics class, wrote that during the 2017-18 school year, Respondent congratulated her for a soccer win "and he gave me a "long high-five" or a "lingering handshake." (SB 4, Tr. I at 118) She testified that she added that comment to her written statement because "Dr. Ezell told me both of these things that I think he wanted me to write down." (Tr. I at 118) She did not observe Respondent giving other students long high-fives or lingering handshakes. (Tr. I at 119) She testified that it was not something that stood out to her as "strange or out of the ordinary;" (Tr. I at 118) but when pressed further by counsel, she testified that she thought it was "weird but not really uncomfortable." (Tr. I at 119).

Respondent, when asked about ML's testimony, stated that "honestly, the first time I heard the phrase long high-five I didn't even know what that meant. I give a lot of high-fives to students and athletes..." (Tr. III at 19)

Receiving a gift of a "onesie" from students and posing with them for pictures. SS, a 17-year-old Senior, was a student in Respondent's AP macroeconomics class during the 2017-18 school year. She also had him for a summer night-school class on coding before she entered high school. (Tr. I at 130) She and three of her friends (one male and three females) in the macroeconomics class gave Respondent a "gag" present at Christmas 2017. The present was an animal "onesie" – a baggy one-piece monkey costume that can be used as sleepwear. "[W]e thought it would be fun to give [Respondent] because he was our favorite teacher." (Id. at 131) She testified that she and her friends got the idea because they had worn their own "onesies" to school on

Halloween. (Id.) Respondent did not give SS a gift but wrote her a thank you note. (Id. at 133)

At the end of the school year, after the AP exam was over, the group of friends decided they wanted to take a picture with Respondent with all of them in their animal onesies. They planned what day this would happen and asked Respondent to bring his onesie back to wear in school. (Tr. I at 153-4) They posed for a picture with Respondent that was entered into evidence as R. 1. The students and Respondent are all standing with their arms around each other's shoulders, wearing the onesies over their regular clothing and smiling broadly. (R. 1, Id. at 153) This did not interfere with any teaching in the classroom. (Tr. I at 153, III at 25-6)

When asked by Principal Ezell to write about her experiences with Respondent, SS wrote "this was one of my more favorite classes I've taken." She went on at some length:

> My friends and I always had fun in that class and always talked to [Respondent] about other classes and other things going on in our life. [Respondent] always cheered us up. In fact, after my friend died in January, he was the only teacher who talked about it and said something meaningful and it really helped me when I finally came back to school. Also, during Christmas, I gave him a box of cookies, like I do for all my teachers, and a letter because I wanted him to write my rec [recommendation] letter. My friends and I also bought him a onesie for Christmas so we would all have matching animal onesies. He was one of our favorite teachers.

(SB 10) She explained in this hearing that her friend had committed suicide in January of 2018, and Respondent asked her if he should say something to the class and then he did so. He also spoke with her privately, letting her know that she could talk with him if she needed to and suggesting that she talk with her counselor and the grief counselor provided by the school. (Tr. I at 135)

Hugging students. SS testified that she gave Respondent a hug when she and her friends gave him their Christmas gift. And at the end of the school year, "I initiated a hug with him saying good-bye." (Tr. I at 144) SS described the hug as a "normal hug." (Id.)[1] Her friends also hugged Respondent. (Tr. I at 145) The hugs did not make her uncomfortable; she regarded them as the kind of hugs she shares with her grandparents; they were not romantic in any way. (Tr. I at 151)

Providing candy for students. There is no dispute that Respondent kept candy in his classroom for his students and for anyone else, like teachers, who asked for it. (Tr. III at 20) Respondent bought the candy from students and other teachers selling it for fundraising purposes. (Tr. III at 19-20) He got the idea to have candy on hand from another teacher, Jean McAteer, who told him he used it sometimes as an incentive for students. (Tr. III 20-1) Student EA testified that Respondent bought candy from students selling it as fundraisers and gave it to students: "That was just a nice thing he did as a teacher." (Tr. I at 35, SB 7)

Commenting on students' personal appearance. There was evidence concerning two separate occasions when Respondent made comments to two different female students about their personal appearance.

June 2018 comment to JG. JG never had Respondent as a teacher. (SB 29 at 1)[2] However, Respondent shared a classroom with Ms. Stroka, who taught a career exploration class that JG was in. One day in June 2018, when JG was in class,

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[1] SB's attorney questioned SS at length about the hug, the extent of body contact, etc. I found those questions frankly disturbing, an effort to pull out of SS that there had been a sexual aspect to the hugs she initiated, even though that was clearly not her experience. (See Tr. I at 144-7) During this questioning, SS stated, "I'm a little sick." (Tr. I at 146)

[2] Because the court reporter was late, no stenographic record was made of JG's testimony. Instead, the parties have agreed to use my notes as the official record of JG's testimony. It is identified as SB 29.

Respondent was at his desk in the back of the room doing his class prep; he had no teaching duties in the class. JG was wearing a black outfit that day. (Id.) Her mother testified that the outfit was a "black stomper and a cardigan" that had been "tacked" so that it was not low cut. (Tr. I at 12)

Toward the end of the class, Respondent was exiting the classroom and passed by JG's desk. When he was still a "comfortable distance" away, Respondent told JG words to the effect that "You look good in basic black" (SB 8) or "Black's your color" (SB 9). JG was taken aback and said, "What?" Respondent came closer to JG and repeated his comment. (SB 29 at 1) There is no dispute that Respondent did compliment JG that day about her outfit. (Tr. III at 48)

There is some dispute, however, about how close Respondent came when he repeated the comment. JG testified that he came close to her, touched her on the shoulder, and repeated the comment by whispering in her ear. (SB 29 at 1) In the statement JG wrote about this incident on December 12, 2018, she wrote that Respondent "got closer and whispered into my ear," but she did not say that Respondent touched her. (SB 8)

Student RW sat next to JG and witnessed the interaction between Respondent and JG. RW wrote a statement (undated) and testified in this proceeding. She observed Respondent say something "in a quiet tone" to JG. She could not hear what he said. She testified that she did not see Respondent get any closer to JG than 3-4 feet and did not see him whisper in her ear. (Tr. I at 170-1)

Respondent testified that he was about 5-6 feet away from JG when he made the first comment and moved back 2-3 feet to repeat. He did not whisper in her ear, and doubts that he placed a hand on her shoulder. (Tr. III at 17)

It is not disputed that this interaction made JG uncomfortable. (SB 29 at 1) She told RW so right after class, as RW wrote in her statement (SB 9) and confirmed in her testimony. (Tr. I at 168) JG also called her mother right after the class. (SB 29 at 1) Her mother was at work but took the call. She testified that her daughter was uncomfortable and upset. JG told her mother what Respondent had said, that Respondent had whispered in her ear, and that he had touched her on the shoulder. (Tr. I at 11) The mother told her daughter to discuss the incident with her guidance counselor, Mr. Seavey, and not with any other students. (Tr. I at 11) The whole incident upset the mother. (Tr. I at 13) JG texted her mother a bit later, upset again because the administration seemed to be talking to other people – "it was becoming an incident which, you know, it wasn't her intention." (Id.) The mother exchanged emails with Mr. Seavey, who told her that the Principal, Dr. Morrell, wanted to know how she wanted this handled. She replied that she wanted the school to handle this "according to protocol," and that she wanted to hear directly from Dr. Morrell, about what was being done. (Id.)

As evidenced by Dr. Morrell's subsequent email to JG's mother (SB 28), and confirmed by Respondent's testimony (Tr. III at 48-9), Dr. Morrell talked to Respondent about the incident later the same day. Dr. Morrell sent Respondent an email asking to see him: Respondent testified about their conversation:

> I had gone over to see him and he was actually exiting the 900 building at the time so we were standing in the lobby of the 900 building. He had asked me did you say something to a student like you look good in basic black? I said yes. He

said he had received a complaint about it. I didn't know actually until today, not today, this week that the complaint came from J[G]'s mother, that he had received a complaint about it. *He told me that statements like that could be misunderstood and I needed to be more careful in the future.* That was it.

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Q. What was your reaction to that conversation?

A. It upset me. I had asked Dr. Morrell if I should go apologize to the student. He told me no, I should just let it be. I made certain, then, for the rest of the school year that I stayed out of second period class. So I went and took my prep somewhere else and I hadn't seen JG again until she came in to testify.

(Tr. III at 48-9 Emphasis added.)

Dr. Morell sent an email to JG's mother letting her know that he had spoken with Respondent:

> I wanted to let you know that I spoke with [Respondent] regarding the comments made. ... He indicated that he did make the comment as he left the room, but it was meant to be a compliment. I mentioned that students do not always perceive things that way and that it was not a comment that should've been made. He understood and agreed that he would comply. I'm not sure if he even knows your daughter's name and I know she doesn't have him as a teacher.
>
> I'm confident that the matter has been resolved, but should anything else arise please don't hesitate to let me know. Thank you for reporting this incident. We want [JG] to feel comfortable on this campus and are here to support her.

(SB 28) Dr. Morrell did not report the incident to the Superintendent, and nothing was put in Respondent's personnel file.

Respondent gave two reasons for his compliment to JG that day. First, he often complimented students who were well dressed. He explained that the District does not have a dress code, and some students dress "atrociously," so he likes to compliment others who dress nicely, male and female alike, like basketball players in jackets and ties before a game, singers dressed for concerts, "things of that nature." Second:

> [W]e are a school of business and business education and proper dress is important in the business world. I don't know if it is still the case, but part of a

> rubric at one time for interviews, practice interviews for these students, included professional dress. So it is something that I notice.

(Tr. III at 16)

September 2018. ML is currently a senior. She is 18 years old. She was in Respondent's AP macroeconomics class in the 2017-18 school year. (Tr. I at 112) In the fall of the current year, she was on her way to the bathroom and passed Respondent, who was in the hall on bathroom duty. (Tr. I at 113) She said "hello" to Respondent, and he said, she was "looking healthy." (Id., SB 4) She did not know what he meant by the comment and thought it was "funny" "Just because of the oddity of it. ... It was a little strange." (Tr. I at 114) She could not recall his making any other personal comment, and it did not make her uncomfortable. (Id.)

Respondent recalled talking with ML at the beginning of this school year. She stopped by to say, "hi" while he was in front of his classroom, waiting for students to come in. (Tr. III at 18) He recalls the interaction this way:

> I had asked her how her summer was. She said good. I asked her what she did. She said, well, I was playing soccer all summer. I said who do you play for. She told me she plays for a club team named PDA, Professional Development Academy. That is a very elite club team. I know that because my own daughter played for PDA for one year. So she had been playing all summer. I went ahead and I told her, well, you look healthy. The reason for that is the important thing to an athlete, in particular an athlete that wants to play in college, is staying healthy. Being injured hurts that. She was going into her senior year and I knew she wanted to play in college. I told her, well, you look healthy. I wished her a good season and that was the nature of the conversation.

(Tr. III at 18-19)

The recommendation of tenure charges. Both Principal Ezell and Superintendent Lazovick testified about their conclusions that the conduct at issue here was inappropriate and unbecoming as well as their conclusions that discharge was the appropriate penalty.

Dr. Ezell testified that after he finished the interviews described above and consulted with AP Zamrock, he concluded that "the behaviors that I saw and experiences students had were consistent with (1) sexual harassment, (2) hostile workplace, and (3) conduct unbecoming. He was "not comfortable having [Respondent] at campus any longer." (Tr. II at 45)

Dr. Ezell had "concerns that this was not isolated this was a pattern of behavior;" he thought that a penalty less than dismissal would allow Respondent to go to another school and put other students at risk. (Tr. II at 47) He was also concerned by the students' reports that they found Respondent's conduct "not unusual" or "normal."[3] He explained that Respondent's conduct would not be appropriate for any boss with a subordinate and "certainly not appropriate for a teacher with a student," because there is an imbalance of power with younger subordinate students unable to say no. He thinks that it is "not appropriate for students to think that interactions like that are normal or regular because they are not. And if they are that is indicative of an expectation that is unhealthy and will have an impact the rest of their lives;" they may have bosses in the future to whom they are not comfortable saying no. "I think the younger you are the less likely you are to feel empowered to say no" (Tr. II at 51)

Asked about the practice of exchanging gifts with students, Dr. Ezell acknowledged that District policy allows teachers to accept gifts from students: "small gifts are not reason for concern." (Tr. II at 53) Dr. Ezell, nevertheless, was concerned about Respondent giving candy to his students. His concern came out of his experience in a former school district where a teacher had a pattern over years of providing gifts

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[3] The District's attorney asked Dr. Ezell about student use of the term "normalized;" to which he replied, "That was not my language." (Tr. II at 50) I did not locate that term in any student statement. Students did use the terms "normal" about their relationship with Respondent (JH, SB3; AJ, SB5; SS Tr. I at 144).

and candy to students to whom he then made sexual overtures. That case resulted in 40 criminal counts against the teacher. The prosecutor in that case referred to the teacher's gift giving as "grooming behavior." (Tr. II at 52-3) When asked to review his notes (SB 18), his report to the Superintendent (SB 11), and the student statements (SB 3-10), he acknowledged that there is no report that Respondent gave any student a gift, and no report that he gave any particular student or students candy – only that he had candy available in his classroom. (Tr. II at 56-60) He further acknowledged that the district does not have a policy against teachers bringing cookies or candy or a treat in for a class. (Tr. II at 61)

In his formal report to the Superintendent dated February 26, 2019, Dr. Ezell stressed the following points:

- The student reports were credible, because they were consistent, verified by other witnesses, and not all the students are part of the same peer group;
- The evidence established "a pattern of behavior where he makes frequent physical contact with female students and comments on female students' physical appearance;"
- Respondent's conduct was unwelcome, "was severe and persistent" and adversely impacted the educational environment by "altering student's sense of security."

(SB 11) Dr. Ezell could not point to any specific student or students who were adversely impacted by Respondent's conduct: that was his deduction. (Tr. II at 96) It is his contention that students who witness or hear about an inappropriate act by a person in power toward another student are themselves likely to feel unsafe. (Tr. II at 104-5)

In addition to completing his own report, Dr. Ezell recommended that the District's Affirmative Action Officers conduct another investigation. The Officers

reviewed the statements of the students gathered by Dr. Ezell and also interviewed Respondent. In a report dated January 30, 2019, the officers recommended that Respondent "should receive consequences for his actions." They recommended the District consider tenure charges; alternatively, if Respondent's employment continued, "it must be made clear to him that any future deviation from district policy or misconduct will lead to additional discipline, up to and including termination." (SB 12) Asked if he thought Respondent could be remediated, Dr. Ezell, who had been Respondent's principal for less than one month, (Tr. II at 10) replied that he did not know the Respondent well enough to say; it would be speculation. (Tr. II at 111)

Dr. Lazovick reviewed the reports and recommendations from Dr. Ezell and the Affirmative Action Officers, as well as the student statements discussed above, which were appended by Dr. Ezell to his report. He concluded that Respondent's conduct – the kissing of students, physical contact with them, and making personal comments about appearance – was inappropriate and violated Board policies against sexual harassment and inappropriate behavior. (Tr. II at 130-3) Dr. Lazovick asserted that the District follows progressive discipline. (Tr. II at 134) He summarized the evidence presented to him that he deemed inappropriate: Respondent "put his hands on a student in any way, shape or form" over a period of time, when there "had been a conversation in the middle of these documented incidents," before he and Dr. Ezell had become aware of them. That conduct was "unacceptable." (Tr. II at 134) By prior conversation, he was referring to the emails between the former Dr. Morrell and JG's mother, documenting that the principal had spoken to Respondent. (SB 28, Tr. II at 135) When asked if those emails constituted a "warning," he replied, "Not so much

warned." He went on to state that in his view, simply putting hands on a student is grounds for termination:

> [A]ctions sustained of this nature are on their own in any district I have been in grounds for termination. You do not put your hands on students The simple fact that he had already received a conversation in some way, shape or form didn't change my mind in any way, shape or form.

(Tr. II at 136)

Dr. Lazovick was asked whether he regarded all touching of students, regardless of context, to be inappropriate. He said he did, but admitted that as a former coach, he has seen coaches slap student athletes on the back or put an arm around their shoulders. He stated that at the District high school "we work with coaches" to ensure that any physical contact is mutual." (Tr. II at 143) Asked about student-initiated hugs, for example, at graduation, he replied,

> That is where we have to be careful. Correct. We at times can't physically restrain students, but it is about who is initiating in that respect.

(Tr. II at 146) District policy 3281(5) expressly exempts student-initiated, thank-you hugs. The Superintendent acknowledged it is possible for both parties to view hugs and kisses as non-sexual. (Tr. II at 161)

Dr. Lazovick testified that his concern was that "this pattern of behavior will not be broken and I cannot risk other students being put into an environment where we have this type of result." (Tr. II at 150) Shown pictures from the school's website of two teachers or staff members posing for pictures with their arms around the shoulders of students, the Superintendent was asked if those poses violated the District's training. He replied that in both situations there had to be a conversation with the teachers; he was not aware there had been a formal complaint about this behavior, but he would have to have a conversation with those teachers. (R. 4a, b, Tr. III at 126) Shown

pictures of President Obama and Secretary Hillary Clinton hugging students at a graduation and at a school, he saw "no imbalance of power:" "I would hope this would be appropriate." (Tr. II at 176)

The Superintendent testified regarding the state-mandated, annual training given to District employees about sexual harassment and related subjects. The District uses online training modules and videos. The District placed in evidence two screen shots identified as the particular training slides relevant to the issues in this case. The text of the two slides was:

> 1:01 Types of Staff-student Sexual Harassment
>
> Teachers may also make harassing comments. Staff-to-student harassment might also include hugging students, complimenting them inappropriately, making sexual gestures, and suggesting they hang out outside of school. IN other words, staff-to-student sexual harassment is often much more subtle than the stories that are hyped up in the news.
>
> 1:49 Avoiding Accusations of Harassment Against you
>
> In order to avoid any appearance of improper behavior, you should give students space by not standing too close. Avoid touching students for any reason. Avoid meeting one-on-one with students in a closed room. Compliment students only on merit, such as grades or accomplishments in sports, school-affiliated extracurriculars, or college acceptance. Never comment on a student's actual or perceived sexual orientation, dating life, or relational partners. Never transport students in your own vehicles. Always be fully aware of how your comments or actions might be perceived.

(SB 31, Emphasis on original.)

The Superintendent identified the above slides as being from the 2019 training, after Respondent was suspended; he did not know whether those two slides were included in the training that Respondent took in prior years. (Tr. III at 123) While the Superintendent believed that Respondent had taken the training that included these two slides, (Tr. III at 112), the District's records show only that Respondent completed

training modules on student issues with sexual harassment and staff to student sexual misconduct in August 2017 and July 2015. (SB 22 at 382)

Respondent's response to the charges. As noted above in the sections discussing interactions with particular students, in general Respondent admitted that the charged interactions took place. He acknowledged the remark about looking good in black to JG, and the remark "you look healthy" to ML. He also acknowledged the kisses on the cheek – what he called "pecks" on the cheeks – to students JH and AJ as well as to JM. He has kissed male students on the cheek, as well, in particular two students, who came to say goodbye at the end of the year. (Tr. III at 36-7) He does not recall, but also does not dispute, that he kissed EA on the cheek. (Tr. III at 35)

He testified that he was not aware that he put a hand on the shoulder of students when answering their questions, but does not dispute that, either. (Tr. III at 22) And he was not aware of giving "lingering" high-fives; he gives a lot of high-fives. (Tr. III at 19)

Asked if he ever stopped to think a student might not want a peck on the cheek from him, he said, he had not. "Probably because, to me, a peck on the cheek was – it was friendly. It was – it was a way to...maybe, you know, celebrate something, maybe say good luck, maybe say, you know, hello, haven't seen you in a while. It wasn't anything that was sexual in nature." (Tr. III at 36)

When Respondent was asked if he believed he had the ability to change his behavior if he was permitted to return to school, that is, if he thought he was capable of maintaining rapport with students without giving hugs or kisses or putting his hand on their shoulder, he replied, "I believe so. I mean I like to think – I believe in lifelong learning. When you make a mistake, you know, learn from it and do better, so, yes." (Tr. III at 41)

POSITIONS OF THE PARTIES

The District argues that it has met its burden to prove the tenure charges by a preponderance of the credible evidence in that (1) the District has established the facts alleged in the charges; these facts show that Respondent kissed students on the cheek on multiple occasions; the kisses were unwanted; the facts further establish that Respondent repeatedly engaged in other inappropriate behavior with sexual overtones, including making personal comments to two female students about their appearance, and touching students, including by placing his hand on their shoulders and hugging them; these actions violated Board Policies and Regulations, including policies prohibiting Inappropriate Staff Conduct (District Policy 3281, SB 15, 16), Liability for Student Welfare (District Policy 3280, SB 17), and Sexual Harassment of Students (District Policy 5751, SB 13, 14); (2) the District has further established that Respondent accepted an inappropriate gift of a "onesie" article of sleepwear, in violation of District Policy discouraging the exchange of gifts between staff members and students; (District Policy 3280, SB 17); he made matters worse by donning the onesie and posing for pictures with students during class time; the item has clear sexual overtones; (3) the District additionally proved that Respondent's conduct was unbecoming, regardless of whether it violated Board policies or state law; (4) the conduct conveyed at least the appearance of impropriety and was inappropriate in any case, whether sexual or not; all of the conduct was uninvited by the students, and, although some of the students stated they were not offended or overly concerned, almost all of the students regarded the conduct as undesirable, weird, and confusing; (5) even if the conduct was not sexually motivated, the physical contact Respondent initiated with students clearly had sexual overtones, since the recipients of hugs were 16 and 17 year old attractive females, a fact

that can hardly have been a coincidence; Respondent was in a position of power vis-à-vis the students; this was the kind of conduct that students might come to believe later in life they could not say "no" to, teaching them negative lessons about how to deal with advances from supervisors as they enter the workforce; (6) the fact that the DCF made a finding of "unfounded" about these incidents is irrelevant; Respondent must adhere to District policies, and, as the District's thorough investigation showed, he did not over a significant period of time; (7) the facts in this case are similar to other cases where Arbitrators and the Commissioner have sustained discharge for patterns of conduct by staff who thought they were acting in a fatherly or grandfatherly way and did not intend harm, but could not control their ingrained habits toward students; (8) Respondent was not only trained by the District to avoid the behaviors at issue here, but he was specifically warned after a student complained that he had made a personal comment to her about her appearance; his Principal spoke to him and admonished him to exercise caution in his interactions with students in the future; the admonition satisfies the District's preference for progressive punishment, but even if it did not, the Respondent's pattern of conduct of putting his hands on multiple students merits termination; (9) the evidence is clear that Respondent never really thought there was anything wrong about his conduct; indeed he was unaware of much of the touching; his assurances and promises that he will be able to refrain from such conduct in the future strain credulity; he should not be given any further opportunities to harm students by exposing them to further misconduct; rather, the District has a duty to protect the welfare of the students entrusted to its care. In sum, because Respondent has forfeited the trust of his Principal and the Superintendent and betrayed the public trust and that of the District who expect nothing less than the highest standards of professional behavior and avoidance of even

the appearance of impropriety, termination is appropriate; Respondent must be dismissed.

On the other hand, Respondent argues that the facts established on this record do not warrant Respondent's termination from his tenured teaching position in that (1) the interactions between Respondent and his students were not prurient, sexual, power-driven, or, with one exception, even unwelcome; rather they were expressions of fondness from a deeply committed teacher toward the students in his charge, and were so understood by the students who regarded Respondent with affection and esteem; (2) under the applicable legal standards, the Arbitrator in this case has no authority to rewrite or transmute the charges; this Respondent is charged with conduct unbecoming, not hostile work environment sexual harassment; moreover the Arbitrator is required to independently determine the appropriate penalty, if any, to be imposed and to give no consideration or deference to a District's decision to seek termination; (3) generally progressive discipline is applied to findings of unbecoming conduct; indeed, the District's own policies require progressive disciplinary measures, including verbal and written warnings as appropriate, providing for progressive penalties for repeated violations; failure to give prior warnings may be a reason used by an arbitrator to refuse to sustain disciplinary action, particularly termination; (4) termination is a draconian penalty, not always warranted even in the face of significant misconduct; arbitrators have refused to impose termination in cases involving significantly more serious misconduct than what is at issue here; this is particularly the case where a teacher's wrongful actions are not cruel, premeditated, or vicious; (5) Respondent had a record as an effective, caring and compassionate educator, coming to the profession after a career in the corporate world in information technology; he has received Effective ratings each

year and positive feedback for going above and beyond with students in the classroom and as advisor to student extra-curricular groups; he has also received notes and letters from his students thanking him for being kindhearted, caring, compassionate, sincere, resourceful and making the class fun; these sentiments were repeated in the written statements of the students and in their testimony in the hearing; (6) while Respondent does not dispute the incidents alleged, the evidence establishes that his conduct was not sexual or romantic, but rather friendly and supportive and was understood as such by the students; all but one of the students testified that they were and continued to be comfortable with Respondent after the conduct at issue; the one student who felt uncomfortable complained, and Respondent's principal spoke to him, telling him that his compliment of the student's dress could be misunderstood and Respondent should be more careful in the future; that interaction was very brief; there was no formal or informal admonition and nothing was placed in Respondent's file; (7) Respondent's use of kisses on the cheek comes from his Italian cultural background, where such gestures are signs of respect, affection, sometimes a "hello", sometimes "good luck;" the gestures were not sexual in nature, and Respondent had made such gestures with male as well as female students; (8) this has been a horrible experience for Respondent, he has learned from it, and he would diligently find other ways to support students in the future; he would be able to change his behavior; (9) Respondent did not violate District policies: the prohibition against physical contact is clearly directed toward romantic or sexual contact and does not apply to pecks on the cheek or a "grandpa hug;" moreover, District policies specifically exclude hugs that are initiated by students; further, while District policy discourages the exchange of gifts between staff and students, it specifically states that gifts from students may be accepted as long as they are of a nominal value and are

not encouraged; the only gift Respondent is charged with accepting is an animal onesie, not of particular value and given by a group of students; (10) the District has failed to prove that Respondent in fact received the sexual harassment training testified to by the Superintendent; the District's own records do not establish that he had that training annually, or that the training included the two slides identified by the Superintendent as advising staff to "avoid touching students for any reason;" (11) the District is unable to appreciate the distinction between prurient or power-driven contact between staff and students and perfectly normal physical expressions of fondness, empathy, celebration, or support; when shown photographs from its own website of District staff members with their arms around students' shoulders, the Superintendent claimed that such conduct might violate the District's policies, yet he has taken no action in the past where he has witnessed staff-student physical contact because no complaints had been made, no one was uncomfortable and the environment was "not unhealthy;" the Superintendent's conclusion that Respondent was making students uncomfortable is not supported by the record; indeed, the District's decision to pursue tenure charges against Respondent has caused more harm to the students than anything Respondent has done. Because Respondent's actions were not intended to and did not cause any appreciable harm, this is clearly the sort of case where progressive, remedial measures are appropriate. Accordingly, this much-loved teacher should be returned to the classroom; his removal would be a loss for the District's study body. For all of these reasons, termination is not warranted, and the Arbitrator should exercise her discretion to issue a penalty less than discharge.

DISCUSSION

This case involves a teacher who by all accounts was much beloved by his students. He engaged their interest and was friendly and supportive of them. His friendliness took a number of forms, some of which were appropriate and not outside the District's policies, while others involved physical contact that was not appropriate and violated District policies. There were three instances where he kissed students on the cheek, all in public settings and in specific contexts that might have been appropriate within Respondent's cultural upbringing and experience. The kisses were not intended as sexual and were not perceived by the students as such; no student complained about any of the kisses. Nevertheless, they were confusing and uncomfortable for some students involved either as recipients or witnesses, and they were inappropriate for a teacher in the District. These instances of kissing students constitute conduct unbecoming a teacher. There were also multiple times when Respondent placed a hand on students' shoulders while speaking to them. This conduct, too, was not intended by Respondent as sexual, and it was not perceived by the students as such; no student complained about these touches. Nevertheless, habitual touching of students while speaking to them is inappropriate for a teacher in the District and constitutes conduct unbecoming a teacher.

Finally, Respondent made two comments to female students about their appearance. The first was a comment about a student's clothing. This was inappropriate, despite the teacher's intention merely to compliment a business student on appropriate attire. The student found the remark uncomfortable both in content and the way it was delivered, and she complained about it to her mother, who complained to the District. Respondent was admonished by his principal and warned to be more

careful in the future; he was not disciplined for this remark. The second remark was to an athlete and consisted of an observation that she "looked healthy." This remark was inartful – had he expressed the observation as a question, for example, there would not have been a problem. But the student remembered the remark: she thought it was "funny," but it did not make her uncomfortable. She did not complaint about it, and, looked at objectively, it was, at most, a minor incident and should not be the basis of disciplinary charges.

The remaining incidents for which Respondent was charged were not inappropriate and cannot form the basis for any disciplinary action nor can they be considered in aggravation of the charges that were established as violating District policies. The evidence establishes that on two occasions, both at the end of school terms, a student initiated a hug with Respondent. There was nothing sexual about the hug, not on the part of the student nor on the part of the teacher. Hugs initiated by students are expressly exempted from the District's policies. Likewise, a group of four students gave Respondent a gag present of an animal onesie. While the exchange of gifts between students and staff is discouraged, District policies expressly allow staff members to receive gifts of minimal value from students. There was nothing sexual or inappropriate about this silly article of clothing, even if can be regarded as sleepwear; it was not an item of great value. The hugs and the gift cannot form the basis of any tenure charges. Nor is there anything sexual about adults and students placing their arms around one another's shoulders when posing for a picture. I cannot find that District policies forbid such commonplace gestures.

Finally keeping candy in a teacher's classroom for students or others to take does not violate any District policy. Indeed, the evidence establishes that the school has a

culture of encouraging the selling of candy and pizza by students, teachers, and parents to support extracurricular activities. The District does not dispute that other teachers keep candy in their rooms and use it to reward students. There is no evidence that Respondent gave candy to particular students or in any particular way. Nothing about the candy violates District policies, and it cannot form the basis of any tenure charges.

In this era of evolving cultural expectations, conduct between teachers and students must be examined carefully and in context. Some conduct may be ill-advised but well-intentioned and not upsetting to students. It is just as important to identify that type of conduct and treat it with a measured response, as it is to expose and punish conduct that is prurient and predatory. I find that Respondent's kisses or pecks on the cheek and placements of his hand on students' shoulders fall into the former category: they are gestures of friendliness, given in particular contexts -- a greeting, a goodbye, a thank you for a good year or good luck on your exam -- meant to express support. They were not intended to be sexual in nature, and they were not seen as sexual by the students involved. They were, however, confusing to some students and perceived as "weird" by others. Such gestures have no place in a public school setting. They were misconduct, but neither "persistent" nor "severe;" they were not egregious misconduct.

In urging me to find Respondent guilty of all charges and uphold the penalty of discharge, the District cites a number of cases that it argues are precedent for the ultimate penalty based upon the facts here. Of the cases cited , the one most similar to the present case is that of *I/M/O Tenure Hearing of Marvin Davis and the SD of Asbury Park*, (Symonette, Arbitrator, 2014) Arbitrator Symonette upheld the discharge of a long term custodian who was charged with conduct unbecoming a school employee for touching and pulling the hair of several students and hitting them on their backs.

There were some similarities in that the touching took place in public areas of the school, such as in the cafeteria, in front of other students and adults, including in front of the mother of one girl. Further, the custodian testified that he came from a large family where such touching was seen as "natural" and an expression of affection. Nevertheless, the differences are significant:

- The students involved were fourth graders;
- The incidents were unrelated to any legitimate interaction with the students; sometimes the Respondent would sneak up on the girls and punch them in the back (p. 6);
- Respondent pulled the hair on several girls so hard that their heads were bent backwards (p. 6);
- All of the students interviewed stated they felt uncomfortable with Respondent's actions, which felt "very weird" (p. 10, 11)
- Respondent had a disciplinary history: he had been counseled about inappropriate contact with students during his probationary period (p. 22); he was reportedly involved in similar incidents at two other schools (p. 9); he was previously disciplined for an unrelated matter (p. 22)

Respondent argued that he was "just playing around" and being " a very loving grandfather" (p. 12), and if reinstated, he would never touch a student again (p. 13). However, Arbitrator Symonette found that while his actions might be appropriate with family, there was an issue of "impulse control in the school environment." (p. 23) He was unconvinced that Respondent would be able to refrain from the activity in the future and consequently upheld the discharge. (p. 22-3)

The evidence in the present case, presents quite a different set of facts from *Davis*. The students involved were high school, advanced placement students, rather than fourth graders; the actual physical contacts, were (1) a brief kiss on the cheek as one student was going into the AP exam with her classmates; (2) a brief kiss on the cheek by way of greeting in the school lobby as Respondent met a group of students; (3) kisses on the cheeks of two students after they asked for a "goodbye" selfie at the end of the school year. None of the four students complained about these kisses, which occurred in very specific contexts. By contrast Davis, the janitor, had no reason to interact with any of the young girls whose hair he touched and pulled vigorously; his touches had no explanatory context.

The District also cites the cases of *I/M/O Tenure hearing of James Dunckley and Rockaway Township BOE,* (McKissick, Arbitrator, 2016) and *I/M/O Tenure hearing of George McClelland and SD Washington Township* (Erickson, ALJ, 1983) as similar to the present case. I find both cases dissimilar and unhelpful. In *Dunckley*, the Respondent was accused of repeatedly touching two thirteen-year-old students on their legs, shoulders, collarbones, backs, and, in one instance, on the chest. The school psychologist testified to the traumatic harm this behavior caused the two students. The Respondent did not choose to testify or offer any evidence in his defense, although he made limited admissions in his written response to the charges. Finally, he had been counseled and warned of this type of behavior previously. In *McClelland* the teacher was accused of habitually and flagrantly "touching, caressing and hugging minor female" middle-school students. (p. 227) The allegations included the Respondent reaching his hand inside a girl's slacks to touch her on her bare buttocks and inside another girl's blouse, causing her bra to become undone. (p. 229) Respondent had been

cautioned about touching pupils in 1978 and again in 1983. The Hearing officer did not find all of the allegations to be credible and further found that Respondent's touching of pupils was "a father-figure type gesture, rising from an inner conviction that body contact has certain psychological values in the education process," (p. 238) and was "a reflexive habit deeply ingrained from his many prior years of teaching" (p. 239) He recommended that Respondent be reinstated, but the Commissioner ordered the Respondent terminated because of his "admitted inability to keep his hands off female pupils, even after the advice and direct order from his superiors." (p. 246) These two cases are not remotely similar to Respondent's conduct in this case.

I found the two administrators who led the investigation in this matter and recommended the tenure charges against Respondent to be sincere and well-intentioned. When they received a complaint about Respondent kissing a student on the cheek, they had a duty to investigate and they tried to be thorough and objective. They were justifiably concerned that such kisses could be perceived as power plays or sexual, if not by the students who received them, then possibly by others who observed them. They were also concerned to learn that the kisses and touches appeared to be habitual – conduct that Respondent was largely unaware of and thus would not be able to stop.

Nevertheless, the administrators over-reacted, piling on charges for conduct – accepting hugs and a humorous gift -- that was not only innocent but expressly permitted under District policy.[4] Further, they put the students through an unduly long and upsetting process. The precipitating incident took place in September, at which time

[4] Principal Ezell also appears to have been unduly influenced by his experience with serious and criminal sexual contact between a teacher and students in another district.

students learned that Respondent had been suspended; they were not interviewed until December; and they were called to testify before me in June. While some students expressed more emotion than others in their appearances before me, almost universally, the student witnesses expressed appreciation for Respondent as a teacher and testified they had not been particularly upset, if at all, by Respondent's gestures of friendliness and support. Several indicated they were upset by the process of having to testify against their teacher.

There was one student who had been upset and had complained in June 2018. Her complaint had been handled by the Principal at the time, who admonished Respondent and cautioned him that "statements like that could be misunderstood" and he "needed to be more careful in the future." The Principal did not regard the matter as serious enough to either report it to Superintendent Lazovick or to document it in Respondent's personnel file. Thus, contrary to the District's arguments, that incident did not put Respondent on notice in any way that his physical gestures of support were inappropriate or violations of District policy.

The District argues that any reasonable teacher should have known that kisses – even on the cheek – and habitual touches on the shoulder violated District policies against sexual harassment. I agree Respondent should have known such physical contact, even if non-sexual, was inappropriate.

But Superintendent Lazovick goes further, stating that all touching of students, regardless of context, is inappropriate – "You do not put your hands on students." The District has utterly failed to prove that its policy forbids any kind of touching of any student at any time. Dr. Lazovick acknowledged that the District does not forbid accepting a hug from students, for example, at graduation. For him the questions are:

who initiated the physical contact and was it mutual. He appears to have ignored the fact here that a student initiated the hugs, not Respondent.

When asked about the District's training on these matters, Dr. Lazovick could only produce two slides from the most recent training in 2019, which, he admitted, may not have been in previous years' training modules. (Tr. III at 123) The District's own records show that Respondent only received training on staff-to-student physical contact in 2015 and 2017. In any event, the training does not absolutely prohibit physical contact. One slide lists hugging students as among types of teacher conduct – along with harassing comments, complimenting students inappropriately, making sexual gestures, and suggesting hanging out outside of school – that *may* constitute sexual harassment. It does not discuss student-initiated hugs, which is what happened here. The other slide, rather than *prohibit* touching, advises teachers to *avoid accusations* of harassment by not standing too close to students and "Avoid touching students for any reason." It does not train staff that every form of touching violates District policy. In short, the District failed to put Respondent on notice that his conduct, which I find, based on the overwhelming preponderance of the evidence, to have been non-sexual in nature, violated District policy. Likewise, the warning by Principal Morrell did not put Respondent on notice regarding non-sexual physical contact.

The District's own policies require progressive discipline, unless the conduct is so egregious that the staff member must be removed for the safety of the school community. The facts in this case do not establish egregious misconduct. This Respondent is entitled to an opportunity to learn from his mistakes and to correct his behavior, which, by the students' own testimony, did not cause them great harm.

Obviously, if Respondent does not change his behavior in the future and continues to kiss students on the cheek or touch them on the shoulder, further discipline up to and including termination may be appropriate.

With regard to the Charges, I make the following findings:

Charge I. The following allegations are **sustained**: Respondent did put his arm around student JM and kissed her on the cheek in the 100 Building lobby; Respondent did initiate this contact, which was uninvited by the student. The following allegations are **not sustained**: There is insufficient evidence that the contact was unwelcome or forced on the student against her will.

Charge II. The following allegations are **sustained**: Respondent did put his hand on EA's shoulder and that of other students while answering their questions. Respondent did kiss EA on the forehead or cheek as she and other students were waiting to go into their AP exam.

The following allegation is **not sustained**: Respondent did buy candy and had it available in the classroom for students and others; this does not violate any District policy. I find insufficient evidence that Respondent engaged in misconduct by giving students "long handshakes" as charged.

Charge III. This charge is **not sustained**. I find that Respondent did make a statement to JG "You look good in basic black" or words to that effect; that comment was inappropriate and violates District policy. However, Respondent was admonished and counseled about this remark by his Principal at the time, who did not report the incident or write it up for his personnel file. While the incident is relevant in terms of background, it cannot form the basis of a current tenure charge. Accordingly I do not sustain this charge.

Charge IV. This charge and the allegations that comprise it are **not sustained**. Respondent did participate in conversations with SS about classes and other things going on in the students' lives. There is absolutely no evidence that any of those conversations was inappropriate or violated any District policy; indeed, some of the conversations had to do with helping the students cope with the suicide of one of their friends, and suggesting they talk to their counselors, all of which was entirely appropriate. It is undisputed that a group of students gave Respondent a humorous gift of an animal onesie and that, at their request, he posed with them all dressed in their onesies during class time, toward the end, if not the last day of class, when AP exams were over. This behavior did not violate any District policy; instead District policy explicitly allows staff to accept nominal gifts from students.

Charge V. I find that Respondent did make a comment to ML that she "looked healthy." However, I do not find that comment to have violated District policies. Accordingly this charge is **not sustained**.

Charge VI. I find that Respondent did engage in a pattern of inappropriate conduct with multiple students over an extended period of time, to-wit, he kissed four students on the cheek and placed his hand on the shoulders of many students while answering their questions. To that extent, I find this charge **sustained.**

Penalty. I find that termination is too harsh a penalty for a teacher based on the facts in this case. It is true that Respondent kissed four students on the cheek on three occasions and repeatedly, and apparently unconsciously, placed his hand on students' shoulders when answering their questions. All of these actions were inappropriate and unbecoming. However, they were minor incidents. No student complained about any of them.

Respondent was never counseled or disciplined for physical contact, only spoken to by his principal for a single comment made to a student in June 2018. No disciplinary memo was placed in his file. And it is important to recognize that type of misconduct was not repeated; I find Respondent's comment to a student athlete in September that she looked healthy may have been inartful but was not the kind of personal comment he had been warned to avoid. Finally, the District failed to prove by a preponderance of the credible evidence that District policy forbids every type of touching whatsoever, or that it communicated such a policy to Respondent through its training.

It is apparent that the District considered, in aggravation, conduct that was innocent, initiated by students, and expressly permitted by District policy. This included student-initiated hugs, accepting a humorous present from a group of students, and posing for a group photograph with students, with everyone placing their arms around the shoulders of others in the group. These incidents should not have been considered in any way.

Finally, the District appears to have given no consideration to the record of this teacher as a kind and caring, supportive educator, lauded each year he taught by those who evaluated him as well as by the students who were subpoenaed to testify in this hearing. Indeed, in early 2018 the Superintendent, with effusive praise, commended Respondent for "throwing caution to the wind and sharing his passions" with his colleagues in putting together a session teaching them how to use technology to promote independent learning. Dr. Lazovick urged Respondent to "continue to *take the lead*," and thank him for "sharing your light with the rest of us." (SB 19 at 99)

In sum, this is not an educator who should be dismissed without an opportunity to learn from his mistakes. Those mistakes were the result of misplaced energy and affection; there is absolutely no evidence that they derived from sexual, prurient or predatory impulses or that they were perceived as sexual by the students involved.

AWARD

As detailed above, the District has established some of the allegations in Charges One, Two, and Six. The District has not established the remaining allegations in Charges One and Two. The District has not established Charges Three, Four or Five. With regard to the proven charges, the District has failed to establish that such conduct warrants Respondent's dismissal from employment. Respondent has already been suspended for a full school year; he has already been penalized. Further suspension or other form of penalty would be excessive. This Opinion should be regarded as a formal reprimand and warning to refrain from casual physical contact with students in the future. Further, Respondent is ordered to complete training regarding appropriate physical contact between staff and students; that training must be through a program that is approved by the District; the District shall not unreasonably withhold approval of such a program.

Ruth Moscovitch, Arbitrator

Date: August 5, 2019

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On August 5, 2019, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

CYNTHIA D FISHER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02FI6385518
Qualified in New York County
Commission Expires January 7, 2023

Notary Public
My Commission expires 8/5/19

204-19LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

August 6, 2019

Jesse Humphries, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

Joseph L. Roselle, Esq.
Schenck Price Smith & King, LLP
220 Park Avenue
P.O. Box 991
Florham Park, NJ 07932

Re: *Lisa Healy v. Board of Education of the Township of Hardyston, Sussex County. Agency Dkt. No. 279-11/18, Commissioner Decision No. 186-19.*

Dear Counsel,

I have reviewed the materials filed in connection with the petitioner, Lisa Healy's, Motion for Reconsideration of the Commissioner's July 22, 2019 decision. Based upon the certification submitted by counsel to the petitioner, attesting to the fact that he did not receive the June 14, 2019 Initial Decision of the Office of Administrative Law, this matter will be reopened to allow for the filing of exceptions. Please be advised that both parties may file exceptions within 13 days of the date of this letter. Within five days after the receipt of exceptions, reply exceptions are due.

Accordingly, the petitioner's Motion for Reconsideration is hereby granted.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

206-19

COMMISSIONER OF EDUCATION, State of New Jersey

IN THE MATTER OF	:	
	:	Docket No. AR-110-5/19
Norwood Borough School District Bergen County, New Jersey	:	
Adv.		
	:	**Final Award, by Consent**
Courtney Bullen, Tenured Teacher	:	
	:	

Appearances by:
Stephen R. Fogarty, Esquire [for the School District]
Sanford R. Oxfeld, Esquire [for the Teacher]

Before Jay D. Goldstein, Impartial Arbitrator

FINDINGS and OPINION

Background:

On/about June 18, 2019, Jennifer Killough-Herrera, Acting Director, Office of Controversies & Disputes of the New Jersey Department of Education appointed this Arbitrator to hear and decide the above tenure related matter. In accordance with the Arbitrator's authority under P.L. 2015, c. 109, several preliminary matters were immediately addressed by the Arbitrator, upon receipt and review of the Agency's file.

Thereafter, 'discovery' challenges were discussed and decided by / between Party Counsel and the Arbitrator. In a Pre-Hearing Conference call between Counsel / Arbitrator held on June 25, 2019, discovery issues resolved (i.e., scheduled for completion by Aug. 2, 2019) and blocks of Hearing dates were tentatively scheduled for late August and mid-September of 2019. Notice of the above was transmitted to the Parties; including an agreed upon location for Hearing and agreement for sharing transcript costs.

The above matters contributed to a minimal delay in the attempt to schedule hearings; however preliminary timelines were met by the occurrence of the telephonic Conference. However, the extended time frame resulted in apparent settlement discussions between the named Parties during that hiatus before discovery completion.

Through the parties' attempts, a settlement was reached between them. The settlement was announced and transmitted to this Arbitrator on July 30, 2019, immediately after the Arbitrator had written to the Parties seeking a status report for the scheduling of Hearing days.

Counsel for the School District, Attorney Fogarty wrote to the Arbitrator on July 30, 2019: "*Attached please find our correspondence of even date, along with attachments, with regard to the above captioned matter.*" Notably and in well documented fashion, Mr. Fogarty's correspondence and documentation included the following:

"1. ***Separation of Employment Agreement*** *that is fully executed by the parties.*

2. ***Letter of Resignation*** *from Courtney Bullen from all employment with the Norwood Board of Education.*

3. Personal Leave of Absence Request.

*4. **Certified Resolution** by the Norwood Board of Education approving the Separation of Employment Agreement, granting Ms. Bullen personal leave and accepting her resignation.*

*5. **Board's submission** setting forth compliance with the standards for settlement of tenure charges."*

[5 documents; hereafter, "Settlement" package]

Along with the above referenced "Settlement" documentation was an appropriate and conventional request for the Arbitrator's approval of: "*...the terms of the parties' settlement and incorporate same into a Final Award.*"

That material was copied to Mr. Fogarty's opposing counsel [Sanford R. Oxfeld, Esq.]; and, several School District officials.

Review of Settlement Reached and Documentation Submitted:

All five (5) "Settlement" documents referenced above were reviewed by this Arbitrator.

The document entitled, "***Separation of Employment Agreement***" is the main one and, while standing on its own, acts as the anchor to the documents that follow. It appears by its' terms to describe an 'arms-length' transaction entered into without duress and with each of the principle signatories relying upon the advice of counsel.

Consistent with its terms, it makes reference to the documentation advising, 'Teacher' has submitted her, "***Letter of Resignation***"; *from all employment with the Norwood Board of Education*". Further, by its terms that 'Teacher' has submitted her, "***Personal Leave of Absence Request***".

Moreover, the 'School Board' has demonstrated its part in, "...consideration of the mutual covenants and promises", contained in the Agreement, by providing a, "***Certified Resolution***", effectively, "*approving the Separation of Employment Agreement, granting Ms. Bullen personal leave and accepting her resignation*. Last but not least the, "***Board's submission*** *setting forth compliance with the standards for settlement of tenure charges*", effectively completed the transaction, which thus terminates the Tenure charge proceedings against this Teacher.

Accordingly, the hiatus occurring after the initial Conference Call but before the extensive scheduled Hearings in August and September of 2019 resulted in the parties having negotiated a successful and amicable resolution of the charges pending. Therefore, the documentation resultant thereto appears to be in the mutual best interest of maintaining ongoing and harmonious relationships in the Parties environment, in the public interest and, found to be consistent with the settled law of the jurisdiction.

The Parties settlement of their differences encompasses all outstanding issues of this matter, achieving School Board approval and thereafter the approval of this Arbitrator after his review of the entire matter. The Arbitrator considered whether their proposed settlement represents an appropriate resolution of the issues, taking into account the relevant law and the best interests of the parties. On the basis of that review the Arbitrator finds the parties' proposed settlement of their differences to be an appropriate compromise of their respective positions.

Taking all of the above into consideration, the following Decision in the form of a 'Consent Award' is issued:

DECISION

The underlying record of this 'Final Award, by Consent' matter involves the "Settlement" of Tenure Charges filed against Tenured Teacher, Courtney Bullen by the Norwood Borough School District. The documents encompassing the "Settlement" include but are not limited to the fully executed "Separation of Employment Agreement" [by the Teacher and Board of Education] and "Letter of Resignation" [by The Teacher] and, have been carefully reviewed.

The Arbitrator believes and thus finds that the "Settlement" is consistent with established standards governing settlement of tenure matters in this jurisdiction. Moreover, the terms agreed to by the Parties are deemed to be consistent with and therefore in conformity with the principles established by, "*In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846.*

All terms of the "Separation of Employment Agreement" referred to hereunder and the accompanying supporting documents referenced above shall be enforced and deemed enforceable by the Parties to them. Moreover this matter is concluded, having been deemed final and binding. Accordingly, this settlement is hereby approved and the tenure matter dismissed, subject to full compliance with the terms of all the "Settlement" documents referenced hereunder.

Dated: 07 August, 2019

Jay D. Goldstein,
Jay D. Goldstein, Impartial Arbitrator

SEPARATION OF EMPLOYMENT AGREEMENT

THIS AGREEMENT is made and entered this 29 day of July, 2019 by and between **COURTNEY BULLEN** (hereinafter "Bullen") and the **NORWOOD BOARD OF EDUCATION** (hereinafter the "Board") (collectively the "Parties"), according to the following:

WITNESSETH:

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

WHEREAS, Bullen is a tenured member of the teaching staff; and

WHEREAS, the Board and Bullen have engaged in good faith discussions concerning Bullen's separation from employment with the Board and have reached an agreement, which they wish to memorialize herein; and

WHEREAS, the Board and Bullen wish to fully and finally resolve all the issues between them respecting her employment, of any kind whatsoever, whether known or unknown, which either party may have against the other in this agreement.

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

1. SEPARATION FROM EMPLOYMENT

Bullen will formally end all employment with the Board at the close of business on December 31, 2019. She will be granted a personal leave of absence with pay, and with benefits and remain on said paid leave through December 31, 2019. She will submit an irrevocable letter of resignation effective December 31, 2019, which shall be in the form attached hereto as Exhibit A.

2. LEAVE OF ABSENCE

Bullen shall submit a request for a personal leave of absence with pay through December 31, 2019, which shall be in the form attached hereto as Exhibit B. Bullen shall not have any professional responsibilities as a teaching staff member during her paid leave of absence, and shall not be present on any of the Board's campuses without the express written consent of the Superintendent. During Bullen's paid personal leave of absence through December 31, 2019, she shall continue to receive her regular annual salary less the mandatory taxes, pension, health benefit payment and/or any other deductions required by her employment with the Board. Any vacation, personal leave, sick leave, pay for accumulated sick leave and any other financial remuneration to which she is otherwise entitled under the terms of the CNA shall be subsumed during her leave of absence and shall not accrue, nor shall Bullen be entitled to their cash equivalent.

3. **PAYMENT**

In consideration for Bullen's resignation as set forth in paragraph 1 of this Agreement and the waiver and release as set forth in paragraph 6 of this Agreement, the Board, by and through this Agreement, approves Bullen for back pay for the period of her unpaid suspension from June 1, 2019 through June 30, 2019 in the amount of $6,183.80, plus four months' salary for the period of September 1, 2019 through December 31, 2019 in the amount of $24,735.20. The total payments shall be equal to $30,919, subject to any negotiated increase in the successor collective negotiations agreement with the Norwood Education Association for the 2019-2020 school year, less the mandatory taxes, pension, health benefit payment, and/or any other deductions required by her employment with the Board. During the period of Bullen's personal leave of absence with pay, she shall continue to receive the health insurance or cash out payment

that she is eligible to receive consistent with the collective negotiations agreement in effect between the Board and the Norwood Education Association.

Bullen shall also receive a lump sum payment of $1,000., which represents the prorated stipend that Bullen is owed for the extracurricular activity she performed during the 2018-2019 school year.

4. HEALTH BENEFITS

Bullen shall continue to receive or be reimbursed the premiums for all district-provided health and medical benefits until December 31, 2019. Following December 31, 2019, consistent with her rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), Bullen shall have the same COBRA rights as any other former employee and shall be solely responsible for all costs associated with said COBRA coverage.

5. NO FURTHER COMPENSATION/BENEFITS

Other than as stated in paragraphs 3 and 4 above, Bullen waives any right she may have to any other compensation or emoluments of employment from the Board that otherwise may have been due to her as a result of any collective negotiations agreement, contract or Board Policy, apart from any benefits to which he may be lawfully entitled under the Workers' Compensation Act, COBRA or other governmental benefit to which he may be entitled by statute.

6. MUTUAL RELEASE

In exchange for the above consideration, Bullen, her heirs and assigns and the Board and its successors in interest mutually irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against each other, personally and officially, individually and collectively, against past and present Board members, all officers and administrators, its agents and employees, personally and

officially, as well as their successors, and assigns of the parties, including, but not limited to any and all claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this settlement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the 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 Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all 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 or any administrative action. Specifically exempted from this release are any claims for health insurance continuation coverage under and pursuant to the Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"), the New Jersey Workers Compensation Act, any rights associated with any pension earned in the Public Employment Retirement System (TPAF) and any claim to unemployment benefits.

7. REFERENCE INQUIRIES

The Board agrees, through its Administration, not to make any disparaging remarks regarding Bullen in response to any future employment inquiries and will limit any statements made, either orally or in writing, to confirming the dates of Bullen's employment within the

District; the amount of Bullen's salary in the final year of her employment; the positions that Bullen held within the District.

8. NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comment regarding each other, and each others' employees and/or agents. However, nothing in this Agreement shall be construed to limit Bullen or the Board and its agents' obligation to provide accurate information in response to legitimate requests for required information from: the Division of Pensions and Benefits; the Unemployment Compensation Board and/or their agents or other governmental agency.

9. UNEMPLOYMENT INSURANCE APPLICATION

The Board agrees, through its Administration, that it will not contest, object to, or otherwise interfere with Bullen's application for unemployment insurance benefits, if an application is made. Upon inquiry, the Board will relate that Bullen's separation from employment was in settlement of an employment dispute, the details of which shall remain confidential to the greatest extent permitted by law.

10. NOTICE OF POSSIBLE REVOCATION OF AGREEMENT

Bullen hereby waives her 21-day right to revoke this Agreement. Bullen shall have seven (7) calendar days after signing this Agreement to revoke it if she chooses to do so ("Revocation Period"). The Agreement shall not be effective until after the Revocation Period has expired. To revoke this Agreement, Bullen must notify the Board, in writing, of her intention to do so. Said notice must be posted or emailed within seven (7) days of the execution of this Agreement. If Bullen revokes this Agreement on a timely basis, she shall not be entitled to the consideration set forth in Paragraph 3 or 4 of this Agreement. Upon the expiration of the Revocation Period, this Agreement will be legally binding.

11. PUBLIC INTEREST

This proposed settlement will serve the public interest because, as a result, litigation to resolve the rights and liabilities of the parties will not be necessary.

12. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

13. BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President and Board Secretary are fully authorized to execute this Agreement on behalf of the Board.

14. ASSENT TO TERMS

Both Bullen and the Board hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and that they have, in fact, consulted with legal counsel of their choice in advance of execution. They also acknowledge that they entered into this Agreement without duress and of their own free will and volition.

15. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

16. SEVERABILITY

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. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall be null and void, *ab initio*.

17. MODIFICATIONS:

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

18. GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

19. NO ADMISSIONS

The parties agree that the resignation of Bullen does not constitute an admission of any liability or wrongdoing on her part and that the execution of this Agreement does not constitute an admission or acknowledgement by Bullen or the Board of any wrongful or otherwise improper conduct, nor as to the liability of any party.

20. EXECUTION IN COUNTERPARTS & FACSIMILE SIGNATURES

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

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 24th day of July, 2019.

NORWOOD BOARD OF EDUCATION

Sacha Hazen-Pouliot
Business Administrator/Board Secretary

Dated: July 24, 2019

Michael Sprague
Board President

Dated: 7/24, 2019

WITNESS Sandra Roxfelt

Dated: July 25, 2019

Courtney Bullen

Dated: _____, 2019

EXHIBIT A

COURTNEY BULLEN
163 Reid Way
Paramus, New Jersey 07652

July __, 2019

Mr. Michael Sprague
Board President
Norwood Board of Education
177 Summit Street
Norwood, New Jersey 07647

Re: Letter of Resignation

Dear Mr. Sprague:

I hereby submit my irrevocable resignation from all employment with the Norwood Board of Education effective at the close of business on December 31, 2019 subject to the terms of the Separation Agreement executed simultaneously herewith and which are incorporated herein by reference.

Sincerely,

Courtney Bullen

Exhibit B

COURTNEY BULLEN
163 Reid Way
Paramus, New Jersey 07652

July ___, 2019

Mr. Michael Sprague
Board President
Norwood Board of Education
177 Summit Street
Norwood, New Jersey 07647

Re: Personal Leave of Absence Request

Dear Mr. Sprague:

I am requesting personal leave from June 1, 2019 through December 31, 2019, with pay and prorated reimbursement for the premiums for all district-provided health and medical benefits. During the period of my personal leave of absence with pay, any personal leave, vacation leave, pay for accumulated sick leave and any other financial remuneration to which I am otherwise entitled under the terms of the collective negotiations agreement in effect between the Board and the Norwood Education Association shall be subsumed during my leave of absence and shall not accrue, nor shall I be entitled to their cash equivalent.

Sincerely,

Courtney Bullen

RESOLUTION

BE IT RESOLVED by the Norwood Board of Education (hereinafter referred to as the "Board") that the terms, stipulations and conditions as established in the Settlement Agreement between the Board and the Parents of a student whose name is on file in the Superintendent's office, which is annexed to this Resolution, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Settlement Agreement, and any other documents necessary to effectuate the settlement.

ROLL CALL VOTE:

AYES: 6

NAYS: 0

ABSTENTIONS: 1

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Norwood Board of Education by a majority vote at its duly authorized meeting on July 29, 2019.

SACHA POULIOT
Business Administrator/Board Secretary

DATED: July 29, 2019

208-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

August 21, 2019

Edward Cridge, Esq.
Mellk O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

Patricia M. Reilly, Esq.
Wolff, Helies, Spaeth & Lucas
P.O. Box 320
Manasquan, New Jersey 08736

Re: *Michael Scarano and the Horace Mann Insurance Company v. Board of Education of the Rumson-Fair Haven Regional High School District, Monmouth County, OAL Dkt. No. EDU 02024-15, Agency Dkt. No. 364-12/14.*

Dear Counsel:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge Elia A. Pelios' order issued August 5, 2019, granting partial summary decision to petitioner Horace Mann Insurance Company. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

LOR/JKH/BCM

cc: Elia A. Pelios, Administrative Law Judge
Clerk, Office of Administrative Law

VIA E-MAIL ONLY

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE
CHARGES AGAINST
BRUCE BASETTI

Opinion and Award

BY

Agency Docket No. 75-4/19

THE PENNS GROVE-CARNEYS POINT
REGIONL SCHOOL DISTRICT
SALEM COUNTY

x

Peter Adomeit, Esq.
Arbitrator

Appearances: For the Petitioner School District: Jeffrey R. Caccese, Esq.,
Comengo Law Group
For the Respondent Teacher: Keith Waldman, Esq. and
Hop Wechsler, Esq.,
Selikoff & Cohen, P.A.

Dates of Hearings: May 30 and 31, 2019

Briefing Completed: July 17, 2018

Date of Award: August 23, 2019

OPINION

This matter came before the Arbitrator pursuant to P.L 2012, Chapter 26 of Title 18A, N.J.N.J. The Arbitrator decided a number of pretrial evidentiary motions. The hearings took place on May 30 and 31, 2019 at the District's offices in Penns Grove, NJ. Both parties submitted briefs. Attorney Caccetti requested and received an extension,

without objection, of one day, to July 17, 2019. No reply briefs were provided for. After briefs were submitted, Attorney Wechsler on, behalf of Mr. Bassetti, filed a post-filing motion to strike Charges Two and Three, which the Arbitrator denied. The Arbitrator obtained an extension to file the decision from August 16, 2019 to August 23, 2019.

Both parties were represented by counsel and had a full opportunity to present evidence, to cross-examine each other's witnesses and to make arguments in support of their respective positions. Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, the relevant evidence, the authorities cited and the arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Tenure Charges

Following the statement of facts, the Board's Charges contain these paragraphs.

"**Charge One, Conduct Unbecoming**" lays out two incidents, incorporated by reference, from the statement of facts, one incident in the classroom, the other during the interview/investigation jointly held by Middle School Assistant Principal Roy Wright, Jr. and Middle School Principal Dr. Luis Amberths. The classroom Charges allege:

"[Statement of Facts] §6. Mr. Bassetti used the word "nigger"in his fifth (5^{th}) period science class comprised of seventh (7^{th}) grade students.

[Statement of Facts] §7. More specifically, the students alleged that Mr. Bassetti **quietly said to himself** something to the effect of "I'm done with these niggers" or "I'm not trying to deal with these niggers" while walking away from certain students who were disruptive in the class." [Emphasis added]

Referring to the post-incident interview, Charge One alleges:

[Statement of Facts] § 28. "Thereafter , in an effort to cover up his grossly inappropriate conduct, he made the situation worse when he explained that he could not have used the word "nigger" because the student to whom he was referring was white."

The Arbitrator was puzzled by paragraph§ 28. Assistant Principal Wright strongly reacted to the words he attributed to Mr. Bassetti and abruptly ended the meeting, and this was the source for this Paragraph § 28. It was among the charges relied upon by Superintendent Zenaida Cobian in moving forward these proceedings. Assistant Principal Wright's explanation as to why he believed Mr. Bassetti's words to be was an intolerable racial comment will be discuss later.

Charge One goes on to allege:

[Statement of Facts] § 30. "The use of any racial epithet by a teacher is intolerable There is no place in a school district for such conduct. By making such highly sensitive and intolerable comments, Mr. Bassetti has lost all credibility with both students and staff, and, therefore, cannot continue to be employed by the Board."

> **Charge Two Incapacity**," incorporates the same facts as Charge One and states in § 34 that "it is impossible for him to effectively return to the District" because it "would cause acrimony with student, staff and community." Charge Two states [§ 35] that "Mr. Bassetti will not be able to perform the duties of his job if he were to be returned to the District and, therefore, is incapable of continuing his employment with the District."

"Charge Three, Other Just Cause" incorporates the same facts as Charge One and states that returning Mr. Bassetti back to the classroom "would violate the public

trust to ensure the District students' care and well-being and that they are in a safe environment where they are not subjected to racial slurs by their teachers."

Discussion

This termination is based on a single event, involving a single word "n" - which the Board alleges and the Respondent denies saying in the course of a rambunctious period five, seventh grade class.

Mr. Bassetti (Respondent) is a tenured teacher employed by the District for fourteen years, since January 8, 2005, as a science teacher at the Penns Grove-Carney's Point Middle School. His record shows no previous discipline of any time, and no previous accusations of the accused of the use of "the N Word," on the job or off. He testified that when growing up, he used the "n" word, but stopped using it years ago. There is no evidence he makes racist comments to others. He has been a volunteer in the community, assisting minority students. He holds all of his students to the same high standards. Because the "n" word may be distracting in reading this Award, I have shortened to "n". "N" is, in the African-American community, simply "toxic" or more graphically, as called in the *Amazon.com* review of a book[1] on the word, "'the nuclear bomb of racial epithets,' a word that whites have employed to wound and degrade African Americans for three centuries", and a word that can provoke in some African Americans an immediate, visceral reaction. So when Assistant Vice Principal Wright, during his investigatory interview with Mr. Bassetti, showed such a reaction when just discussing the word, it was understandable when placed in context of "n" long

[1] The 226 page Book, titled "Nigger" and subtitled, "The Strange Career of a Troublesome Word" is by Randall Kennedy, a Professor of Law Harvard Law School.

history of derision and insult. Whether his reactions damaged the investigation is another question, to be discussed later.

On February 27, 2009, Mr. Bassetti was teaching a fifth period, seventh grade science class. His testimony continues:

> I was sitting at my desk and the students were returning those corrected tests and I was going through them, and I noticed across the room that [Student 1] was using a Chromebook and it was teetering on top of his stuff.
> So across the room I said, please keep all Chromebooks flat on the table. And he looked at me and I gave it a minute or two and he refused. *So I walked over to him and I went to take the Chromebook from him and as I was [sic] reached out to take the Chromebook, he slowly slid the Chromebook to his left over to [Student 2] , out of my reach.* [Emphasis added]
>
> Rather than cause any classroom disruption or engage [Student 1] in any way, I returned to my desk and continued with the test papers.
> And then I waited till the end of the class period and then students were bringing me their Chromebooks to check them back in and I noticed that [Student 1] had gotten up and was walking away from his Chromebook. And I asked him to please, please bring me the Chromebook. And he said, "are you lazy, come get it yourself."
>
> And that was as the bell had rung and I pretty much just smiled at him as he walked out the door and he did a little double take and I wanted to leave him thinking that maybe there was going to be some discipline action [sic] for his comment. And then that's how I let him to [sic] walk out the door.

Mr. Bassetti's prior written statement from the day of the alleged incident, February 27, 2019, is consistent with this testimony. It states:

> Bassetti "asked [Student 1] to please put Chrome book flat on desk. [Student 1] refused. Went to take Chrome book and [Student 1] slid Chrome book to another student. At class end asked [Student 1] to return Chrome book, [Student 1] responded, 'Are you lazy, come get it yourself' "No other communication with [Student 1] during class period."

The statements of the students varied in length, words used, with differences about time, place, and the comment. A number did write that they heard the word, "n." One heard "n...a." Eight students heard nothing. To save hearing time and save these students from testifying that they heard nothing, Attorneys for the parties devised a creative solution.

The students were at the District Office, many with a parent. The attorneys together interviewed them one by one, in the absence of the Arbitrator, immediately before the start of Hearing Two. The attorney's then stipulated that none of them would be called as witnesses because they heard nothing.

Several students noticed details, unnoticed by the others, that solve the mystery of why some students heard 'n" but Mr. Bassetti denied saying it when at the investigation Assistant Principal Wright asked whether he said "n", the grievant's reaction as immediate, visceral, and emotional "No No No, adding words to the effect that made no sense because the student was "white." He has consistently denied saying "n".

The answer to the puzzle is he doesn't remember saying "n" because he said it "under his breath". He was not speaking to the class. He was speaking to himself. He was "mumbling' "under his breath." Student 3 so wrote on the incident report: "Me and [Student 1] were siting down. Mr. Bassetti comes over to me and [Student 1] and tells [illegible] to do, me and [Student 1] he'd [said?] a smart remark back and Mr. Bassetti walked away and mumbled under this breath, 'I'm done with these N***'" [Emphasis added].

> The Definition of the underline phrase: "If you say something under your breath, you say it in a very quiet voice, often because you do not want other people to hear what you are saying.
> Walsh muttered something under his breath." *Collins English Dictionary*[2]

These fleeting thoughts, self-articulated, are stored in short-term memory.[3] Persons reading this opinion will store the start of each sentence in short term memory to understand its meaning. When the parties read this Opinion, they will be using short term memory .

Long term memory stores experiences, which can be retained longer.[4] Mr.

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[2] COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers
[3] Collins English Dictionary. Copyright © HarperCollins Publishers.
[4] "That section of the memory storage system in which experiences are stored on a semipermanent basis." Collins English Dictionary. Copyright © HarperCollins Publishers

Bassetti was able to recall what happened in the classroom because he experienced it. He remembered not trying to provoke a confrontation. Not remembering what he said to himself is understandable and hardly unusual.

[Student 3] was sitting right next to Student 1, the provocateur, and Mr. Bassetti, and in a good position to see and hear the incident, and had the experience and vocabulary to describe it as mumbling to himself under his breath.

Other student's observations were similar to [Student 3's] version. These students used their own vocabularies. [Student 3] wrote: "We were doing our work kids where [sic] loud and very quietly Mr. Bassetti [sic] said "nigger" and I thought he did not really say it but my classmates heard him say it." [Emphasis added] [Student 4] wrote that Student 4 and another student were turning off the chrome book and Mr. Bassetti, said the n word very softly." Student 5 wrote [two students] were turning off the chrome book and Mr. Bassetti [sic] said the n word softly. [Emphasis added]

From this I conclude that Mr. Bassetti was not lying when he denied saying "n". Lying is knowing at the time you make it that your statement is false.[5] He cannot be punished for lying when saying something that he mistakenly believes to be true.

The Petitioner's arguments in favor of disregarding all of the student statements are not persuasive. The Arbitrator has considered the student testimony with great caution. The Arbitrator is not persuaded that the low grades Mr. Bassetti issued to some of these students motivated them to invent their stories.[6] Some were uncertain about hearing whether he said, "n". They talked about it in the halls after his class: "Did you hear it?" This is not

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[5] See *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* {Perjury defined.]

[6] Mr. Bassetti assigned a science project to all of his students, setting the same high standards for all of them. Those who did not do the assignment, or could not complete it after extensions, knowing it counting for 30% of the grade, got low grades coincidental with this incident. After submitting the low grades for the project, and after his suspension with pay pending this arbitration, Mr. Bassetti discovered that someone had substituted a new grade: "E" for "Excused." That raised the grades.

the same as a conspiracy to lie about it. (One student, who was out of class, later wrote about hearing it. Two others were considered not credible. None of the three testified.) The student written statements varied widely in some details – time of day, location, words used. Common to the statements of students in a position to hear was the word, "n."

The Respondent contends, also in the alternative, that the other stated reasons for termination are without merit. They are the subjects of the rest of the Opinion.

Part Two of Charge One is the investigation, which the Petitioner contends was unfair and filled with errors. The Board contends otherwise. The Arbitrator finds that the Petitioner's contentions have merit. Even without these deficiencies, the part of the charge dealing with Mr. Bassetti's statements during the meeting are on its face, illogical, and not based on any reasonable interpretation of what Mr. Bassetti said.

The Regional School District rules and normal practices required the matter to have been assigned to Affirmative Action, who was Dr. Michael Ostroff, but he was out of town that day on school business. So the matter was assigned to Assistant Principal Wright. There then followed a series of events that the Respondent contends undermined the results. Assistant Principal Wright was not the proper investigator - it should have been assigned to the District's Affirmative Action Officer, Dr. Michael Ostroff, who signed off on the report based on the student's written statements obtained by Assistant Principal Wright.

But the two most serious deficiencies in the Assistant Principal's Investigation was first, when he summoned Mr. Bassetti to an investigatory interview which could lead to (and did lead to) discipline and Mr. Bassetti was denied Union representation. And second, that he did not recuse himself when it became evident that he was so deeply and emotionally involved that it impaired the investigation and his judgment and led to the filing of an illogical complaint about what Mr. Bassetti did not say during the interview, but Mr. Wright claimed he implied.

Charge One states in relevant part:

"Thereafter , in an effort to cover up his grossly inappropriate conduct, he made the situation worse when he explained that he could not have used the word " "nigger" because the student to whom he was referring was white."

This Charge makes no sense. Mr. Bassetti had a right to defend himself. By inferring an unstated and illogical meaning, the Board has interfered with the right to defense. For example, if a teacher denies a charge during an investigatory interview, and is hit with an additional charge of lying, then what purpose would be served with having the interview in the first place? And what if the teacher was not lying? If these were the ground rules, then the purpose of the interview – to allow the employee to have his or her say, so the employer would know both sides - would be defeated.

Mr. Wright claimed that, after informing Mr. Bassetti of the allegations, Mr. Bassetti asked who the student was towards whom he allegedly used the "N" word. Mr. Wright's answer was, " [Student 1]". Mr. Bassetti allegedly responded "I couldn't have called him that because he's white." Hearing this, Mr. Wright testified, "I became extremely angry, just put my head down and told. . . Mr. Bassetti that I found his response to my question on its own merits to be offensive. And I said, 'The meeting will now end.'"

The following explains why the Arbitrator upon reading the Charges, could not understand it. Mr. Wright explained that he interpreted Mr. Bassetti's alleged response to mean that "[using the 'N' word] would have been justifiable had it not been a white student that he said that to or because it was a white student that he couldn't have possibly said the word. And like I said, [that] just didn't put me in a good place."

The argument is absurd and contrary to the rules of logic. Mr. Bassetti never said that he would have used the "n" word if the student were black. Nor did he infer it. Deconstructing why it is illogical, here is the false syllogism: Mr. Wright has constructed and them laid upon Mr. Bassetti a false argument. "Illogical" means not following the rules of logic. This is why:

Major premise: Mr Bassetti calls African Americans "n".

Minor premise: [Student 1] is not African American.

Conclusion: Therefore Mr. Bassetti did not call [Student 1] a "n".

Mr. Wright has constructed the major premise out of whole cloth and attributed it to Mr. Bassetti. It's a verbal slight of hand, arising out of feelings, creating a denial into an admission. Creative, but not valid. This part of Charge Two is without merit.

And because it found part of the foundation for Principal Cobain's decision to embrace it and refer it to the Board of Education, it seriously impairs the Principal decision and the Board's.

Superintendent Cobain accepted Mr. Wright's implied inference as being an admission by Mr. Bassetti that he would use "n" against African-Americans. Superintendent Cobian then mischaracterized Mr. Wright's version of his interview with Mr. Bassetti as unfavorable to Mr. Bassetti on direct examination. Referring to "concerns that Mr. Bassetti ha[d] said, if it would have been a white student, I would have not said it [sic], implies that he will not use it against a white [sic], but he will use it against a black [sic]" The Superintendent inserts a newly invented sentence using the subjunctive verb "would have": "If it would have been a white student."

The Superintendent attributes to Mr. Bassetti words he did not say to create a conclusion he did not make.

The Respondent contends that additional defects in the investigation voided the process, That Assistant Principal Wright was "investigating" was established by credible evidence. Dr. Michael Ostroff, the district's Affirmative Action Officer who wrote the investigation report, but did not conduct the student's investigatory interviews, as he was out of district on a training session, and was not aware of the situation until after the weekend, and was not present for any of the investigatory interviews with the students or with Mr. Bassetti. Dr. Ostroff stated that "[i]t was a judgment call. By that time . . . the kids had been interviewed by administration. I had received the statements in PDF form from the

Superintendent. I was able to review those and felt at that time that the students' statements, along Dr. Ostroff accepted Mr. Wright's conclusions without questions and without interviewing Mr. Bassetti.

The Resondent contends these are serious defects that call the result into question. The Arbitrator agrees.

The respondent states that the Board denied Mr. Bassetti his right to Union representation at the investigatory interview with Assistant Principal Wright and Principal Amberths. The Arbitrator agrees.

Mr. Bassetti testified that Principal Amberths "told me I did not require union representation for this, I needed to make a statement" and thus slammed shut the Union representation door. And that, when Mr. Wright testified that Mr. Bassetti never asked for and was never denied union representation, Mr. Wright was incorrect. A violation of an employee's *Weingarten* rights "is not harmless error or a formality." On the contrary, it is well-recognized that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates . . inequality [of bargaining power between employees and employers], and bars recourse to the safeguards the[National Labor Relations] Act provided 'to redress the perceived imbalance of economic power between labor and management.'" N.L.R.B. *v. J Weingarten, Inc.*, 420 U.S. 251, 262 (1975) (quoting *Am. Ship Bldg. Co. v. N.L.R.B.*, 380 U.S. 300, 316 (1965)).

The New Jersey Supreme Court extended the *Weingarten* rule to New Jersey public employees, writing:

> an investigatory interview of an employee often entails an atmosphere of isolation and intimidation ...In such a setting, employees may be less than articulate in attempting to defend themselves. Employees may not realize that they could exonerate themselves through recounting to the employer certain mitigating circumstances. Thus, ***an employee's defense may be less than compelling, squandering the last chance of exculpation before punishment is delivered.*** *Matter of Univ. of Med. & Dentistry of New Jersey (Sch. of Osteopathic Med.),* 144 N.J. 511, 528 (1996).

Charge Two Incapacity," incorporates the same facts as Charge One and states in § 34 that "it is impossible for him to effectively return to the District" because it "would cause acrimony with student, staff and community." Charge Two states [§ 35] that "Mr. Bassetti will not be able to perform the duties of his job if he were to be returned to the District and, therefore, is incapable of continuing his employment."

The Charge is without merit. The Arbitrator has found that Mr. Bassetti, while speaking to himself softly under his breath, used "n". To uphold this termination would create a new common law of teacher termination: "If you so much as breathe to yourself the word "n", with no intention to communicate it to others, but are overheard by some students, even if you never intended them to hear, even if you have never said "n" to students in 14 years, your intent is irrelevant, and your spotless record is irrelevant, and you shall be terminated for the first offense."

First, The New Jersey legislature set up a statutory plan to balance the needs of School Districts for competent teachers, and the needs of teachers to be treated fairly, and created a panel of experienced arbitrators to adjudicate these disputes. The Board's argument here would transfer that power directly to the School Boards or the public, and that their decision, not the arbitrator's, shall be final and binding.

Second, the Arbitrator is aware of the facts of this case, because of the hearing with witnesses and cross-examination. The public is not so aware. Misinformation, rumor, innuendo can run rampant in any community. Especially where, as here, an individual has tried to influence Board decisions, regularly calling out for the termination of teachers, includint Mr. Bassetti. In the Bassetti matter, a parent of a student who came home and reported that Mr. Bassetti said "n", called a local television station that sent over a reporter, and interviewed the student about this matter. The matter as also reported in local newspapers. The legislature never intended to dispense with an orderly hearing under strict safeguards and turn terminations over to the press and the public.

Charge Two is without merit.

"Charge Three, Other Just Cause" incorporates the same facts as Charge One and states that returning Mr. Bassetti back to the classroom "would violate the public trust to ensure the District students' care and well-being and that they are in a safe environment where they are not subjected to racial slurs by their teachers."

Charge Three is without merit.

Mr. Bassetti did not direct his comments outward. He was saying softly under this breath to himself, not the students. Reinstatement would not violate the public trust. No student said he or her was unsafe. Mr. Bassetti.

Under (TEACHNJ Act), L. 2012, c. 26 (N.J.S.A. 18A:6-117 to -129), fact-finder in a tenure hearing involving allegations of misconduct should consider, when determining the appropriate penalty, "the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and .. . any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967) Other factors to be considered include "the impact of the penalty on [the respondent's] teaching career"; the respondent's "teaching record . . and teaching ability"; and whether the respondent "had . . . been disciplined in any manner by the board prior to the date of the incident[s] involved in [the] charges." *Id.*

The Charges relate to a single incident, not a pattern of misconduct. His conduct will have no harm or serious effect on the maintenance of discipline or the school system. It leaves open the ability of the District to discipline other teachers for direct and open and intentional verbal belittling of students. No student was injured. He did say it to the students. He made the comment under his breath under provocation from a student who refused his request to move the Chrome Book off the pile, challenged his authority, called him "lazy", and when Mr. Bassetti walked over to take the Chrome Book, the student slid it over to another student. At the same time, Mr. Bassetti was trying to control other students and had to raise his voice. (This was the seventh period of the day. The students had been in school

for a long time.)

The impact on Mr. Bassetti's career would be devastating. He has good teaching ability, has good evaluations, is initiates regular contact with parents of struggling students, tries to help the students improve, hold all students to high standards, sets limits and adheres to them, and encourages students to meet the standards, regardless of background. Prior to this event, his record shows no discipline.

The incident was not premeditated. He did not intend for his thoughts expressed to himself be heard by students; he did not intend to communicate to students. He was muttering to himself, under his breath.

The contentions advanced by the Board are not persuasive. I have addressed most of them and need not repeat them. I disagreed with the Board's assessment of the facts and the implications from those facts.

Mr. Bassetti had no obligation to respond at the meeting to the Superintendent. There was nothing left to say. The result had already been reached. His Union representative told him to stay silent.

The Arbitrator rejects the Board's contention that they proved each element of their case against Mr. Bassetti, as discussed previously. The Arbitrator rejects the Board's contention that Mr. Bassetti engaged in unbecoming conduct.

The Arbitrator rejects the Board's argument that Mr. Bassetti lacks credibility, for reasons explained in detail in this Award.

The Arbitrator rejects the Board's contention that Mr. Bassetti cannot continue his employment. He has had a spotless record for 14 years. He was good evaluations.

Balancing all of these factor, discharge is too severe, disproportionat to the offense. Mr. Bassetti did not engage unbecoming conduct. Mr. Bassetti is not a racist. The Board did not have statutory cause, including just cause, to terminate him.

AWARD AND REMEDY

The District has failed to establish any of the charges as sufficient grounds for termination against the Respondent. Accordingly, the tenure charges are dismissed.

As a remedy, the District is ordered to remove the dismissal from Bruce Bassetti's record. It is further ordered to immediately reinstate him to his former position, or to a comparable position mutually agreeable to the parties, without loss of seniority. It is further ordered to make Bruce Bassetti whole for losses, if any, incurred as a result of his dismissal.

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

Peter Adomeit, Arbitrator 8/23/19

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

x

IN THE MATTER OF THE TENURE
CHARGES AGAINST
BRUCE BASETTI

Opinion and Award

BY

Agency Docket No. 75-4/19

THE PENNS GROVE-CARNEYS POINT

REGIONL SCHOOL DISTRICT
SALEM COUNTY

x

I, Peter Adomeit, affirm that I am the individual who executed this Decision and Award.

Peter Adomeit, Arbitrator 8/23/19

212-19
OAL Dkt. No. EDU 06938-18
Agency Dkt. No. 82-4/18

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

New Jersey Department of Education, Cumberland County Office of Education,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petitioner has voluntarily agreed to dismiss the petition of appeal. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/19
Date of Mailing: 8/27/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 06938-18
AGENCY DKT. NO. 82-4/18

HOPEWELL TOWNSHIP BOARD OF EDUCATION, CUMBERLAND COUNTY,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, CUMBERLAND COUNTY OFFICE,
Respondent.

Alicia D'Anella, Esq., for petitioner (Comegno Law Group, P.C., attorneys)

Geoffrey N. Stark, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 5, 2019 Decided: July 16, 2019

BEFORE **JEFFREY R. WILSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 14, 2018, 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 dismissal without prejudice for ninety (90) days from date of receipt of the Stipulation of Dismissal executed by the parties, after which this matter shall be dismissed with prejudice.

I have reviewed the Stipulation of Dismissal and I **FIND**:

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

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

I **CONCLUDE** that the Stipulation of Dismissal to the Complaint meets the requirements of N.J.A.C. 1:1-19.1 and that the dismissal should be approved. I approve the Stipulation of Dismissal herein and therefore **ORDER** that these proceedings be concluded.

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

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

July 16, 2019
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: July 16, 2019

Date Mailed to Parties: July 16, 2019

tat/lam

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(856) 234-4114
(856) 234-4262 Fax #
Attorneys for Petitioner, Hopewell Township Board of Education

BY: ALICIA D'ANELLA, ESQUIRE (Attorney ID # 22652008)

RECEIVED
2019 APR -5 P 12:13
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

HOPEWELL TOWNSHIP BOARD OF EDUCATION, CUMBERLAND COUNTY Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, CUMBERLAND COUNTY OFFICE, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF No.: 82-4/18 DOCKET No.: EDU-06938-2018S **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED by and between Petitioner, HOPEWELL TOWNSHIP BOARD OF EDUCATION and the Respondent, NEW JERSEY DEPARTMENT OF EDUCATION, CUMBERLAND COUNTY OFFICE OF EDUCATION, that any and all claims and counterclaims asserted herein are dismissed without prejudice and without costs for a period of ninety (90) days from the date of filling, after which this matter shall be dismissed with prejudice.

By: _____ Dated: 3/20/19
Geoffrey N. Stark, D.A.G.,
Attorney ID No.: 01811-2010
N.J. Office of the Attorney General, Division of Law
PO Box 112
Trenton, NJ 08625-0112
Attorney for Respondent

By: _____ Dated: 3/25/19
Alicia D'Anella, Esq.
Attorney ID # 22652008
COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
Attorney for Petitioner

220-19

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE HEARING OF:

BELLEVILLE TOWNSHIP BOARD OF EDUCATION, ESSEX COUNTY

Petitioner

AND

DECISION APPROVING SETTLEMENT AGREEMENT

CHRISTOPHER MICHELE

Respondent

AGENCY DOCKET NO. 244-9/18

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Ari D. Schneider, Esq.
The Busch Law Group, LLC

For the Respondent:
Nicholas Poberezhsky, Esq.
Caruso Smith Picini, PC

On October 22, 2018, I was appointed by the New Jersey Department of Education, Bureau of Controversies and Disputes to serve as arbitrator pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109, to hear and make a final determination on tenure charges filed by the Belleville Township Board of Education [the "Petitioner"] against tenured teacher Christopher Michele [the "Respondent"]. Upon receipt of that appointment, I reviewed the certified tenure charges and the answer opposing the charges, as well as all documentation accompanying those submissions. Thereafter, I convened a conference call with counsel for the parties, at which time the procedures for processing this case were discussed, mutually agreed upon and set. Pursuant to the understandings reached during the conference call, an informal pre-hearing conference was held on November 14, 2018 to clarify all issues raised in the formal filing and responses, potential evidentiary issues that could arise during hearing and also to engage in efforts that could resolve the issues raised in the formal filings. At the conclusion of the informal conference, it was agreed that formal hearings were to be scheduled but not to the exclusion of any future efforts that could be undertaken to resolve all issues.

Arbitration hearings in this matter were held on January 28, April 16 and June 4, 2019. During the June 4, 2019 hearing, the Petitioner and Respondent voluntarily engaged in informal discussions to again ascertain whether the issues that gave rise to this proceeding were susceptible to resolution. After lengthy

joint discussions ensued, the parties successfully constructed preliminary tentative terms for resolution but were unable to finalize all terms. This required the arbitrator to request an additional extension of time and to schedule a final arbitration hearing to be held on August 19, 2019. Prior to the conduct of the August 19, 2019 hearing, the parties were successful in refining all terms. The Settlement Agreement was then formalized into mutually agreed upon language. Those terms were signed by Respondent on August 14, 2019, approved by the Belleville Township Board of Education at its August 19, 2019 meeting and signed by the Board's authorized representatives on August 26, 2019. Pursuant to the terms of settlement, the Respondent submitted an irrevocable letter of resignation from employment as one element of a lengthy and comprehensive Settlement Agreement. Another element included the Board's acceptance of the letter through its approval of the Settlement Agreement that also included the withdrawal of any pending disciplinary and/or legal actions concerning Respondent.

As acknowledged by all parties, the arbitrator is required under N.J.A.C. 6A:3-5.6 to issue a decision approving the settlement of tenure charges and to explain why the arbitrator is approving the terms of settlement. After review, I have approved these terms for the reasons that follow.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been satisfactorily

addressed and resolved by the terms of settlement. In addition to the fact that these terms are mutually acceptable to the parties, I also find that the interests of the public will also be served by the voluntary resolution and the avoidance of continued extended litigation and the attendant uncertainties to the parties of final disposition of any disputed issues by the arbitrator

The parties have agreed that the interests of all concerned will be served by Respondent's separation from employment by voluntary resignation as a condition precedent to the withdrawal of the tenure charges. The parties have acknowledged that these terms have been agreed upon without admission of any wrongdoing or liability by, or on the part of, any party as to the merits of any claim raised by Petitioner in the tenure charges or by Respondent's answers to the charges. The Settlement Agreement resolves Petitioner's desire that Respondent no longer be employed by the Board and Respondent's acknowledgement that he no longer seeks retention of employment by this employee while denying all allegations against him that have now been withdrawn. I conclude that the considerations received by the Respondent as part of the Settlement Agreement are reasonable in all respects and reflect an amicable termination of Respondent's employment on terms consistent with the public interest. The Board and the public will further benefit by the avoidance of additional litigation costs and the uncertainties attendant to having a final disposition of the tenure charges through an Award, as well as any potential for either party to seek judicial review after the issuance of an Award.

Accordingly, and based upon all of the above, I hereby approve the parties' settlement agreement.

Dated: August 28, 2019
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 28th day of August, 2019, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

221-19

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
OFFICE OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Between:

SCHOOL DISTRICT OF THE CAMDEN COUNTY TECHNICAL SCHOOLS

"Petitioner"

DECISION ON MOTION TO DISMISS

and

BRETT FETTY

"Respondent"

Agency Docket No. 173-7/19
[Brett Fetty]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
David C. Patterson, Esq.
Maressa Patterson, LLC

For the Respondent
Andrew L. Schwartz , Esq.
Schwartz Law Group, LLC

PROCEDURAL HISTORY

On July 17, 2019 the School District of the Camden County Technical Schools [Petitioner or District] served Brett Fetty [Respondent or Fetty] with a Notice of Tenure Charges pursuant to *N.J.S.A.* 18A:6-11. Charge One alleged Conduct Unbecoming; and Charge Two alleged Other Just Cause. On or about August 1, 2019, the Respondent, in accordance with *N.J.A.C.* 6A:3-5.3(a)(1), filed a Motion to Dismiss [Motion] the tenure charges with the Office of Controversies and Disputes in lieu of filing an answer. I was appointed the Arbitrator to adjudicate this matter on August 7, 2019. A conference call was held with the parties on August 8, 2019 which resulted in the Petitioner filing its response in opposition to the Motion on August 23, 2019. This is a Decision on the Respondent's Motion to Dismiss the tenure charges filed by the Petitioner.

BACKGROUND

Brett Fetty has been employed by the District since July 1, 2013. He served as Assistant Principal at the District's Gloucester Township Campus from July 1, 2013 until June 30, 2016; and has served as the Principal of the District's Pennsauken Campus from July 1, 2016 through June 30, 2019. Based upon its tenure charges the District is seeking to demote Fetty from a Principal to an Assistant Principal (presumably to revoke his principal certification) and reassign him to the Gloucester Township Campus. On or about July 16, 2019, Fetty was suspended without pay pending this matter.

In its Statement of Charges the District alleged in Charge One, that Fetty engaged in unbecoming conduct by his allegedly repeated verbal abuse and malicious conduct and disparaging and humiliating remarks, particularly about a female administrator that created a hostile work environment and violated District Policies and Procedures. The

District elaborated, alleging that Fetty made such remarks to and about staff members; he allegedly berated a female administrator in front of staff and subordinates thereby undermining her authority; and it alleged he treated female and male staff members differently.

The District also alleged in Charge One that Fetty's conduct demonstrated his failure to perform in accordance with the Multidimensional Principal Performance Rubric because his conduct allegedly negatively impacted morale and the school environment. The District further alleged Fetty failed to provide a safe, efficient and effective learning environment; that he associated accountability with threats and made decisions based upon his own self interest.

Finally, the District also alleged in Count One that Fetty's conduct failed to adhere to and follow the goals stated in the principal's job description. The District alleged Fetty failed to foster an effective learning environment; failed to foster staff and personnel relationships; failed to solve problems effectively; and, failed to maintain superintendent relationships and execute administrative regulations.

In Charge Two the District alleged that the above alleged Conduct Unbecoming constituted Other Just Cause warranting that Fetty be removed from his principal position and be reassigned as an assistant principal with his mandatory participation in the employee assistance program and with counseling. The District concluded Charge Two arguing that Fetty's increment for the 2019-2020 year be withheld and that his suspension without pay; continue during the pendency of the charges.

In its Statement of Evidence the District primarily relies upon nine documents. But it also stated that there may be other supporting evidence that exists beyond those nine documents and it "reserved" the right to supplement the evidence.

Exhibit 01 is the June 19, 2019 memorandum of written "charges/recommendations" by Superintendent Patricia Fitzgerald to the District's Board of Education. In her memorandum Fitzgerald relies upon written statements by 10 staff members sent to the District's Affirmative Action Officer, Kathleen Cassidy, regarding Fetty's alleged conduct. Fitzgerald summarizes remarks made by staff members about Fetty in their statements to Cassidy, but Fitzgerald does not name any of those staff members.

Fitzgerald refers to Cassidy's summation of staff members statements to her [which is Exhibit 03], and Fitzgerald refers to comments she made in Fetty's evaluation. Fitzgerald concludes that Fetty's performance did not comply with the Principals Multi-dimensional Rubric; and that he violated the District Healthy Workplace Environment Policy (No. 3351) and its' Code of Ethics Policy (No. 3211).

Exhibit 02 is the District's Healthy Workplace Environment Policy. It provides that employees are entitled to a healthy workplace environment where employees are treated with dignity and respect and an environment devoid of threatening, intimidating or humiliating conduct by another employee. Under the Policy employees can submit a report of Policy violations to the Superintendent.

Exhibit 03 is Cassidy's summary of the ten staff statements submitted to her allegedly regarding Fetty's conduct. Cassidy is both the District's Manager of Human

Relations and its Affirmative Action Officer. Cassidy referred to those staff statements as Staff Members A through Staff member J.

Cassidy explained that she spoke to four female staff members on May 22, 2019, and asked them to submit written statements. Subsequently, six other staff members submitted statements concerning Fetty. Two of those ten staff members are no longer employed by the District. Cassidy noted that she asked all of the staff members if they wanted to file affirmative action claims (against Fetty), but they all declined to do so. Cassidy wrote that all of those staff members still employed by the District requested that their statements remain confidential allegedly because they feared Fetty's retaliation.

Exhibit 04 includes the ten staff member statements submitted to Cassidy. None of those statements are signed. Rather, they are designated as A through J.

Exhibit 05 is an excerpt from Fitzgerald's June 20, 2018 evaluation of Fetty. Fitzgerald notes in that document that Fetty should use professional wording in all staff communications, and he should not make any negative comments to or about staff or administrators.

Exhibit 06 is the District's Code of Ethics Policy. It provides that staff will adhere to the highest ethical standards.

Exhibit 07 is the District's Multidimensional Principal Performance Rubric.

Exhibit 08 is the District's Job Description for Principal. It includes the requirement that a Principal provide; a "safe, secure and caring environment", and, enforce the Code of Conduct.

Exhibit 09 is the District's Policy No. 4381, Protection Against Retaliation. It provides that the District will not take retaliatory action against any employee that has disclosed behavior that the employee believes is in violation of law or rule.

POSITIONS OF THE PARTIES

RESPONDENT

The Respondent's Motion to Dismiss the Charges was filed on August 1, 2019. It argued two reasons for dismissal. First, because the Petitioner relies upon an incomplete statement of evidence that deprives Respondent of the right to prepare a complete defense; and Second, because the statement of evidence primarily relies upon ten written but unsworn and anonymous statements. The Respondent argues that TEACHNJ prohibits such unspecific and indefinite charges and individually, and particularly when combined, those reasons require the charges be dismissed.

The Respondent's first reason for dismissal refers to the Petitioner's remark in its statement of evidence that "there may be other supporting evidence that exists beyond the documents attached with this submission". The Respondent argues that the above remark indicates that the District's evidence was incomplete when the charges were filed and thus violated the intent of both *N.J.S.A.* 18A:6-11 and the regulation in *N.J.A.C.* 6A:3-5.1(b)(1).

N.J.S.A. 18A:6-11 provides in pertinent part that when a tenure charge is filed it shall include a "written statement of evidence under oath to support such charge". The regulation in *N.J.A.C.* 6A:3-5.1(b)(1) conforms to the Statute and requires that charges be specific; and that they be accompanied by a supporting statement of evidence with complete copies of all documents referenced in the statement of evidence.

N.J.A.C. 6A:3-5.1(b)(1) specifically provides:

> 1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement.

The Respondent contends that the Petitioners reference to the possible existence of other evidence not included in its statement of evidence; and, its reliance upon ten unsigned and anonymous employee statements lacks the required specificity required by law. Relying upon several prior decisions, the Respondent therefore argues that the Petitioner has failed to comply with both the Statute and the Regulation.

In *In re Neal Gordon/Endlgwood Board of Education*, Docket No. 24-1/18 (8/13/18), Arbitrator Licata granted a motion to dismiss due to the Board's failure to comply with *N.J.A.C.* 6A:3-5.1(b). The Arbitrator held in pertinent part that:

> The sworn tenure charges must align with the sworn statement of evidence and the sworn statement of evidence must include all documents identified therein. At p.11

In *In re Marie Ebert/School District of the City of Newark*, Docket No. 267-9/14 (1/30/15), Arbitrator Denenberg granted a motion to dismiss due to the Board's failure to comply with the requirements of *N.J.S.A.* 18A:6-17.1(b)(3). That Statute provides in pertinent part:

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

In the *Ebert* case the Respondent had not been provided with certain requested documents or with summaries of witness testimony. Arbitrator Denenberg held that a district and all its evidence must be thoroughly prepared before tenure charges are filed. She concluded that the tenure charges in that case were premature, and dismissed those charges due to the District's failure to disclose all evidence to the Respondent when the charges were referred to arbitration.

The result was the same in *In re Tara Trongone/School District of the City of Gloucester City*, Docket No. 173-6/16 (9/12/16); and in *In re Kevin Karp/Barnegat Township Board of Education*, Docket No. 102-4/16 (5/26/16) where arbitrators granted motions to dismiss when the respective employers failed to comply with *N.J.S.A.* 18A: 6-11 and *N.J.A.C.* 6A:3-5.1(b) in part by relying upon unsigned and unsworn statements made to superintendents who did not directly participate in the related investigations.

Relying upon the above cited decisions the Respondent here makes the point that the District's comment in its statement of evidence that there may be other supporting evidence demonstrates that the District is not ready to proceed as required by TEACHNJ. Similarly, the Respondent contends that the Petitioner's reliance on unsworn and unnamed statements places it (the Respondent) in an unfair position forcing it to guess the identity of its accusers. The Respondent maintains that the District was obligated upon filing the charges to disclose the identity of the staff members upon whose statements Cassidy and Fitzgerald relied.

PETITIONER

In its brief opposing the Motion the Petitioner raised three arguments. First, it represented that it reference in its original statement of evidence that there may be additional evidence was a mistake; and, that there is no other evidence or documents to be submitted in this case other than its previous submission and the new affidavits by Fitzgerald and Cassidy submitted with this response which includes the names of the staff members who provided statements to Cassidy. In her most recent affidavit Fitzgerald certifies that the remark in the District's original statement of evidence that there may be additional evidence was an error, and that the statement of evidence provided with the tenure charges (apparently, now with the inclusion of staff member names on the statements in Exhibit 04) is complete.

Second, the Petitioner argued that it should be permitted to "correct or amend" its tenure charges by providing the identity of the staff members who wrote statements about Fetty to Cassidy. The District noted that Fitzgerald's most recent affidavit indicates that those names should have been included in its original statement of evidence and were added to those statements as attached to her most recent affidavit. The District contends that since those names are now provided it removes any prejudice to the Respondent's ability to respond to the charges.

Third, the Petitioner argued that Fitzgerald's original affidavit and most recent affidavit should be accepted because she did have first-hand knowledge of and was directly involved in participating in the investigation that led to the tenure charges against Fetty, and that both her statements were sworn. Additionally, the District argued that Cassidy's now sworn affidavit submitted with its (the District's) response to the Motion

should be accepted as a correction or amendment to the tenure charges because it supports Fitzgerald's certifications and the letters submitted to both of them by the staff members.

The Petitioner concludes its response arguing that the cases relied upon by the Respondent have different fact patterns than this case, and that with the additional information provided in its response to the Motion, the Respondent is no longer prejudiced in proceeding to develop its case.

DISCUSSION

I remind the parties that the Motion before me does not concern the merits of the Petitioner's charges, but rather the procedural issue of whether the Petitioner's filing of the charges complied with both the statute and the rules. Consequently, I can not consider in this Decision whether Fetty made any inappropriate remarks to other staff or violated the rubric, his job description or District policies. My Decision here is limited to whether the charges were properly filed.

An initial view of the Petitioner's original statement of evidence reveals that the District's mention that there may be other evidence; and its reliance on anonymous written statements certainly creates doubt about the specificity and reliability of its charges. Standing alone, anonymous statements do not comply with the decision in *In re Gordon* above because since they are not sworn statements, they cannot be considered part of or included in the sworn statement of evidence. Such anonymous statements present an untenable position for any respondent; hindering his or her ability to prepare a legitimate defense. Therefore, such anonymous statements seem to violate the intent of *N.J.S.A.* 18A:6-11; *N.J.S.A.* 18A:6-17.1(b)(3); and, *N.J.A.C.* 6A:3-5.1(b)(1).

Although the wording of *N.J.S.*A. 18A:6-11 and *N.J.A.C.* 6A:3-5.1(b)(1) requiring a statement of evidence supporting the charges may not clearly enunciate what needs to be included therein, the same cannot be said about *N.J.S.A.* 18A:6-17.1(b)(3). That provision clearly requires that the employing board of education provide "all evidence" including "statements of witness, and a list of witnesses" to the affected employee or his/her representative. Subsumed within the requirement to provide "all evidence" and "statements of witnesses" is the need to provide the names of the authors of any statements a board relies upon. Anonymous statements are of no reliable or probative value and their submission in a statement of evidence is a failure to comply with the statutory requirement.

It appears from its response to the Motion that the District here realized that the statements in its Exhibit 04 were insufficient, and it sought to correct the problem by providing the names of the authors of those statements through Fitzgerald's supplemental affidavit. I appreciate the District's effort in its response to the Motion to correct (or to at least attempt to correct) its remark in its original statement of evidence that there may be additional evidence, and its effort to attempt to correct its original submission of anonymous statements. It asserts those were both errors that it was correcting with Fitzgerald's supplemental affidavit. Fair enough, I understand why it would make sense to accept those corrections so that a hearing may proceed on the merits of the charges.

But I cannot accept Fitzgerald's recent affidavit to correct those errors and this Motion must be granted for two particular reasons. First, a board's obligation to submit all evidence it intends to rely upon when filing tenure charges is a statutory requirement. It appears to me that the Legislature understood that the revocation of tenure was a

serious matter and it (the Legislature) intended board's of education to reveal all of the evidence it would rely upon and to be fully prepared to proceed on such charges before filing tenure charges. There is no provision I am aware of in the TEACHNJ statutory scheme that provides that a board can amend or supplement its original statement of evidence after filing charges in order to subsequently comply with *N.J.S.A* 18A:6-11 and *N.J.S.A.* 18A:6-17.1(b)(3) after having originally failed to comply with those statutes. The appropriate procedure, I believe, is that such a board must refile its charges.

The decisions cited above support that position. The arbitrators in *In re Neal Gordon*; *In re Marie Ebert*; *In re Tara Trongone*; and, *In re Kevin Karp*: were vigilant about enforcing the "statement of evidence" requirements in *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6A:3-5.1(b)(1) and the "all evidence" and "statements of witnesses" requirement in *N.J.S.A.* 18A:6-17.1(b)(3). By enforcing those requirements board's of education will be consistently on notice to carefully and fully comply with those requirements when they file tenure charges.

Second, even if I were inclined to accept Fitzgerald's supplemental affidavit that there was no additional evidence for the District to present in this case; the mere providing of the names of the authors of the statements in Exhibit 04 was insufficient to cure those originally anonymous statements. The District's own statement of evidence revealed that all of the staff members who submitted statements declined to file affirmative action claims, and, apparently, they all requested that their statements remain confidential. I can only infer from that information, that those staff members were/are reluctant to give evidentiary level statements. Based upon those stated positions the Respondent can not be certain of the veracity or the accuracy of those statements with

just the names of the authors of those statements. At the very least, for those statements to have legal viability – or at least for the statements the District intends to rely upon to be included in the sworn statement of evidence as discussed in *In re Gordon* – they need to be sworn and signed by the authors of the statements

CONCLUSION

Based upon all of the above the Respondent's Motion to Dismiss the Charges is granted because the District failed to comply with the statutory and procedural filing requirements. However, this ruling is without prejudice to the District's right to re-file charges that comply with those filing requirements and procedural provisions. However, any refilling must contain sworn and signed statements from employees who claim inappropriate behavior by Fetty.

The District shall immediately reinstate the Respondent with full back pay and benefits, as if he were in a principal position, but this Decision is not intended to require the District to return the Respondent to the principal position at the Pennsauken (or at the Gloucester) Campus.

Accordingly, I issue the following:

AWARD

The Motion to Dismiss is granted without prejudice to the District's right to re-file tenure charges. The District shall reinstate the Respondent with full back pay and benefits consistent with the above Conclusion. If the charges are refilled, the District must provide sworn statements from those staff members it chooses to rely upon.

Arnold H. Zudick
Arbitrator

Dated: September 3, 2019
Yardley, Pennsylvania

Commonwealth of Pennsylvania}
County of Bucks }

On this 3rd day of September 2019, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Notary Public

Commonwealth of Pennsylvania-Notary Seal
Lori A Hackman, Notary Public
Bucks County
My Commission Expires June 04, 2022
Commission Number 1332692

OAL Dkt. No. EDU 4272-19
Agency Dkt. No. 62-3/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Butler, Morris County,

Petitioner,

v.

Board of Education of the Borough of Bloomingdale, Passaic County and Board of Education of the Township of Pequannock, Passaic County,

Respondents.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: September 4, 2019

Date of Mailing: September 6, 2019

OAL Dkt. No. EDU 4272-19
Agency Dkt. No. 62-3/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Butler, Morris County,

Petitioner,

v.

Board of Education of the Borough of Bloomingdale, Passaic County and Board of Education of the Township of Pequannock, Passaic County,

Respondents.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: September 4, 2019

Date of Mailing: September 6, 2019

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04272-19

AGENCY DKT. NO. 62-3/19

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, PASSAIC COUNTY,

Respondents.

Vito A. Gagliardi, Esq., for petitioner Butler BOE (Porzio Bromberg & Newman, attorneys)

Rodney T. Hara, Esq., for respondent Bloomingdale BOE (Fogarty and Hara, attorneys)

Peter B. Fallon, Esq., for respondent Pequannock BOE

S.B. and R.B. on behalf of minor child, I.B., participant, pro se

C.K. on behalf of minor child, E.K., participant, pro se

E.K. and J.K. on behalf of minor child A.K., participant, pro se

K.L. and C.L. on behalf of minor child, J.L., participant, pro se

D.S. on behalf of minor child, M.S., participant, pro se

Record Closed: July 17, 2019 Decided: July 26, 2019

BEFORE **KELLY J. KIRK**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on March 27, 2019, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Resolution setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Resolution setting forth the terms of the parties' agreement, I **FIND**:

1. The parties have voluntarily agreed to the Resolution as evidenced by the signatures of the parties and/or their representatives and statements made in the record.
2. The Resolution reflects that it was adopted by the Butler BOE at its meeting on June 24, 2019, the Pequannock BOE at its meeting on June 24, 2019, and the Bloomingdale BOE at its meeting on June 25, 2019.
3. The Resolution setting forth the terms of the parties' agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the Resolution setting forth the terms of the parties' agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the Resolution setting forth the terms of the parties' agreement should be approved.[i] I approve the Resolution setting forth the terms of the parties' agreement and, therefore, **ORDER** that the parties comply with the Resolution and that these proceedings be concluded.

[i] This Initial Decision – Settlement is issued pursuant to the Department's July 16, 2019 letter, as the Resolution reflects, "Upon adoption of this Resolution of Agreement, Butler Board of Education shall withdrawal [sic] with prejudice its Petition" and Butler's June 27, 2019 letter reflects that "Petitioner hereby withdraws its pending Petition of Appeal with prejudice."

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

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

July 26, 2019
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mm

RESOLUTION

BE IT RESOLVED between and amongst the Bloomingdale Board of Education ("Bloomingdale"), the Pequannock Board of Education ("Pequannock"), and the Butler Board of Education ("Butler") (hereinafter "the parties") that a proposed settlement of the litigation instituted by the Butler Board of Education entitled *Butler Board of Education v. Pequannock Board of Education and Bloomingdale Board of Education*, Office of Administrative Law, Agency Docket No.: EDU 04272-19, be and is hereby approved on the following terms:

1. Designation. Bloomingdale, as the sending district, hereby reaffirms Butler as the designated receiving district for Bloomingdale's pupils in grades 9 through 12, in accordance with the provisions of *N.J.S.A.* 18A:38-11 *et seq.*, and the terms of this Agreement. Butler hereby reaffirms to provide a high school education for all Bloomingdale pupils in in grades 9 through 12 in accordance with the requirement of *N.J.S.A.* 18A:38-11 *et seq.*, and the mandates of *N.J.S.A.* 18A:33-1 *et seq.*, together with other applicable Rules and Regulations of the New Jersey State Board of Education.

2. Agreements. Butler shall be the designated receiving district for Bloomingdale pupils in grades 9 through 12 pursuant to a sending-receiving agreement. Bloomingdale and Pequannock agree that the tuition contract agreement recently entered by and between them is modified by the terms reflected herein.

3. Enrollment in Other Schools. Bloomingdale shall retain its discretion pursuant to N.J.S.A. 18A:38-15 to pay the tuition for a resident Bloomingdale pupil who desires to attend Pequannock High School or another school which offers a particular high school course of study not offered by Butler High School. Butler shall retain its right to object to Bloomingdale's exercise of such discretion regarding individual students based upon relevant statutory criteria. In the event Butler decides in the future to offer a particular high school course of study that is

offered at Pequannock High School, Butler shall provide Bloomingdale and Pequannock advance notice no later than January 15 of its intent to implement the particular high school course of study that following September and provide the names of the course of study, course description, scope and sequence, and curriculum. Nothing contained herein shall effect the right of Bloomindale students to attend a Pequannock Academy Program that following September if Butler decides to implement the particular high school course of study that is offered at Pequannock High School once they have been admitted to the Freshman class or continue to attend a Pequannock Academy Program until they graduate if they have previously been admitted to the Freshman class.

4. Limitation. Notwithstanding Paragraph 3, Bloomingdale agrees that it will approve no more than 10 students per each freshman class from Bloomingdale to enroll in the Pequannock High School Academies pursuant to *N.J.S.A.* 18A:38-15.

5. No Transfers. Bloomingdale and Pequannock further agree that no Bloomingdale resident pupil enrolled in Butler High School shall be permitted to transfer from Butler High School to Pequannock High School or its Academies.

6. Upon adoption of this Resolution of Agreement, Butler Board of Education shall withdrawal with prejudice its Petition in the litigation entitled *Butler Board of Education v. Pequannock Board of Education and Bloomingdale Board of Education*, Office of Administrative Law, OAL Docket No.: EDU 04272-19.

7. Butler agrees not to file a lawsuit against Bloomingdale and Pequannock in connection with the tuition contract agreement that was entered into by Bloomingdale and Pequannock, and Butler hereby releases any and all claims it has or might have against Pequannock and/or Bloomingdale that are referenced in, or covered by, the Notices of Tort Claim letters from Vito A. Gagliardi, Jr. (i) dated December 28, 2018; and addressed by Robert

Mooney, Interim Superintendent Bloomingdale School District; and (ii) dated March 15, 2019, addressed to Dr. Brett Charleston, Superintendent of Schools Pequannock Township School District.

IN WITNESS WHEREOF, the Bloomingdale Board of Education, Pequannock Board of Education, and Butler Board of Education have caused this agreement to be approved at a public meeting by recorded roll call vote, and signed by their respective Presidents, attested to by their respective Secretaries and their corporate seals to be affixed hereto; all on the day and year first written below.

[*signature page to follow*]

ADOPTED by the Bloomingdale Board of Education at its meeting on June 25, 2019.

ADOPTED by the Pequannock Board of Education at its meeting on June 24, 2019.

ADOPTED by the Butler Board of Education at its meeting on June 24, 2019.

Witness or Attested to:

BLOOMINGDALE BOARD OF EDUCATION

Mark Kramer, Board Secretary

Lauren Grecco, Board President

PEQUANNOCK BOARD OF EDUCATION

Joseph Bellino, Board Secretary

Joseph Blumert, Board President

BUTLER BOARD OF EDUCATION

Patrick Tierney, Board Secretary

Tracy Luciani, Board President

ADOPTED by the Bloomingdale Board of Education at its meeting on June 25, 2019.

ADOPTED by the Pequannock Board of Education at its meeting on June 24, 2019.

ADOPTED by the Butler Board of Education at its meeting on June 24, 2019.

Witness or Attested to:

BLOOMINGDALE BOARD OF EDUCATION

Mark Kramer, Board Secretary

Lauren Grecco, Board President

PEQUANNOCK BOARD OF EDUCATION

James Colabaio, Board Secretary

Joseph Blumert, Board President

BUTLER BOARD OF EDUCATION

Patrick Tierney, Board Secretary

Tracy Luciani, Board President

223-19

OAL Dkt. No. EDU 17937-18
Agency Dkt. No. 270-11/18

New Jersey Commissioner of Education

Final Decision

Cindy Matute-Brown,

Petitioner,

v.

Board of Trustees of the Golden Door Charter School, Hudson County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19

Date of Mailing: 9/06/19

223-19

OAL Dkt. No. EDU 17937-18
Agency Dkt. No. 270-11/18

New Jersey Commissioner of Education

Final Decision

Cindy Matute-Brown,

Petitioner,

v.

Board of Trustees of the Golden Door Charter School, Hudson County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19

Date of Mailing: 9/06/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17937-18

AGENCY DKT. NO. 270-11/18

CINDY MATUTE-BROWN,

Petitioner,

v.

BOARD OF TRUSTEES OF THE GOLDEN DOOR CHARTER SCHOOL, HUDSON COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld Cohen, PC, attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy & Flanagan, attorneys)

Record Closed: July 25, 2019 Decided: July 25, 2019

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On December 4, 2018, the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On July 19, 2019, the parties settled this case. A copy of their settlement agreement and the board resolution are attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement agreement voluntarily as evidenced by their signatures, the signatures of their representatives, or both.

In addition, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement agreement and that these proceedings are now closed.

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

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

7/25/19
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

dr

PURCELL, MULCAHY & FLANAGAN
RITA F. BARONE, ESQ. (038211995)
One Pluckemin Way
P.O. Box 754
Bedminster, NJ 07921
(908) 658-3800
Attorneys for Respondent, Golden Door Charter School Board of Trustees
Our File: 304-26223-RFB

Cindy Matute-Brown, Petitioner, vs. Golden Door Charter School Board of Trustees, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket. No.: EDU 17937-2018 N Agency Ref. No.: 270-11/18 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and General Release, ("Agreement"), is entered into this _____ day of July, 2019 by and between the Petitioner, Cindy Matute-Brown ("Petitioner") and the Golden Door Charter School Board of Trustees ("Respondent") (the Petitioner and Respondent collectively referred to as the "Parties"); and

WHEREAS, the Petitioner commenced an action against the Respondent before the Commissioner of Education by way of Petition of Appeal, which action was captioned Cindy Matute-Brown v. Golden Door Charter School Board of Trustees, OAL Docket. No.: EDU 17937-

2018 N; Agency Ref. No.: 270-11/18. Petitioner also instituted a Discrimination Complaint before the New Jersey Department of Labor and Workforce Development – File No. D63-06-250 and an Unfair Practices Charge before the Public Employment Relations Commission under Docket No. Co 2017-262.

WHEREAS, the Parties have agreed to settle all of the claims in the matters listed above in an amicable way and dismiss all claims with prejudice and therefore, after consultation between legal counsel and following extensive negotiations, have agreed to enter into this Settlement Agreement and Release in order to formalize their compromise, which will fully and finally resolve all claims between the Parties; and

WHEREAS, the Respondent does not admit liability or any wrongdoing of any kind, but is entering into this Settlement Agreement and Release solely as a matter of a business judgment; and

WHEREAS, having negotiated in good faith, the Parties enter into this Settlement Agreement and Release in order to reach a compromise to fully and finally resolve their dispute in this litigation, and hereby agree as follows;

1. Release from All Claims:

The execution of this Agreement will constitute the full release by Petitioner of all claims known and unknown that they ever had or may have against one another arising up to and including the date of the execution of this Agreement, including all claims that were alleged in the Petition of Appeal, Discrimination Complaint before the NJ Department of Labor and Workforce Development, Unfair Practices Charge before the Public Employment Relations Commission any and all claims that could have been alleged in these actions and in these venues, against parties both known and unknown (John Doe, parties) as well as any and all claims for money damages in

any form as well as any claim for attorneys' fees. Petitioner expressly agrees to send a letter to the NJ Department of Labor and Workforce Development requesting that her Complaint as against Respondent be withdrawn. She also expressly agrees to request that the Unfair Labor Practice Charge and Grievance filed on her behalf by her former Union be withdrawn with prejudice.

2. Consideration:

In consideration for this Settlement Agreement and Release, the Defendants will provide payment to Petitioner in the amount of $39,444.06 for full and final settlement of all claims. This payment shall be made out to Petitioner and her counsel within sixty (30) days of Board Approval and the approval of the Commissioner of Education. The next Board meeting is scheduled for July 24, 2019. Petitioner shall be responsible for any and all tax consequences related to the within settlement and agrees to indemnify the Respondent and Respondent's insurance carrier for any tax liabilities associated with the settlement.

3. Full and Final Settlement:

This Settlement Agreement and Release represents a full and final settlement of the dispute between the Parties. The Parties expressly acknowledge and agree that the settlement payment is for all of the claimed damages, including, but not limited to, compensatory damages, attorneys' fees, litigation costs and/or expenses incurred by and/or on behalf of Petitioner with respect to this litigation, the actions set forth above and any and all other claims, cross-claims and/or counterclaims which Petitioner asserted and/or could have asserted including those which are not specifically mentioned in this Settlement Agreement and Release, except for any such claims as may be necessary to seek enforcement of the terms of this Settlement Agreement and Release. This means that Petitioner releases any and all claims she has asserted and/or could have asserted against Respondent in this or any other forum arising out of her employment with the Respondent.

Respondent has not made, and does not make, any representations as to the tax consequences of any payment hereunder or the allocation of these monies between the Petitioner and her counsel. It is specifically understood and agreed that the amount paid under this settlement agreement includes all counsel fees and costs to which Petitioner and/or her attorneys may be entitled, and the amount is specifically intended to be inclusive of all counsel fees and costs.

4. General Release:

(a) Release of Claims by the Petitioner Against Respondent:

In consideration for the making of this Agreement and for the Settlement proceeds, and for other benefits realized by the parties under this Agreement, Petitioner, for herself, her spouse, administrators, beneficiaries, assigns, executors, and attorneys, knowingly, voluntarily and unconditionally releases and forever discharges Respondent, its agents, officers, directors, board members, employees, representatives, parents, subsidiaries, subcontractors and contractors and assigns, both jointly and individually, in both their personal and official capacities of and from all manner of action(s), cause(s) of action, and suit(s), including but not limited to, any claims, debts, sums of money, accounts, reckonings, bonds, bills, claims for counsel fees, interest, expenses and costs, specialties, covenants, contracts, controversies, agreements, benefits, claims for vacation and/or sick pay, claims for wages and commissions, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever, in law or in equity, civil or criminal, vested or contingent, which she has ever had, now has to assert, or which she or her relatives, heirs, executors, representatives, assigns or administrators hereafter can, shall or may have or may assert, for, upon or by reason of any matter, cause or thing whatsoever to the date hereof, it being the intention herein of Petitioner to release Respondent from any and all claims of any and every nature, including attorneys' fees, up to the date of the Agreement, unrestricted in

any way by the nature of the claim, including, though not by way of limitation, all matters which were asserted or could have been asserted in all actions or claims identified above or any matter arising out of Petitioner's employment by the Respondent, Golden Door Charter School, and any other state or federal statutory, constitutional, or common law claims. This includes, but is not limited to: claims of tenure, seniority, recall rights under the New Jersey Education Laws at N.J.S.A. 18A: et seq.; alleged contractual rights under the collective bargaining agreement governing the employment relationship between the Parties; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the New Jersey Conscientious Plaintiff Protection Act, N.J.S.A. 34:19-1, et seq., the New Jersey Family Leave Act, N.J.S.A. 34:11B, et seq., the New Jersey Wage and Hour Law, as amended, the New Jersey Worker Health and Safety Act, as amended, claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, et seq., Executive Order 11246, as amended, 29 U.S.C. §621, et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), the Plaintiff Retirement Income Security Act of 1974, 29 U.S.C. §1002, et seq., the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq. & 5 U.S.C. §6381, et seq., the National Labor Relations Act, as amended, The Equal Pay Act, as amended, any anti-retaliation provision of any statute or law, worker compensation statutes, medical malpractice statutes and any other applicable federal, state or local, constitutional or statutory provision, order or regulation, arising from any event or act of omission or commission. This release includes, but is not limited to, any and all rights, causes of actions, claims or demands of any kind through the date of this release and further includes any alleged injuries or damages suffered at any time after the date of this release by reason of the continued effects of any such acts which occurred on or before the date of this release including any claims

to attorneys' fees.

5. Voluntary Stipulation of Dismissal:

The Parties shall execute and file the Voluntary Dismissal with Prejudice annexed to the Settlement Agreement and Release as Exhibit A after full execution of this Settlement Agreement and Release by all parties which dismisses the Discrimination Complaint presently before the NJ Department of Labor and Workforce Development. Petitioner shall also withdraw her Unfair Practices Complaint before the New Jersey Public Employee Relations Commission with prejudice upon full execution of this Settlement Agreement by all parties.

6. Non-Assignment:

By executing this Settlement Agreement and Release, the Parties expressly certify, acknowledge, and represent that they have not assigned to any third party any right or claim that any party has, may have or believes that the party has or may have against each other. The Parties further certify that they have no other charges, claims and/or complaints of any kind pending against each other, other than set forth herein, and further covenant and certify that they will not file or cause to be filed any charge, claim or complaint of any kind against each other seeking civil and/or criminal sanctions, personal recovery and/or injunctive relief based upon any facts leading up to the date of the signing of this Settlement Agreement and Release. The Parties certify that they have not assigned any claims and will not file any claims based upon any facts leading up to the date of the signing of this Settlement Agreement and Release.

7. No Admission of Liability:

(a) Respondent expressly denies liability for any and all of the Petitioner's claims, whether known or unknown, alleged in the Complaint. It is understood and agreed between the Petitioner and Respondent that this Agreement will not be construed at any time or for any purpose as an

admission by the Respondent of any act or omission alleged by Petitioner, or any acts or omissions that could have been alleged by Petitioner, or any liability or responsibility for any wrongdoing of any kind;

(b) The Parties expressly agree that neither of them shall be considered to be a "prevailing party" as a result of this Agreement; and

(c) The Parties further agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type, except to the extent necessary to enforce the terms of this Agreement. The Parties further agree and understand that they shall not provide a copy of this Agreement to any person, other than their attorneys, except if compelled to do so by legal process.

8. Attorneys' Fees:

The Parties, and their counsel, expressly waive and release each other from any and all claims for attorneys' fees and costs, including, but not limited to, claims for attorneys' fees and costs allowed under any Federal, State and/or local law, statute, regulation and/or ordinance.

9. Binding Agreement:

This Settlement Agreement and Release shall be binding and inure to the benefit of Petitioner and her spouse, heirs, representatives, successors and assigns, and to Respondent, its present or former departments, elected and appointed officials, officers, directors, agents, administrators, board members, attorneys, representatives, past and present employees, and any and all of their respective heirs, representatives, successors and assigns.

10. Covenant Not to Sue:

The Parties covenant that no other claim shall at any time hereinafter be filed against any party relating to any event or matter that was or could have been raised in the Complaint.

11. Confidentiality of Agreement:

The Petitioner agrees that, going forward, the amounts and fact of the payments described herein, any and all consideration provided herein, any and all discussions, communications and correspondence leading to this Agreement, which could give rise to an inference as to the parties involved shall be kept confidential, to the extent permitted by law. The Petitioner also agree that, pursuant to this Agreement, no party has admitted liability, nor has any party succeeded on the merits of the case. The Petitioner is precluded from disclosing any and all events, conduct, statements, and/or communications giving rise to, forming the basis for, or relating in any way to any and all of the claims asserted, which would give rise to an inference that a party has succeeded on the merits of the case. It is the Parties' understanding, agreement and expectation that this confidentiality provision shall apply to the fullest extent permissible by law, and shall preclude the Petitioner, her agents or representatives, from voluntarily or otherwise testifying at or participating in any proceeding, hearing, trial or preparation for hearing or trial, concerning the matters covered by this confidentiality provision, unless compelled to do so by law or by court order. The sole consideration for this confidentiality provision is the mutuality of the obligations of the parties with respect thereto.

The Parties mutually agree not to make any disparaging remarks about any party or former party to the litigation. The Parties further agree that they will not speak to the press or media including, but not limited to, television, newspaper, radio or internet press or media regarding any aspect of this matter, or any of the underlying facts and circumstances. The Parties agree that if they are solicited by the press or media for a comment regarding this matter, or any of the underlying facts or circumstances, their only responses will be that they do not have a comment.

The Petitioner also acknowledges that this settlement being made with a public entity is

subject to disclosure, notwithstanding this confidentiality clause, in accordance with the Open Public Meetings Act, N.J.S.A. 10:4-6, et. seq.; Open Public Records Act, N.J.S.A. 47:1A-1, et. seq.; any and all Federal or New Jersey statutes or regulations governing public entity meetings and disclosures including all case law interpreting same.

12. Future Employment

The Petitioner agrees to not seek any future employment from the Respondent.

13. Recusal

The Parties acknowledge that Petitioner presently is employed by the State of New Jersey Office of Charter and Renaissance Schools within the New Jersey Department of Education. In this capacity, Petitioner either does or may have in the future input, supervisory authority, investigative responsibility or other control, connection or administration over the Respondent, its board of trustees, school or school employees. Petitioner affirmatively agrees by execution of this agreement to recuse herself from any assignments, input, oversight, administration, investigation, renewals, probation pertaining to Respondent, its board of trustees, school or school employees in any position she may hold with the State of New Jersey for six (6) years.

14. Verification of Employment

The Respondent will verify Petitioner's employment by providing the dates of employment only if requested by a prospective employer of Petitioner.

15. Language:

The language of this Settlement Agreement and Release has been negotiated and is a product of the draftsmanship of all of the Parties, and shall, in all cases, be construed as a whole according to its objective and fair meaning and shall not be interpreted in favor of or against any party. Not by way of limiting the foregoing, the interpretation of any provision (in part or in whole)

of this Settlement Agreement and Release shall not, in any manner, be interpreted against the drafter.

16. Entire Agreement:

This Agreement constitutes the entire agreement between the Plaintiff and the Defendants with respect to the Complaint and supersedes all prior written or oral agreements, statements, offers or understandings between the Parties. The Parties acknowledge that they are not relying on any other representations, warranties, agreements or undertakings other than those expressly contained herein. This Agreement shall not be amended, modified or revised except by a written instrument duly signed by all of the Parties hereto, or their respective successors or assigns. No oral statement of any person shall in any manner or degree, modify the terms and provisions of this Agreement.

17. Controlling Law and Venue:

This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey. To the extent that any party seeks to enforce the provisions of this Agreement, or litigate any other dispute or controversy among them arising out the matters herein, any and all such actions shall be filed and venued only in the Superior Court of New Jersey, Somerset County Vicinage, which Court shall retain jurisdiction to enforce the terms of this Agreement.

18. Severability:

If any provision of this Agreement is declared invalid or unenforceable by any court of competent jurisdiction, and if such provision cannot be modified to be enforceable to any extent or in any application, the remaining provisions of this Agreement shall nevertheless survive and continue in full force and effect.

19. Counterparts:

This Agreement may be executed in several counterparts, each of which will be deemed an original, but all of which will constitute one and the same.

BY SIGNING THIS SETTLEMENT AGREEMENT AND RELEASE THE PARTIES SPECIFICALLY ACKNOWLEDGE THAT:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THAT THEY ARE GIVING UP IMPORTANT LEGAL RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT AND TO ABIDE BY THE TERMS OF THIS AGREEMENT;

D. THEIR ATTORNEYS NEGOTIATED THIS AGREEMENT WITH THEIR ASSISTANCE, KNOWLEDGE, AND CONSENT;

E. THEY HAVE CONSULTED WITH AN ATTORNEY CONCERNING THIS AGREEMENT PRIOR TO EXECUTING THIS AGREEMENT;

F. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Cindy Mutute-Brown, Petitioner

DATED: 7-19-19

Paul Velelis, Board Secretary/Business Administrator

Danielle Downs, Board President

DATED: 7-24-19

3040 Kennedy Blvd.
Jersey City, NJ 07306
(201) 795-4400

BE IT RESOLVED THAT THE BOARD OF TRUSTEES APPROVED GOVERNANCE ITEM "D" AS FOLLOWS:

XII. GOVERNANCE

Motion by Ms. Keyes and second by Mr. Patel to approve Item D. Carried by unanimous voice vote (4-0).

D. Resolved that the Board of Trustees approves the **Settlement Agreement and Release** regarding OAL Docket No. EDU 17937-2018 N, PERC Docket No. Co 2017-262, and the New Jersey Department of Labor and Workforce Development File No. D63-06-250; and authorizes the Board President, Chief Academic Officer, Business Administrator, and Board Attorney to take all actions necessary to effectuate this resolution.

CERTIFYING STATEMENT

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF **Jersey City Golden Door Charter School** IN THE COUNTY OF **Hudson**, NEW JERSEY, AT A MEETING HELD ON **July 24, 2019**.

P L V

Signature, Business Administrator/Board Secretary

7-25-19

Date

OAL Dkt. No. EDU 07601-17
Agency Dkt. No. 104-5/17

New Jersey Commissioner of Education

Final Decision

Corey Mehl,

Petitioner,

v.

Board of Education of the Caldwell-West Caldwell School District, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed for failure to prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

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

OAL Dkt. No. EDU 07601-17
Agency Dkt. No. 104-5/17

New Jersey Commissioner of Education

Final Decision

Corey Mehl,

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v.

Board of Education of the Caldwell-West Caldwell School District, Essex County,

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed for failure to prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 07601-17
AGENCY DKT. NO. 104-5/17

COREY MEHL,
Petitioner,
v.
BOARD OF EDUCATION FOR THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT OF ESSEX COUNTY,
Respondent.

Jonathan R. Mehl, Esq., for petitioner

Isabel Machado, Esq., for respondent (Machado Law Group, LLC, attorneys)

Record Closed: July 23, 2019 Decided: July 23, 2019

BEFORE, **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the short-term suspension imposed by the Board. The petitioner's request for a hearing was granted and the matter was transmitted to the Office of Administrative Law on May 30, 2017, for hearing as a contested case.

During a conference call held on June 6, 2017, the parties advised that the suspension had been served already; no other discipline was pending; nothing would appear on the transcript, and there were no immediate consequences to the suspension. The parties also reported that the student would be graduating in a few days and the case was over. The parties agreed to discuss disposition and advise the undersigned.

On September 14, 2018, correspondence was sent to the parties inquiring as to the status of this matter. Neither counsel provided the courtesy of a reply. Over two years have elapsed since the transmittal and filing of this matter, and nothing has been heard from either party since the June 6, 2017, conference. Based upon all of the foregoing I **FIND** that this 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.

July 23, 2019
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: July 24, 2019

Date Mailed to Parties:

dr

OAL Dkt. No. EDU 787-19
Agency Dkt. No. 307-12/18

New Jersey Commissioner of Education

Final Decision

A.B., on behalf of minor children, C.B. and A.B.,

Petitioner,

v.

Board of Education of the Township of South Harrison, Gloucester County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

OAL Dkt. No. EDU 787-19
Agency Dkt. No. 307-12/18

New Jersey Commissioner of Education

Final Decision

A.B., on behalf of minor children, C.B. and A.B.,

Petitioner,

v.

Board of Education of the Township of South Harrison, Gloucester County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00787-19

AGENCY DKT. NO. 307-12/18

AB. ON BEHALF OF MINOR CHILDREN,
C.B. AND A.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP
OF SOUTH HARRISON, GLOUCESTER COUNTY,

Respondent.

A.B., on behalf of minor children, C.B. and A.B., petitioner, pro se

Daniel F. Thornton, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: July 29, 2019 Decided: July 31, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on June 5, 2018, 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 and General Release indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement (J-1.) The President of the Board of Education, Janet Brown, signed on the Board's behalf.

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

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

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

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

July 31, 2019
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Received at Agency: 8-2-19

Date Mailed to Parties: 8-2-19

/vj

APPENDIX

EXHIBIT

J-1 Settlement Agreement and General Release

A.B
o/b/o A.B.
C.B

Settlement Agreement
J-1

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057-3209
856-234-4114

Attorneys for Respondent,
South Harrison Township Board of Education

By: R. Taylor Ruilova (039892006)
Daniel F. Thornton (108572014)

RECEIVED

2019 JUL 29 P 1:24

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

A.B. on behalf of minor children, A.B. and C.B., Petitioner, v. SOUTH HARRISON TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 00787-2019 S Agency Docket No. 307-12/18 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is entered into by and between the South Harrison Township Board of Education ("Board" or "District"), located at 904 Mullica Hill Road, Harrisonville, New Jersey, and A.B. ("Parent"), who resides at 230 Carter Avenue, Gibbstown, New Jersey, on behalf of her minor children, A.B. and C.B. (the Board and Parent are referred to collectively as the "Parties").

WHEREAS, A.B. and C.B. currently attend school in the District; and

WHEREAS, on November 19, 2018, following notice to the Parent and a hearing, the Board determined by a roll-call vote that A.B. and C.B. do not reside within the District and are thus ineligible to attend school in the District; and

WHEREAS, on November 26, 2018, the Board sent Parent notice of its decision; and

WHEREAS, on December 18, 2018, A.B. appealed to the Commissioner of Education, who then transmitted the matter to the Office of Administrative Law; and

WHEREAS, the Parties intend to resolve all outstanding issues regarding A.B. and C.B.'s residency and school attendance in a confidential manner; and

WHEREAS, in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties enter into this Agreement to outline their agreement, release claims, and express the full and complete terms of same;

NOW, THEREFORE, THE PARTIES HEREBY AGREE THAT:

1. A.B. and C.B. shall be dis-enrolled from the District effective at 12:00 AM on the day following the last day of school in the District in June 2019 (which is anticipated to be June 20, 2019).

2. Thereafter, A.B. and C.B. shall not be eligible for re-enrollment in the District unless they provide legally sufficient proof of their domicile in the District.

3. The Board shall permit the Parent to attend her son's graduation ceremony at the conclusion of the 2018-2019 school year.

4. Except as otherwise provided herein, the Board agrees to waive all tuition claims against the Parent under N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22-3.1 relating to A.B. and C.B.'s attendance in the District.

5. The Parent, individually and on behalf of A.B. and C.B., agrees that the terms of this Agreement shall remain **strictly confidential** to the fullest extent permitted by law, and they shall not share or communicate the terms of same with any other individual, unless enforcement of same is sought by either Party in a court of law.

6. In consideration of the above, Parent, individually and on behalf of A.B. and C.B., hereby forever and fully waives and releases the Board, its members, officers, administrators, agents, servants, employees, or assigns from any and all claims that have accrued as of the date of this Agreement, and that may accrue through June 30, 2019, under any law, regulation, or legal theory, including without limitation:

a. attorney's and other professional fees and costs;

b. N.J.S.A. 18A:1-1 to 76-4;

c. N.J.A.C. 6A:1-1.1 to 33-4.1

d. Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g;

e. Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17;

f. The Rehabilitation Act of 1973, as amended, 20 U.S.C. § 7801, *et seq.*;

g. 42 U.S.C. §§ 1983 & 1988; and

h. Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49.

Nothing in the release set forth in this Paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

7. Parent understands and acknowledges that should she breach any term of this agreement, including, but not limited to the confidentiality provisions of paragraph 5, the Board may immediately seek to collect tuition from Parent for the full period of time during which A.B. and C.B. attended school in the District, but were not District residents.

8. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, and

that they are entering into this Agreement knowingly, freely, voluntarily, without coercion, and not under the influence of anything or anyone.

9. The Parent agrees that this Agreement is subject to approval by the Board during its regularly scheduled meeting following the execution by Parent of this Agreement.

10. The Parent represents, verifies, and affirms that she has the authority to enter into this Agreement on behalf of A.B. and C.B. and that it is binding on her, and on A.B. and C.B.

11. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey, without regard to that jurisdiction's choice-of-law doctrines. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

12. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

13. This Agreement may only be amended via a writing signed by all Parties.

IN WITNESS WHEREOF, the Parties hereto executed this agreement as of the dates set forth below:

FOR THE SOUTH HARRISON TOWNSHIP BOARD OF EDUCATION:

BY: _____ DATED: 5/29/19

FOR PARENT, INDIVIDUALLY AND ON BEHALF OF A.B. and C.B.

BY: _____ DATED: 5/24/2019

226-19

OAL Dkt. No. EDU 6697-19
Agency Dkt. No. 65-3/19

New Jersey Commissioner of Education

Final Decision

RM. and A.N., on behalf of minor child, A.M.,

Petitioners,

v.

Board of Education of the Township of Green, Sussex County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06697-19

AGENCY DKT. NO. 65-3/19

R.M. AND A.N. ON BEHALF OF MINOR CHILD A.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,

Respondents.

Lori E. Arons, Esq., for petitioner

Marc H. Zitomer, Esq., for respondent, (Schenck, Price, Smith & King, attorneys)

Record Closed: July 22, 2019 Decided: July 24, 2019

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

On May 14, 2019, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

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

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

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

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

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

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

July 24, 2019

DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent
Green Township Board of Education

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STATE OF NEW JERSEY

R.M. and A.N. o/b/o A.M.,

Petitioners,

v.

GREEN TOWNSHIP BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

BEFORE THE COMMISSIONER OF EDUCATION

OAL Dkt. No. EDU 06697-2019N
Agency Ref. No. 65-3/19

SETTLEMENT AGREEMENT & RELEASE

This Agreement is made by and between Petitioners R.M. and A.N. ("Petitioners") and Respondent Green Township Board of Education ("Board" or "Respondent").

RECITALS

WHEREAS, on or about March 6, 2019, the Respondent determined, based on the results of a residency investigation, that Petitioners are not domiciled in the Green Hills School District ("District") during the 2018-19 school year and, thus, A.M. was not entitled to a free, public education in the District; and

WHEREAS, the Board passed a resolution ordering the removal of A.M. from the District and that Petitioners pay back tuition and transportation costs up to the date of removal; and

WHEREAS, Petitioners filed a Petition of Appeal with the Commissioner of Education challenging the Board's residency determination; and

WHEREAS, this administrative action is presently pending before the Commissioner of Education in the Office of Administrative Law ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioners and Respondent in connection arising from this Litigation; and

WHEREAS, by this Agreement, Petitioners will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other; and

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. Petitioner shall pay the Board the sum of ($5,000.00), representing a portion of the back tuition for the 2018-19 school year. Said payment is due within fourteen (14) days after the Board's approval of this Agreement.
2. By approving this Agreement, the Board is hereby rescinding the resolution disenrolling A.M. from the District and is permitting his continued attendance in the District/Mt. Olive at Respondent's cost and expense, subject to R.M. and A.M. remaining domiciled in Green Township.
3. It is acknowledged that A.N. is not domiciled in Green Township.
4. Respondent acknowledges and understand that R.M. uses an apartment in Fort Lee, New Jersey for business purposes.

5. R.M. represents that said apartment is not his domicile (not his true, fixed and permanent home).

6. Petitioners, in consideration of this Stipulation of Settlement, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal with prejudice, of the Petition of Appeal in this matter upon the Board's approval of this Agreement.

7. Petitioners, individually and on behalf of A.M. hereby fully and completely release the Board, collectively and individually, it members, employees and agents from any and all claims they may have or may have accrued against them through the date of this Agreement under any State or Federal laws or regulations or any other claims which have been or could have been asserted by Petitioners on behalf of themselves or A.M. any forum arising out of or connected with this Litigation through the date of this Agreement. This paragraph shall not serve to release any claims arising from the parties current dispute over the extended school year program.

8. Respondent agrees to completely release Petitioners from any and all claims they may have or may have accrued against them through the date of this Agreement under any State or Federal laws or regulations or any other claims which have been or could have been asserted by Respondent in any forum arising out of or connected with this Litigation through the date of this Agreement. This paragraph shall not serve to release any claims arising from the parties current dispute over the extended school year program.

9. The releases set forth in Paragraphs 5-6, *supra*, shall not be construed as a release of either parties' right to enforce the terms of this settlement agreement or the prior settlement agreement bearing Docket No. EDS 05595-18.

10. Nothing contained in this Agreement shall preclude Respondent from verifying Petitioners' domicile in the future.

11. This Agreement is subject to approval by Respondent. If approved, the Board President and/or Business Administrator is/are fully authorized to execute this Agreement on behalf of the Board.

12. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

13. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

14. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

15. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

16. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of five (5) pages, effective on the day and year first above written.

PETITIONERS

Date: 07/16/19 Roman Mykonchenko
R.M. o/b/o A.M.

Date: 07/15/19 Anna Nam
A.N. o/b/o A.M.

FOR RESPONDENT,
GREEN TOWNSHIP BOARD OF EDUCATION

_____ Marie Bilik
Marie Bilik, Bd. President

Date: 7/17/19

227-19

New Jersey Commissioner of Education

Final Decision

T.C., on behalf of minor child, P.S.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

Synopsis

Pro se petitioner filed an appeal in April 2019 seeking emergent relief on behalf of her son, P.S., who was expelled from Monmouth Regional High School (MRHS) and placed on home instruction following an incident in which P.S. allegedly threatened a teacher during class in March 2019. Petitioner contested the Board's action and sought an order to return her son to the classroom to complete his classes for the 2018-2019 school year. Emergent relief was denied in May 2019, and the underlying petition appealing the Board's disciplinary action remained pending at the OAL.

The ALJ found, *inter alia*, that: subsequent to the denial of emergent relief, a prehearing telephone conference in this matter was scheduled for June 26, 2019; petitioner was provided with appropriate notice, but failed to answer her phone to participate in the scheduled call; the Board then filed a motion to dismiss for failure to appear at the prehearing conference; petitioner emailed the Board and the OAL after the filing of the motion to dismiss to say that she did not receive the phone call from OAL to initiate the prehearing conference on June 26, 2019; subsequent efforts to initiate telephone conferences to address the status of the pending case failed, as petitioner never answered her phone; petitioner made no further filing in opposition to the Board's motion to dismiss. The ALJ concluded that petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition. Accordingly, the Board's motion to dismiss was granted and the file was returned to the Department of Education.

Upon comprehensive review of the record, and for the reasons stated in the Initial Decision, the Commissioner concurred with the ALJ's determination that the petition of appeal should be dismissed for failure to appear and/or prosecute. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

September 4, 2019

OAL Dkt. No. EDU 5628-19
Agency Dkt. No. 82-4/19

New Jersey Commissioner of Education

Final Decision

T.C., on behalf of minor child, P.S.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed for failure to appear and/or prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

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

New Jersey Commissioner of Education

Final Decision

T.C., on behalf of minor child, P.S.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

Synopsis

Pro se petitioner filed an appeal in April 2019 seeking emergent relief on behalf of her son, P.S., who was expelled from Monmouth Regional High School (MRHS) and placed on home instruction following an incident in which P.S. allegedly threatened a teacher during class in March 2019. Petitioner contested the Board's action and sought an order to return her son to the classroom to complete his classes for the 2018-2019 school year. Emergent relief was denied in May 2019, and the underlying petition appealing the Board's disciplinary action remained pending at the OAL.

The ALJ found, *inter alia*, that: subsequent to the denial of emergent relief, a prehearing telephone conference in this matter was scheduled for June 26, 2019; petitioner was provided with appropriate notice, but failed to answer her phone to participate in the scheduled call; the Board then filed a motion to dismiss for failure to appear at the prehearing conference; petitioner emailed the Board and the OAL after the filing of the motion to dismiss to say that she did not receive the phone call from OAL to initiate the prehearing conference on June 26, 2019; subsequent efforts to initiate telephone conferences to address the status of the pending case failed, as petitioner never answered her phone; petitioner made no further filing in opposition to the Board's motion to dismiss. The ALJ concluded that petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition. Accordingly, the Board's motion to dismiss was granted and the file was returned to the Department of Education.

Upon comprehensive review of the record, and for the reasons stated in the Initial Decision, the Commissioner concurred with the ALJ's determination that the petition of appeal should be dismissed for failure to appear and/or prosecute. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

September 4, 2019

OAL Dkt. No. EDU 5628-19
Agency Dkt. No. 82-4/19

New Jersey Commissioner of Education

Final Decision

T.C., on behalf of minor child, P.S.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed for failure to appear and/or prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/19
Date of Mailing: 9/06/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION TO DISMISS
OAL DKT. NO. EDU 05628-19
AGENCY DKT. NO. 82-4/19

T.C. ON BEHALF OF
MINOR CHILD P.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
MONMOUTH REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY,
Respondent.

T.C., petitioner, pro se

Samantha Dev, Esq., for respondent (Capehart Scatchard, attorneys)

Record Closed: July 8, 2019 Decided: July 30, 2019

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner, T.C., initiated the present action by filing a petition seeking emergent relief on behalf of her son, P.S., who was a student at Monmouth Regional

High School (MRHS). MRHS alleged that P.S. verbally threatened a teacher during class on March 21, 2019. Following an expulsion hearing before the MHRS Board (Board) on April 2, 2019, P.S. was expelled from MRHS and placed on home instruction pending placement at the Class Academy school beginning in the fall of 2019. On April 26, 2019, the petitioner appealed the Board's action and filed for emergent relief, seeking an order immediately returning P.S. to MRHS for the remainder of the school year to complete his classes.[1] The motion was transmitted to the Office of Administrative Law (OAL), where it was heard on April 30, 2019. The emergent relief motion was denied in an order dated May 1, 2019.

Following the denial of emergent relief to allow P.S. to return to MRHS pending the appeal of MRHS' disciplinary action, the underlying petition to appeal MRHS' disciplinary action remained pending before the OAL. The matter was scheduled for a telephone prehearing conference and, on June 18, 2019, the parties were given notice of a telephone prehearing conference on the matter to be held on June 26, 2019, at 3:30 p.m. The petitioner failed to answer her phone to participate in the scheduled pre-hearing conference call, and on June 28, 2019, the respondent filed the present motion to dismiss the petitioner's petition for her failure to appear on the prehearing conference call pursuant to N.J.A.C. 1:1-14.4. Later that day, the petitioner responded via email to the respondent and OAL that, while she was aware of and available for the scheduled telephone conference, she did not receive the phone call from OAL to initiate the conference call on June 26, 2019. The petitioner was unresponsive to subsequent efforts by the OAL on July 3, 2019, and July 8, 2019, to initiate telephone conferences to discuss the status of the pending case and made no further filing in opposition to the respondent's present motion.

[1] As found in the previous hearing on the petitioner's motion for emergent relief, the Board recommended that P.S. be transferred to the CLASS Academy, an alternative high school within the District, beginning in the fall of 2019. At the time of the hearing on the emergent motion in April 2019, P.S. was a junior in high school, but had only completed 25 of the 120 credits required to graduate. MRHS does not have a credit recovery program that would allow P.S. to complete these credits in time for him to graduate next year. CLASS Academy offers a credit recovery program that would allow P.S. to make up the credits he needs to graduate high school next year. Although P.S. and his mother indicated at the April 2019, hearing that they were willing to try CLASS Academy starting in the fall, they still wanted P.S. returned to MRHS to finish out his classes in the current school year. The current school year at MRHS ended on June 17, 2019.

PROCEDURAL HISTORY

On April 26, 2019, the New Jersey Department of Education received the underlying petition of appeal and motion for emergent relief. The matter was transmitted to the Office of Administrative Law, where it was filed on April 26, 2019. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument on the motion for emergent relief was held on April 30, 2019, and the motion was denied in an order dated May 1, 2019. On June 18, 2019, the parties were given notice that a prehearing telephone conference on the underlying petition to appeal the school's disciplinary action was scheduled for June 26, 2019, at 3:30 p.m. The petitioner did not answer her telephone when called by OAL staff to participate in the scheduled telephone conference. On June 28, 2019, the respondent filed the present motion to dismiss the petitioner's petition pursuant to N.J.A.C. 1:1-14.4. Pursuant to N.J.A.C. 1:1-12.2, the record on the motion remained open until July 8, 2019, to permit the petitioner to file and serve responsive papers to the respondent's motion. The petitioner responded to the respondent's filing with an email communication directed to the respondent and OAL staff on June 28, 2019, but made no further filing in opposition to the respondent's motion. OAL staff attempted to reach the petitioner via telephone to set up a conference call with the parties on July 3, 2019. The petitioner did not answer her phone and did not respond to a voice mail message left for her by OAL staff seeking a return telephone call. The petitioner was also unresponsive to voice mail left for her by OAL staff on July 8, 2019, seeking to set up a conference call to discuss the status of the pending matter. As neither party requested oral argument and no other responsive papers were received from the petitioner, the record on the motion closed July 8, 2019.

FACTUAL DISCUSSION

A summary of the pertinent facts is undisputed and largely procedural, and I **FIND** the following **FACTS**:

1. The petitioner's motion for emergent relief was denied on May 1, 2019. Following denial of her emergent relief motion, both parties to this matter were contacted by OAL staff via email on May 21, 2019, seeking availability for a prehearing conference call on the petitioner's underlying petition. (Resp. Br. at Ex. A.)

2. On May 21, 2019, counsel for the respondent replied, via email, providing dates and times for their availability for a prehearing conference call. As late as June 18, 2019, however, the petitioner had not responded to provide her availability for a prehearing conference call. (Id.)

3. OAL staff followed up via telephone with the petitioner and secured her verbal confirmation of availability for a telephone call on June 26, 2019, at 3:30 p.m.

4. On June 18, 2019, the parties were notified by OAL staff, via email, of a telephone status conference to be held on June 26, 2019, at 3:30 p.m. (Id. at Ex. B.) The parties were informed that the OAL would initiate the conference call. (Id.)

5. On June 18, 2019, at 3:30 p.m., OAL staff called the parties to initiate the scheduled conference call. Respondent's counsel was reached via phone and waited on the call, however, despite numerous calls made to the petitioner's phone number, the petitioner did not answer the phone.

6. Because the petitioner did not answer the phone to participate in the call, the scheduled conference call could not take place.

7. Consistent with the requirements of N.J.A.C. 1:1-14.4, no action was taken on the matter following the petitioner's failure to appear on the June 26, 2019, status conference call. The petitioner did not attempt to contact the OAL staff or respondent's counsel to inquire if the scheduled conference call was proceeding on the designated date and time, and no communication was received by the

OAL from the petitioner in the twenty-four hours following the scheduled call to explain her non-appearance on the scheduled telephone call.

8. On June 28, 2019, at 1:04 p.m., two days after the petitioner's failure to appear on the scheduled conference call, the respondent filed the present motion, transmitting it via email to the OAL with a copy to the petitioner.

9. On June 28, 2019, at 1:45 p.m., the petitioner responded to the email from respondent's counsel transmitting the present motion to dismiss, relaying the following in an email to respondent's counsel and OAL staff:

> To whom it may concern:
>
> I waited by the phone from 3:00 pm till 3:45pm. No call came thru. It is not my fault.
>
> That I did not received [sic] phone call. Don't know what happened under these circumstances.
>
> The call did not come thru for some reasons as I mentioned I waited for phone call from the Court.
>
> It's a phone system – they don't always work properly I guess.
>
> For the most part, I don't need attorneys speaking on behalf of me and quoting – I did a nonappearance.
>
> It's Friday and I will not be in the office till Monday. I have no idea why the call did not come thru as I have arranged the conference with your assistance [sic] on the phone so it is my belief that I never got the call.
>
> I don't think you people understand . . . The educational system hurt my son. If you don't want him in the school[.]
>
> What's the argument about. I don't want this to get nasty because I am still disgusted by this whole thing.
>
> Sincerely,
>
> [T.C.][2]

[2] The petitioner in this matter is proceeding pro se, and it is unclear from the content of this email if her communications to the respondent and OAL on June 28, 2019, was intended to be a filing in opposition to the respondent's motion to dismiss or, in the absence of any other filing by the petitioner, the respondent's current motion is unopposed. For purposes of making a complete record, and in the absence of any further filing or communication from the petitioner, this tribunal shall regard this email as the petitioner's responsive filing to the respondent's motion and address the respondent's present motion on the merits.

10. On July 3, 2019, OAL staff attempted to contact the petitioner via telephone to set up a conference call with the parties to discuss the matter and to address any confusion the petitioner may have regarding the dismissal of her motion for emergent relief and proceedings on her underlying appeal of MRHS' disciplinary action against her son. The petitioner did not answer the phone and did not respond to a voicemail left for her by OAL staff asking her to contact the OAL regarding her case by the close of business on July 3, 2019.

11. On July 8, 2019, OAL staff again attempted to contact the petitioner via telephone to set up a conference call with the parties to discuss the status of the pending matter. The petitioner did not answer the phone and did not respond to a message left on her voicemail by OAL staff seeking her return telephone call by close of business on July 8, 2019.

LEGAL DISCUSSION

The respondent's motion was filed seeking dismissal of the petitioner's petition pursuant to N.J.A.C. 1:1-14.4. Under N.J.A.C. 1:1-14.4:

> (a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).
>
> (b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.
>
> (c) If the judge receives an explanation:
>
> 1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or
>
> 2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may

> reschedule the matter and, at his or her discretion, order any of the following:
>
> i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
>
> ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
>
> iii. Such other case-related action as the judge deems appropriate.
>
> (d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

Based upon the facts as detailed herein, I **CONCLUDE** that the petitioner was provided with appropriate notice of a scheduled proceeding, namely a telephone conference call which was to be held on June 26, 2019, at 3:30 p.m. The petitioner was provided written notice of this scheduled proceeding via email on June 18, 2019, (Resp. Br. at Ex. B) and the petitioner concedes in her email communications with the OAL that she was aware of the scheduled call and reported that she was waiting by the phone at the scheduled date and time for a call to initiate the scheduled conference. Despite receiving appropriate notice, neither the petitioner, nor her representative appeared on the scheduled conference call by answering any of the multiple phone calls placed to her by the OAL staff in an effort to participate in the scheduled conference call at the pre-determined date and time. As the petitioner herself conceded in her email communications to the respondent and OAL staff following the scheduled conference call, she "did a nonappearance." The petitioner has further been unresponsive to subsequent efforts by OAL staff to communicate with her regarding her pending matter on July 3, 2019, and July 8, 2019.

Although the OAL received email communications from the petitioner on June 28, 2019, regarding her failure to appear on the scheduled conference call on June 26, 2019, the OAL did not receive "an explanation for the nonappearance within one day" of

> reschedule the matter and, at his or her discretion, order any of the following:
>
> i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
>
> ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
>
> iii. Such other case-related action as the judge deems appropriate.
>
> (d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

Based upon the facts as detailed herein, I **CONCLUDE** that the petitioner was provided with appropriate notice of a scheduled proceeding, namely a telephone conference call which was to be held on June 26, 2019, at 3:30 p.m. The petitioner was provided written notice of this scheduled proceeding via email on June 18, 2019, (Resp. Br. at Ex. B) and the petitioner concedes in her email communications with the OAL that she was aware of the scheduled call and reported that she was waiting by the phone at the scheduled date and time for a call to initiate the scheduled conference. Despite receiving appropriate notice, neither the petitioner, nor her representative appeared on the scheduled conference call by answering any of the multiple phone calls placed to her by the OAL staff in an effort to initiate the call at the pre-determined date and time. As the petitioner herself conceded in her email communications to the respondent and OAL staff following the scheduled conference call, she "did a nonappearance." The petitioner has further been unresponsive to subsequent efforts by OAL staff to communicate with her regarding her pending matter on July 3, 2019, and July 8, 2019.

Although the OAL received email communications from the petitioner on June 28, 2019, regarding her failure to appear on the scheduled conference call on June 26, 2019, the OAL did not receive "an explanation for the nonappearance within one day" of

the petitioner's non-appearance within the meaning of N.J.A.C. 1:1-14.4(a). Having not received a explanation from the petitioner to explain her non-appearance on the June 26, 2019, conference call within a day of her non-appearance on the scheduled call, N.J.A.C. 1:1-14.4 directs that this tribunal "shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c)." As the respondent has not requested a decision on the merits of the matter be issued ex parte, no further proceedings pursuant to N.J.A.C. 1:1-14.4(d) are necessary. This tribunal, therefore, is left only with the mandate that the matter "shall" be returned to the transmitting agency for appropriate disposition. N.J.A.C. 1:1-14.4(a).

The use of the term "shall" in N.J.A.C. 1:1-14.4(a) is generally construed as mandatory as opposed to the statutory use of the term "may" which is permissive or directory. Franklin Estates, Inc. v. Edison, 142 N.J.Super. 179, 184 (App.Div. 1976). I **CONCLUDE** that the petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition, has been unresponsive to communications from the OAL regarding her pending matter, and failed to present good cause in a timely manner as to why her failure to appear for a scheduled conference should be excused pursuant to the provisions of N.J.A.C. 1:1-14.4(c). A plain reading of N.J.A.C. 1:1-14.4(a), therefore, requires that the matter now be returned to the transmitting agency for appropriate disposition. See also N.J.A.C. 1:1-3.3(b).

ORDER

Based on the foregoing, the respondent's motion to dismiss the petition is **GRANTED** and I **ORDER** that the clerk return the case to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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

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

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

July 30, 2019
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 7.30.19

Date Mailed to Parties: 7.30.19

/dw

228-19SEC

Agency Dkt. No. 178-7/19
SEC Dkt. No. C01-18

New Jersey Commissioner of Education

Final Decision

D. Lynn Schwartz,

Complainant,

v.

James Gallagher, Avalon-Stone Harbor Board of Education,

Respondent.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i) when he approached the Chief School Administrator's subordinate employee to inquire whether she would be interested in assuming the position of Chief School Administrator, even though that position was not vacant. The SEC recommended a penalty of reprimand. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29(c) for the Commissioner's final determination on the recommended penalty. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the SEC. Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/05/19
Date of Mailing: 9/09/19

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

Before the School Ethics Commission
OAL Docket No.: EEC-08196-18
SEC Docket No.: C01-18
Final Decision

D. Lynn Schwartz,
Complainant

v.

James Gallagher,
Avalon-Stone Harbor Board of Education, Cape May County,
Respondent

I. Procedural History

This matter arises from a Complaint filed on January 2, 2018, by D. Lynn Schwartz (Complainant), alleging that James Gallagher (Respondent), a member of the Stone Harbor Board of Education (SHBOE) and the SHBOE representative on the Avalon Board of Education (ABOE), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 et seq. By correspondence dated January 10, 2018, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept her filing. On January 24, 2018, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:38-6.7. The Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members (Code).

On January 29, 2018, the Complaint was sent to Respondent, via regular and certified mail, notifying him that charges were filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading. On February 9, 2018, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss). On February 27, 2018, Complainant filed a response to the Motion to Dismiss.

After review, and at its meeting on April 24, 2018, the Commission voted to grant the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(j), but to deny the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i). The Commission also directed Respondent to file an Answer to Complaint as to the remaining allegations, which he did on May 2, 2018.

The parties were notified by correspondence dated May 14, 2018, that this matter would be placed on the Commission's agenda for its meeting on May 22, 2018. At its meeting on May 22, 2018, and after considering the parties' filings, the Commission voted to transmit the matter to the Office of Administrative Law (OAL) for a plenary hearing on the remaining allegations in

the Complaint, namely the alleged violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i). By correspondence dated May 30, 2018, the above-captioned matter was transmitted to the OAL.

At the OAL, an initial telephone conference was conducted on August 2, 2018, during which discovery issues were discussed. *Initial Decision* at 2. On August 31, 2018, Respondent faxed a letter to Administrative Law Judge Catherine A. Tuohy (ALJ Tuohy), and advised that "he was withdrawing from the proceeding based on the advice of his physician." *Id.* By correspondence dated September 11, 2018, Respondent was advised that because he is the Respondent, and not the Complainant, he is not permitted to "withdraw" from the matter. *Id.* Respondent was further advised that, because he was unable to withdraw, it was expected that he would participate in the next telephone conference, which was scheduled for October 3, 2018. *Id.* Despite this advisement, Respondent failed to participate in the telephone conference on October 3, 2018. *Id.* The matter was ultimately scheduled for a hearing on May 2, 2019, but, once again, Respondent failed to appear. *Id.* Nonetheless, ALJ Tuohy conducted a hearing on May 2, 2019, and the record closed. *Id.*

On May 9, 2019, ALJ Tuohy issued an Initial Decision detailing her findings of fact and legal analysis. Based on her findings of facts and legal analysis, ALJ Tuohy concluded that Complainant had proven, by a preponderance of the competent and credible evidence, that Respondent's actions violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i). Based on her legal conclusions, ALJ Tuohy recommended a penalty of reprimand. *Initial Decision* at 5-7.

The Commission acknowledged receipt of ALJ Tuohy's Initial Decision on May 9, 2019; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was June 24, 2019. Prior to June 24, 2019, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until August 8, 2019. Respondent filed Exceptions to the Initial Decision on or about May 23, 2019. Complainant did not file her own Exceptions, and did not file a reply to Respondent's Exceptions.

The Commission considered the full record in this matter, including ALJ Tuohy's Initial Decision and Respondent's Exceptions, at a special meeting on June 19, 2019. At its regular meeting on July 23, 2019, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Tuohy's findings of fact; to adopt the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e); to adopt the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(i); and to accept the recommended penalty of a reprimand.

II. Initial Decision

As set forth in the Initial Decision, ALJ Tuohy issued the following findings of facts:

1. Complainant has been a member of the ABOE for twenty (20) years, the last eight (8) of which she has served as Board President. *Initial Decision* at 2.

2. The ABOE and SHBOE, although separate boards of education, share the services of the Chief School Administrator (CSA) (Ms. Stacey Tracey) and the Supervisor of Curriculum (Dr. Renee Murtaugh). *Id.*

3. Respondent was a member of the SHBOE for approximately one year, and was the Stone Harbor representative on the ABOE. *Id.*

4. Prior to the start of the December 20, 2017, ABOE meeting, Respondent waived Dr. Murtaugh into the hallway and asked her if she would be interested in becoming the CSA of the SHBOE. *Id.*

5. Dr. Murtaugh said no, and Respondent said he was glad he asked. The two then returned to the ABOE's meeting room. *Id.*

6. Dr. Murtaugh subsequently advised Ms. Tracey (the CSA) what Respondent had asked. *Id.*

7. After Dr. Murtaugh disclosed her conversation with Respondent to Ms. Tracey, Ms. Tracey then reported it to Complainant. *Id.*

8. After conferring with counsel, Complainant filed an ethics complaint against Respondent. *Id.*

9. On February 2, 2018, Respondent sent an email to Complainant admitting that his actions on December 20, 2017, were completely outside of the scope of his authority as a board member, and decided that he would not challenge the ethics complaint. *Id.* at 3.

10. Respondent also apologized and indicated that, as a former school district administrator for over thirty (30) years, he should have been aware his actions were not within his authority. *Id.*

11. Respondent requested a second chance to serve the students of ABOE and SHBOE, but if that request was not possible, he would submit a letter of resignation. *Id.*

12. Complainant replied to Respondent's email by thanking him for his apology, and indicating that any decision about resignation from the Board was completely his own. *Id.*

13. During her testimony as a witness for Complainant, Dr. Murtaugh confirmed that, at the ABOE meeting on December 20, 2017, she was waived out of the meeting room by Respondent. *Id.*

14. Dr. Murtaugh's testimony further confirmed that while speaking with Respondent in the hallway, he asked her if a position of CSA was created for the SHBOE, would she be interested in the position. *Id.*

15. Dr. Murtaugh also testified that she replied no to Respondent's inquiry, and Respondent replied that he was glad he asked. *Id.*

16. Dr. Murtaugh acknowledged that, upon returning to the meeting room, she told Ms. Tracey about the conversation with Respondent. *Id.*

17. During her testimony as a witness for Complainant, Ms. Tracey stated that she watched Respondent waive Dr. Murtaugh into the hallway, and confirmed that Dr. Murtaugh advised her (Ms. Tracey) about her (Dr. Murtaugh's) conversation with Respondent when she returned to the meeting. *Id.* at 4

18. Ms. Tracey acknowledged that she subsequently advised Complainant about the conversation that took place between Dr. Murtaugh and Respondent. *Id.* at 4.

19. Respondent submitted his letter of resignation (as a Board member) to the Board on or about November 14, 2018. *Id.*

20. Respondent did not appear at the hearing on May 2, 2019, and did not otherwise offer any testimony or witnesses in support of his defense. *Id.*

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and after having had the opportunity to observe the demeanor of the witnesses and assess their credibility, ALJ Tuohy found the testimony of Complainant and her witnesses, namely Dr. Murtaugh and Ms. Tracey, to be fact. *Initial Decision* at 4.

In light of the facts offered by Complainant, Dr. Murtaugh, and Ms. Tracey, ALJ Tuohy found that Respondent's actions at the ABOE meeting, specifically, initiating a conversation with Dr. Murtaugh about her interest in serving as the CSA of the SHBOE, was beyond the scope of his duties as a Board member and had the potential to compromise the Board. *Initial Decision* at 5. As a Board member, ALJ Tuohy noted that Respondent could only act with the remainder of the Board and vote on matters properly presented to the Board as a whole. *Id.* Importantly, none of these issues discussed with Dr. Murtaugh at the ABOE meeting were before the Board. *Id.* Not only was there no position to fill, as Ms. Stacey Tracey was the current CSA of both the ABOE and SHBOE, but Dr. Murtaugh was Ms. Stacey's subordinate. *Id.* By inquiring of Dr. Murtaugh whether she was interested in her boss's job, Respondent undermined the CSA, thwarted the chain of command, and compromised the CSA in the proper performance of her duties. *Id.* Respondent's actions also compromised Dr. Murtaugh in the proper performance of her duties as the Director of Curriculum, and as someone who reported to Ms. Tracey, the CSA. *Id.* Respondent owed both Dr. Murtaugh and Ms. Tracey his support in the proper performance of their respective duties, and his inquiry of Dr. Murtaugh undermined and harmed both of them in the performance of their duties. *Id.* As such, ALJ Tuohy **found** that Complainant had proven, by a preponderance of the competent and credible evidence, that Respondent's actions violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i). *Id.* at 5-6.

In light of her legal conclusions, and because Respondent – a former district administrator for more than thirty (30) years - "was aware" that his actions were not within his

authority, he issued an apology, and he resigned from the Board, ALJ Tuohy concluded that a penalty of reprimand was warranted. *Initial Decision* at 6.

III. Exceptions

Although Respondent failed to attend the hearing before ALJ Tuohy, Respondent filed Exceptions with the Commission on or about May 23, 2019. In his Exceptions, Respondent admitted that his actions were beyond the scope of his authority, and that he should have notified Ms. Schwartz, in advance, of the decision ("conceived" by him (Respondent) and others) to approach Dr. Murtaugh to see if she would be interested in serving as the CSA of the Stone Harbor School District (SHSD). As for why he approached Dr. Murtaugh, Respondent explained that after the solicitor explained that the SHSD could have its own CSA, and after discussing it with the other Board members, they decided that the administrative costs of having a CSA would be "an issue of concern." However, they discussed that Dr. Murtaugh is already receiving a salary from the SHSD, and she was currently doing a "fine job," so they thought that if she would be willing to be the CSA of the SHSD, it would help with the costs. If she declined, then it would not be feasible to appoint a CSA to the SHSD. As it turned out, Dr. Murtaugh declined and no further action was taken. Respondent understands the Commission must issue a decision and that his actions constitute a violation; however, he "implores the members of the...Commission to consider that [his] reputation, which was built over decades, could come to ruin due to poor judgment in an instance which [he] regret[s]."

Complainant did not file her own Exceptions, and did not file a reply to Respondent's Exceptions.

IV. Analysis and Decision

Upon careful and independent review of the full record, the Commission **adopts** ALJ Tuohy's findings of fact; **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e); and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(i). The Commission agrees that by inquiring about an employee's willingness to serve as the CSA at a time when the CSA position was not vacant, and when the inquiry was made of the CSA's subordinate, Respondent took action beyond the scope of his duties as a Board member in violation of *N.J.S.A.* 18A:12-24.1(e), and took action which compromised both Ms. Tracey and Dr. Murtaugh in the performance of their respective duties in violation of *N.J.S.A.* 18A:12-24.1(i).

V. Penalty

Based upon the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i), and in recognition of the fact that Respondent – a former district administrator for more than thirty (30) years - "was aware" that his actions were not within his authority, he issued an apology, and he resigned from the Board, ALJ Tuohy recommended a penalty of reprimand. After consideration, and for the reasons noted by ALJ Tuohy, the Commission **adopts** the recommended penalty of reprimand.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: July 24, 2019

Resolution Adopting Decision
In Connection With C01-18

Whereas, by correspondence dated May 30, 2018, the School Ethics Commission (Commission) transmitted the above-referenced matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, following a hearing on May 2, 2019, Catherine A. Tuohy, Administrative Law Judge (ALJ Tuohy) issued an Initial Decision dated May 9, 2019; and

Whereas, in her Initial Decision, ALJ Tuohy determined that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(i); and

Whereas, based on her legal conclusions, ALJ Tuohy determined that a penalty of reprimand was warranted; and

Whereas, Respondent, despite not appearing for the hearing, filed Exceptions with the Commission on or about May 23, 2019; and

Whereas, at a special meeting on June 19, 2019, the Commission reviewed and discussed the record, including ALJ Tuohy's Initial Decision and Respondent's Exceptions, and

Whereas, at a special meeting on June 19, 2019, the Commission discussed adopting the findings of fact from the Initial Decision; adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e); adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(i); and adopting ALJ Tuohy's recommended penalty of a reprimand; and

Whereas, at its regularly scheduled meeting on July 23, 2019, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on June 19, 2019; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision as a Final Decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting on July 23, 2019.

Kathryn A. Whalen, Director
School Ethics Commission

Agency Dkt. No. 108-5/19

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Ranjan Chattopadhyay, School District of the
Township of North Brunswick,
Middlesex County.

For the Petitioner, Ari D. Schneider, Esq.

No appearance by or on behalf of Respondent, Ranjan Chattopadhyay

This matter was opened before the Commissioner of Education on May 16, 2019, by way of an Order to Show Cause served by petitioner, the North Brunswick Township Board of Education (Board), upon the respondent, Ranjan Chattopadhyay, requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with petitioner. By notice dated June 12, 2019, the Office of Controversies and Disputes (Office) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on July 3, 2019, the Office sent respondent a second notice, via regular and certified mail, directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted and might result in summary decision by the Commissioner. The copy of the notice that was sent via certified mail was returned as unclaimed. The copy of the notice sent via regular mail was not returned. No answer to the Order to Show Cause has been filed as of this date.

The affidavit submitted by the petitioner in this matter states that the respondent entered into a contract with the petitioner for employment from October 21, 2018 through June 30, 2019. On March 20, 2019 the respondent informed the district that he would not be fulfilling the term of his employment. Despite a warning that the failure to give 60 days notice prior to his resignation could jeopardize his certificate, the respondent resigned effective March 28, 2019. The respondent has not denied the allegations therein; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/05/19
Date of Mailing: 9/09/19

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division

230-19

Agency Dkt. No. 67-4/19

New Jersey Commissioner of Education

Decision

In the Matter of the Tenure Hearing of
Anthony Fiorentino, Rockaway Township
School District, Morris County.

The record of this matter and the proposed Employment Separation Agreement and Release (Agreement) have been reviewed. Upon such review, the Commissioner finds that the proposed Agreement is consistent with established standards governing the 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 Agreement is hereby approved, and the tenure charges are dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/05/19
Date of Mailing: 9/09/19

231-19A

Agency Dkt. No. 2-5/18A
SEC Dkt. No. D07-17

New Jersey Commissioner of Education
Final Decision

In the Matter of Kenyatta Stewart,
College Achieve Paterson Charter School,
Passaic County.

This matter involves an appeal of the School Ethics Commission's (SEC) March 28, 2018 determination that respondent Kenyatta Stewart – a newly appointed charter school trustee for the College Achieve Paterson Charter School – violated the School Ethics Act (Act) for failure to timely file his Personal/Relative and Financial Disclosure Statements (disclosure statements) in accordance with *N.J.S.A.* 18A:12-25 and 26. Respondent ultimately filed his disclosure statements after the issuance of the SEC's February 27, 2018 Order to Show Cause (OTSC), but prior to its March 27, 2018 meeting. The SEC recommended a penalty of reprimand for the violation. Having carefully reviewed the SEC's decision and the record in its entirety, the Commissioner finds that the SEC's decision is supported by sufficient, credible evidence, and that respondent failed to establish that the decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a). Additionally, the Commissioner finds that a penalty of reprimand is appropriate.

By way of background, the Commissioner notes that pursuant to *N.J.A.C.* 6A:28-3.1, school officials must file disclosure statements with their local board secretaries annually, on or before April 30th. Additionally, after April 30th, newly elected or newly appointed board members or administrators must file their disclosure statements within thirty days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), (d), (e), and (f). In this matter,

respondent was appointed to the board of trustees in May 2017. He failed to file his disclosure statements within thirty days. Therefore, on February 5, 2018, the Passaic County Office of Education sent a reminder to respondent by regular mail and e-mail – with a copy to the charter school designee – that his disclosure statements had not yet been filed. Respondent points out that the address used on this correspondence was unfortunately not his home address, nor was it the charter school's address. Respondent also alleges that the reminder was sent to an old e-mail address, even though he had updated the charter school with his new e-mail address in September 2017. The SEC sent a letter on February 14, 2018 to the same incorrect address, with an e-mailed copy to the Business Administrator, informing respondent that failure to file his disclosure statements by February 21, 2018 would result in the SEC voting to issue an Order to Show Cause (OTSC). Accordingly, the SEC issued an OTSC at its meeting on February 27, 2018, sent again to the incorrect address with a copy to the Business Administrator. Thereafter, on March 5, 2018, respondent filed his disclosure statements. Respondent maintains that he never received any of the notifications or the OTSC, and that he only became aware of the OTSC when he was notified by the Business Administrator. In its decision dated March 28, 2018, the SEC found that respondent violated the Act for failure to timely file disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26, and recommended a penalty of reprimand for the violation.

In his appeal to the Commissioner, respondent argues that the SEC was out of time in filing its OTSC as it was more than 250 days after the disclosure statements were due, and *N.J.A.C.* 6A:28-6.5(a) places a 180-day filing deadline on complaints before the SEC. Additionally, respondent contends that language in the rule proposal and in response to a comment in the rule adoption for *N.J.A.C.* 6A:28-3.3 demonstrates that the SEC intends to send a warning notice letter prior to issuance of an OTSC for failure to file disclosure statements. 41 *N.J.R.* 26(a);

41 *N.J.R.* 2095(a). As such, respondent argues that he was deprived of due process because he was not provided with notice and an opportunity to correct any deficiencies before the issuance of the OTSC. He also maintains that he did not willfully violate the Act. Respondent further argues that the 30-day period provided for newly elected or newly appointed board members to submit disclosure statements in *N.J.A.C.* 6A:28-3.1 is only set forth in regulation, not statute, whereas *N.J.S.A.* 18A:12-33 allows one year for new board members to complete the training program. Finally, respondent argues that even if respondent is found to have violated the Act, no penalty should be issued because his actions were *de minimis*.

In opposition, the SEC argues that its decision that respondent violated the Act was not arbitrary, capricious, or unreasonable, as respondent admitted he failed to file his disclosure statements within the required timeframe. The SEC contends that the Commissioner should reject respondent's argument that this matter is out of time because *N.J.A.C.* 6A:28-6.5(a) places a 180-day filing deadline on complaints alleging violations of the Act. The SEC explains that this matter was not initiated by a complaint, but rather by issuance of an OTSC pursuant to *N.J.A.C.* 6A:28-1.6, which does not have a filing timeframe. Additionally, the SEC argues that respondent was provided with due process as he was given notice and an opportunity to respond to the OTSC – which he in fact utilized, as he did respond to the OTSC. The SEC contends that there is no requirement that it issue "warning letters" before the issuance of an OTSC. Nevertheless, the SEC maintains that it did issue two warning notices to respondent, and that his argument that he did not receive them is "undermined by the fact that Respondent did receive and respond to the OTSC, which was sent to him and copied to the charter school's designee in exactly the same manner as to the two prior correspondence(s)." (SEC opposition brief at 8). Finally, the

SEC notes that its recommended penalty of a reprimand – the lowest level of penalty – is justified, as respondent failed to timely file his disclosure statements.

In reply, respondent argues that it is undisputed that he never received the notices sent by the SEC, as they were sent to the wrong street address and email address. Although the SEC claims they sent multiple notices, respondent contends that the argument is irrelevant because they sent them all to the same incorrect addresses. Additionally, respondent reiterates his argument about failing to meet the 180-day filing deadline. Finally, respondent argues that any violation of the Act should not warrant a penalty because he filed his disclosure statements three business days after the issuance of OTSC.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the SEC as to a determination of a violation of the Act is supported by sufficient credible evidence, and the respondent has not established that the SEC's decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). Pursuant to *N.J.A.C.* 6A:28-3.1, respondent – as a newly appointed charter school trustee in May 2017 – was required to file his disclosure statements within thirty days. It is undisputed that respondent did not file his disclosure statements until March 5, 2018, well beyond thirty days from May 2017. As such, respondent failed to timely file his disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26.

The Commissioner does not find respondent's arguments as to whether a violation occurred to be persuasive. With respect to his timing argument, the Commissioner notes that this matter was initiated by way of an OTSC, not a complaint, and therefore the 180-day deadline for the filing of complaints does not apply in this case. *N.J.A.C.* 6A:28-1.6. Additionally, respondent had been in continual violation of *N.J.S.A.* 18A:12-25 and 26 at the time the SEC issued the OTSC, as he had not yet filed his overdue disclosure statements; therefore, a statute of limitations would

not apply in this circumstance, even if one existed. Furthermore, respondent's argument that the SEC waited more than 250 days after the disclosure statements were due to file its OTSC undermines his own argument that he did not violate the Act, because it clearly demonstrates how late respondent was in filing his disclosure statements. Regarding his argument that he did not receive any warning letters, such argument does not affect whether a violation occurred. It is undisputed that the disclosure statements were due many months before respondent ultimately submitted them. Finally, the Commissioner notes that this is not the proper forum for a challenge to the regulatory requirement that newly elected or appointed school officials have 30 days to file disclosure statements, set forth in *N.J.A.C.* 6A:28-3.1.

With respect to the appropriate penalty, while the Commissioner is sympathetic to respondent's argument that he did not receive the notices or the OTSC from the SEC, the Commissioner finds that a reprimand – the lowest penalty – is the appropriate penalty in this matter. The Commissioner notes that there is no requirement that the SEC issue warning notices prior to issuance of an OTSC; the SEC does so as a courtesy. With respect to service of the OTSC, it must be noted that the order was mailed to an address in Tinton Falls, Monmouth County, when the College Achieve Paterson Charter School is located in Paterson, Passaic County; yet the SEC failed to address this fact and instead argues that respondent must have received it because he did respond to the OTSC. However, respondent's argument that the Business Administrator alerted him to the OTSC is consistent with the fact that the Business Administrator was copied electronically. Nevertheless, as respondent received the OTSC – albeit not from the SEC – he had the opportunity to respond to it, which he did. The Commissioner must note that respondent was still months late in filing his disclosure statements. Given the lengthy time that respondent remained out of compliance with *N.J.S.A.* 18A:12-25 and 26, the Commissioner finds that a

penalty of reprimand is warranted in this matter. Furthermore, the Commissioner finds that issuance of a reprimand here is consistent with penalties in prior cases where a school official filed disclosure statements after the issuance of an OTSC. *See, e.g., In the Matter of Johanna Lopez, East Newark Board of Education,* Commissioner Decision No. 361-17SEC (December 18, 2017); *In the Matter of David Eichenholtz, East Newark Board of Education, Hudson County,* Commissioner Decision No. 359-17SEC (December 18, 2017). Therefore, the SEC's recommended penalty will not be disturbed.

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

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/05/19

Date of Mailing: 9/09/19

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

IN THE MATTER OF KENYATTA STEWART	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
COLLEGE ACHIEVE PATERSON CHARTER SCHOOL, **PASSAIC COUNTY**	:	
	:	
	:	**DOCKET NO.: D07-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 27, 2018, and mailed on February 28, 2018, through regular and electronic mail (e-mail), directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a school official who was elected or appointed after April 30, 2017 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated February 5, 2018, from the Passaic County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her Disclosure Statements within the next week, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Passaic County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated February 14, 2018, and informed Respondent that failure to file her Disclosure Statements by February 21, 2018, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by February 21, 2018, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on February 27, 2018. After having been served with the OTSC, Respondent filed her completed Disclosure Statements on March 5, 2018. Respondent also filed a response to the OTSC, but did not dispute that her Disclosure Statements were not timely filed.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on March 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: March 28, 2018

	:	**BEFORE THE SCHOOL**
IN THE MATTER OF	:	**ETHICS COMMISSION**
KENYATTA STEWART	:	
	:	**RESOLUTION ADOPTING**
	:	**DECISION FOR FAILURE TO**
COLLEGE ACHIEVE PATERSON	:	**FILE PERSONAL/RELATIVE**
CHARTER SCHOOL,	:	**AND FINANCIAL DISCLOSURE**
PASSAIC COUNTY	:	**STATEMENTS**
	:	
	:	**DOCKET NO.: D07-17**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at the College Achieve Paterson Charter School; and

WHEREAS, as a school official who was elected or appointed after April 30, 2017, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days thereof; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on February 27, 2018, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent filed her Disclosure Statements on March 5, 2018, although they were required to be filed no later than thirty (30) days of election or appointment; and

WHEREAS, Respondent filed a response to the OTSC, but did not dispute that her Disclosure Statements were not timely filed; and

WHEREAS, at its meeting on March 27, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to timely file her Disclosure Statements; and

WHEREAS, at its meeting on March 27, 2018, the Commission recommended that the Commissioner of Education impose a penalty of **reprimand** on Respondent; and

WHEREAS, at its meeting on March 27, 2018, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on March 27, 2018.

Kathryn A. Whalen, Director

232-19

New Jersey Commissioner of Education

Final Decision

K.P., on behalf of minor child, I.M.,

Petitioner,

v.

Board of Education of the Township of Saddle River, Bergen County, and Danielle Shanley, Superintendent,

Respondent.

Synopsis

Petitioner submitted a harassment, intimidation and bullying (HIB) complaint to the respondent Board pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, in which she alleged that a student told her daughter that she was "ugly and [a] bad dancer." When the Board failed to carry out an investigation into the matter, petitioner filed the within appeal, asserting that her daughter had been the victim of HIB and alleging that the Board failed to conduct the investigation required under the Act. The Board contended that no investigation was conducted because the allegations, even if true, did not constitute a violation of the Act. The Board filed a motion for summary judgement.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact here, and the Board is entitled to prevail as a matter of law because petitioner failed to allege a violation of the Act that would require an investigation; under the Act, "harassment, intimidation, or bullying" means any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, petitioner has not asserted, let alone offered any proof, that the statement allegedly made to her daughter by a fellow student – i.e., that I.M. is "ugly and [a] bad dancer" – was motivated by any distinguishing characteristic, or that the alleged statement substantially disrupted or interfered with the orderly operation of the school. The ALJ concluded that the respondent Board did not fail to investigate this allegation of HIB in violation of the Act. Accordingly, the ALJ granted summary decision to the Board as a matter of law and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the Board was not arbitrary, capricious or unreasonable in making a preliminary determination that the alleged conduct did not meet the statutory definition of HIB, as – pursuant to *N.J.A.C.* 6A:16-7.7(a)(2)(ix)(1) – its HIB policy set forth a process by which to make such a determination prior to launching a full HIB investigation, which process was followed in this case. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

September 5, 2019

233-19
OAL Dkt. No. EDU 04624-19
Agency Dkt. No. 17-1/19

New Jersey Commissioner of Education

Final Decision

K.P., on behalf of minor child, I.M.,

Petitioner,

v.

Board of Education of the Township of Saddle Brook, Bergen County, and Danielle Shanley, Superintendent,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioner submitted a harassment, intimidation and bullying (HIB) complaint to the Board pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, in which she alleged that a student told her daughter that she was "ugly and [a] bad dancer." The Board did not conduct a HIB investigation, and instead determined that the allegation, if true, did not constitute HIB. Petitioner challenged that determination and the Administrative Law Judge (ALJ) found the alleged conduct did not meet the statutory definition of HIB because petitioner did not allege that the comment about her daughter's dancing was motivated by an actual or perceived distinguishing characteristic, in accordance with *N.J.S.A.* 18A: 37-14.

Upon review, the Commissioner agrees with the ALJ that the Board was not arbitrary, capricious, or unreasonable in making a preliminary determination that the alleged

conduct did not meet the definition of HIB. Pursuant to *N.J.A.C.* 6A:16-7.7(a)(2)(ix)(1), a Board's HIB policy may include a "process prior to initiating an investigation by which the principal, or his or her designee, in consultation with the anti-bullying specialist, makes a preliminary determination as to whether the reported incident or complaint, assuming all facts presented are true, is a report within the scope of *N.J.S.A.* 18A:37-14." In this matter, the Board utilized this procedure and determined that, if true, the alleged conduct did not constitute HIB. The Commissioner agrees with the ALJ that petitioner did not allege that I.M. had a distinguishing characteristic, or that the comments regarding her dancing were in any way motivated by a distinguishing characteristic. As such, petitioner has failed to demonstrate that the alleged conduct meets the definition of HIB. *N.J.S.A.* 18A: 37-14.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/05/19
Date of Mailing: 9/09/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04624-19
AGENCY DKT. NO. 17-01/19

K.P. ON BEHALF OF I.M.,

Petitioner,

v.

SADDLE BROOK BOARD OF EDUCATION, BERGEN COUNTY, AND DANIELLE SHANLEY, SUPERINTENDENT,

Respondents.

K.P., petitioner, pro se

Jessika Kleen, Esq., for respondents (Machado Law Group, attorneys)

Record Closed: July 19, 2019 Decided: July 24, 2019

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Petitioner alleges that a student told her daughter that her daughter is an "ugly and bad dancer" in violation of the Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13 et seq. Respondents, however, conducted no investigation. Did respondents violate the ABRA? No. To violate the ABRA, the statement must be motivated by any actual or

perceived distinguishing characteristic—such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability. See N.J.S.A. 18A:37-14.

PROCEDURAL HISTORY

On November 15, 2018, petitioner notified respondents that a student had allegedly told her daughter that her daughter is an "ugly and bad dancer" in violation of the ABRA. Respondents, however, conducted no investigation. As a result, petitioner filed an appeal with the Department of Education.

On January 23, 2019, petitioner filed her appeal with the Department of Education, Bureau of Controversies and Disputes, alleging that respondents had failed to conduct an investigation in violation of the ABRA. On March 12, 2019, respondents filed their answer. Ostensibly, respondents assert that they conducted no investigation because the allegations, even if true, do not constitute a violation of the ABRA.

On April 3, 2019, the Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On June 27, 2019, respondents filed a motion a motion for summary decision. Under N.J.A.C. 1:1-12.5(b), petitioner had until July 17, 2019, to file her response. On July 18, 2019, petitioner emailed this tribunal claiming that she had never received service of the motion. This claim, however, is rejected. On June 27, 2019, respondent served petitioner by certified mail, return receipt requested, and by ordinary mail. Then, on July 8, 2019, respondent served petitioner in person, placing the motion in her mailbox. Since the ordinary mail was never returned, and the motion was later placed in her mailbox, the service is deemed to be good service under N.J.A.C. 1:1-7.1. In other words, these methods provided actual notice to petitioner. As a result, the date by which petitioner had to submit her response will be enforced, not relaxed, and this motion will remain

unopposed, so as to achieve just results for all parties, which includes respondents, given the merits of the motion, and to eliminate unjustifiable delay under N.J.A.C. 1:1-1.3(a).

FINDINGS OF FACT

Based upon the documents submitted in support of and in opposition to the motion for summary decision, I **FIND** the following as **FACT**:

On November 15, 2018, petitioner, K.P., sent an email to respondents stating, among other things, that a student told her daughter, I.M., that her daughter is an "ugly and bad dancer":

> Today an ignorant student J. (black kid) or whatever his name is if I don't spell it correctly had told my [I.] how ugly, and bad dancer she is and all school feels the same. I don't know if this kid has a life or knows anything about dance. Instead he will shut up his dirty mouth and will be charge with HIB. He is lucky that my daughter didn't say anything to him but I will make sure he gets charge with HIB and shut up his dirty mouth forever.
>
> NOT APOLOGY IS ACCEPTABLE. ONLY HIB. This is the only way and example for any ignorant and ugly like him and many to STOP at least torch my baby girl.
>
> [Ex. A to the Certification of Danielle Shanley, Superintendent, dated July 2, 2019.]

Respondents conducted no investigation because they determined that the allegation, even if true, did not constitute HIB.

Meanwhile, respondents were more concerned about K.P. because of the demands she placed on staff through her daily emails, oftentimes more than several emails a day, and the threats she made against staff in those emails. In particular, respondents were concerned about K.P.'s description of the student whom she alleged had told her daughter that she is a bad dancer, and K.P.'s threat that she would make sure that student got "charge[d]" with HIB to "shut up his dirty mouth forever." In fact,

respondents, to underscore the seriousness with which they take these threats, filed a criminal complaint against K.P. for having made terroristic threats against staff.

The criminal complaint is pending.

CONCLUSIONS OF LAW

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. Ibid. "The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

In this case, no genuine issue of any material fact exists and respondents are entitled to prevail as a matter of law because petitioner has not alleged a violation of the ABRA for respondents to investigate.

Under the ABRA, "harassment, intimidation, or bullying" means any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as being motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property. See N.J.S.A. 18A:37-14. It must also substantially disrupt or interfere with, among other things, with the orderly operation of the school. Ibid. Although the ABRA does not limit "distinguishing characteristic" to those specified in the statute, it has consistently required such a perceived motivation. See K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). "Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying." Ibid.

The definition of "harassment, intimidation, or bullying" is reproduced below in full:

§ 18A:37-14. Definitions relative to adoption of harassment and bullying prevention policies

As used in this act:

"Electronic communication" means a communication transmitted by means of an electronic device, including, but not limited to, a telephone, cellular phone, computer, or pager;

"Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In this case, petitioner has not even alleged, let alone offered any proof, that the statement the student allegedly made to her daughter, that I.M. is an "ugly and bad dancer," was motivated by an actual or perceived distinguishing characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability. In addition, one cannot

reasonably argue that being an "ugly and bad dancer," or expressing oneself as an "ugly and bad dancer," even if understood, and even if understood as true, constitutes such a distinguishing characteristic. Likewise, petitioner has not even alleged, let alone offered any proof, that the statement the student made to her daughter substantially disrupted or interfered with the orderly operation of the school. Therefore, I **CONCLUDE** that respondents did not fail to investigate this allegation of harassment, intimidation, or bullying in violation of the ABRA, and that respondents are entitled to summary decision as a matter of law.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case 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 case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

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.

7/24/19

DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 7/24/19

Date Mailed to Parties:

dr

241-19LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

September 19, 2019

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Re: *Board of Education of the Cumberland County Technical Education Center, Cumberland County v. Board of Education of the Cumberland Regional High School District, Cumberland County, et al., Agency Dkt. No. 189-8/18, OAL Dkt. No. 11467-18.*

Dear Counsel:

I have reviewed the materials filed in connection with the New Jersey Council of Vocational-Technical Schools' (Council) motion for leave to appear in this case as amicus curiae pursuant to *N.J.A.C.* 6A:4-3.2. The Council filed the motion to appear in this matter after the Initial Decision was issued by the Administrative Law Judge on August 6, 2019.

Upon review and consideration of the parties' submissions, I find that there is no provision that permits the filing of a motion to participate as an amicus curiae when a case is filed under *N.J.A.C.* 6A:3. The regulatory provision that permits the filing of a motion to participate as an amicus curiae, *N.J.A.C.* 6A:4-3.2, is limited to appeals filed under *N.J.A.C.* 6A:4, i.e. appeals of decisions of the State Board of Examiners suspending or revoking certificates pursuant to *N.J.A.C.* 6A:9B-4 and appeals of the School Ethics Commission finding a school official has violated the School Ethics Act. The petition of appeal in this case was filed in accordance with *N.J.A.C.* 6A:3 and the matter has already been adjudicated at the Office of Administrative Law (OAL) and returned to the Commissioner for a final decision.[1]

[1] Under *N.J.A.C.* 6A:3-1.8, requests for intervention or participation in a contested case may be filed with the Commissioner prior to any transmittal to the OAL, or directly to the OAL after transmittal of the matter.

Accordingly, the motion for leave to appear in this case as *amicus curiae* is hereby DENIED.[2]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

LOR/JKH

Via Regular Mail

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

242-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Cumberland County Technical Education Center, Cumberland County,

Petitioner,

v.

Board of Education of the Cumberland Regional High School District, Cumberland County and Board of Education of the City of Millville, Cumberland County,

Respondents.

Synopsis

Petitioner, the Board of Education of the Cumberland County Technical Education Center (CCTech) filed an appeal in 2018 seeking to compel the respondent Boards to permit full-time students of CCTech who reside within either the Cumberland Regional High School District (Cumberland) or the Millville School District (Millville) to participate in their home district's athletic programs. The respondent Boards had denied CCTech's request, citing financial and other concerns, and contending that they were not required to permit CCTech students to join their athletic programs. CCTech asserted that the respondent Boards' denials were arbitrary, capricious and unreasonable. In a June 2018 decision, the Commissioner directed Cumberland and Millville to meet with CCTech to address logistical concerns and to develop an agreement that would enable CCTech students from Cumberland and Millville to participate in sports programs in their home districts; subsequently, the Commissioner proposed mediation as a means for the three schools to reach an agreement. Prior to the July 2019 hearing in this matter, Cumberland advised that it had reached an agreement with CCTech, and the petition as it pertained to Cumberland was withdrawn.

The ALJ found, *inter alia,* that: the issue here is whether Millville acted in an arbitrary, capricious, and unreasonable manner when it was unable to reach an agreement with CCTech to permit Millville resident students to participate in the sports programs of their home district; the Commissioner clearly expected the parties to reach an agreement within a reasonable period of time after his June 2018 decision; the policies of the New Jersey State Interscholastic Athletic Association (*NJSIAA*) govern this matter as Millville is an *NJSIAA* member; the applicable *NJSIAA* rule governing this issue clearly states that participation in interscholastic sports is subject to discretionary agreement between the principals of both the vocational school and the sending public high school; though discretionary, such determination must be reasonably based on legitimate considerations; CCTech has demonstrated by a preponderance of evidence that the reasons advanced by Millville for not coming to an agreement with CCTech are not legitimate, reasonable or practicable concerns; and there was no reason why CCTech students residing in Millville should be denied the opportunity to participate in Millville's athletic programs. Accordingly, the ALJ ordered Millville to admit CCTech students residing in Millville into the district's sports programs.

The Commissioner noted that, subsequent to the filing of the Initial Decision, Millville advised that the parties had reached a settlement. Accordingly, as an amicable resolution has been reached whereby Millville students attending CCTech are now able to participate in their home district sports programs, the Commissioner determined that the matter herein is now moot.

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

September 19, 2019

OAL Dkt. No. EDU 11467-18
Agency Dkt. No. 189-8/18

New Jersey Commissioner of Education

Final Decision

Board of Education of the Cumberland County Technical Education Center, Cumberland County,

Petitioner,

v.

Board of Education of the Cumberland Regional High School District, Cumberland County and Board of Education of the City of Millville, Cumberland County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Although the parties did not file exceptions to the Initial Decision, the Millville Board of Education (Millville) advised that the parties have reached a settlement and, accordingly, the matter should be deemed withdrawn.[1]

Upon a comprehensive review of the record, the Commissioner finds that because the parties reached an amicable resolution in this case, enabling students who attend CCTech to participate in the athletic programs offered in their home districts, the matter is now moot. Further, now that CCTech students are permitted to participate in athletic programs at Millville, it is not necessary to evaluate whether Millville's prior rationale for prohibiting CCTech students from

[1] The issues raised in the petition of appeal related to the Cumberland Regional Board of Education (Cumberland Regional) and the Cumberland County Technical Education Center (CCTech) were resolved prior to the ALJ's issuance of the Initial Decision, therefore, the ALJ deemed the matter withdrawn with respect to Cumberland Regional.

participating in its sports program was based on bona fide, legitimate considerations. Accordingly, the petition is hereby dismissed as moot.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/19/19

Date of Mailing: 9/20/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11467-18
AGENCY DKT. NO. 189-8/18

BOARD OF EDUCATION OF THE CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT, CUMBERLAND COUNTY,[1]

And

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,

Respondents.

Mitchell H. Kizner, Esq., appearing for petitioner Board of Education of the Cumberland County Technical Education Center (Flaster Greenberg, P.C., attorneys)

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[1] By letter dated July 29, 2019, the OAL was advised that the issues related to the Cumberland Regional Board of Education and CCTech had been resolved with a Memorandum of Agreement to be approved by their respective Boards of Education on July 25, 2019, that would permit Cumberland Regional student residents attending CCTech to participate in Cumberland Regional athletic activities. Accordingly, Cumberland Regional's involvement in this matter has been resolved and the petition, insofar as it relates to Cumberland Regional, is withdrawn.

John G. Geppert, Jr., Esq., appearing for respondent Board of Education of the Cumberland Regional High School District, Cumberland County (Scarini Hollenbeck, attorneys)

Arnold Robinson, Esq., appearing for respondent Board of Education of the City of Millville, Cumberland County (Robinson and Robinson, attorneys)

Record Closed: July 25, 2019 Decided: August 6, 2019

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

The petitioner, the Board of Education of the Cumberland County Technical Education Center (CCTech), seeks to compel the respondents, the Board of Education of the Cumberland Regional High School District (CR) and the Board of Education of the City of Millville (Millville), to comply with the directive of the Commissioner of the Department of Education (Commissioner) and to resolve any outstanding issues in order to permit its full-time students who reside within those districts to participate in their athletic programs. CR has now resolved those issues with a Memorandum of Agreement (MOA); Millville has not, contending that it continues to have reasonable logistical and financial concerns.

PROCEDURAL HISTORY

In a previous related matter, EDU 12252-16, CCTech filed a Request for Emergent Relief to compel CR and Millville to permit its students to participate in sports in their home districts. On August 23, 2016, the request was denied, a decision adopted by the Commissioner on September 20, 2016.

On March 29, 2018, after three days of hearing, an Initial Decision was filed concluding that both CR and Millville had demonstrated by a preponderance of the credible evidence that they each had valid, legitimate, reasonable, or practical concerns for denying CCTech the ability to compel CR and Millville to admit its students into their respective athletic programs for school year 2016–2017.

On June 7, 2018, the Commissioner of Education issued an Order concurring with the ALJ that Cumberland and Millville's decisions barring CCTech's students from participating in their sports programs for the 2016–2017 school year were not arbitrary, capricious, or unreasonable. However, the Commissioner directed the principals of Cumberland and Millville to meet with the principal of CCTech within twenty days of his decision to address the logistical concerns and to develop an agreement that would enable the CCTech students to participate in sports programs in their home districts of CR and Millville.[2] He reminded the Districts that a blanket policy purporting to bar all of CCTech students from CR's and Millville's athletic programs was "absolutely impermissible." CCTech v. Cumberland Reg'l & Millville, EDU 12252-16, Comm'r (June 7, 2018), http://njlaw.rutgers.edu/collections/oal/.

Following this directive, CCTech met individually with CR (on June 26 and July 18, 24, 2018) and Millville (on July 3, 2018). The relative progress of those negotiations was disputed, and the parties were then unsuccessful in resolving the issues.

On August 6, 2018, CCTech filed a Petition for Emergent Relief with the Commissioner arguing that respondents were engaged in a pattern of delay in implementing the Commissioner's June 7, 2018, decision. The Commissioner transmitted the matter to the Office of Administrative Law (OAL), where it was filed on August 9, 2018, as OAL Dkt. No. EDU 11467-18. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

[2] The Commissioner also set some parameters for the negotiations. Concerns about student enrollment and State funding were not "bona fide legitimate reasons" for failing to accommodate these students. He also directed CCTech to give the districts "all of the information necessary to facilitate meaningful discussion." In the event an agreement could not be reached or if one of the parties failed to participate in the process, the Commissioner stated, CCTech "may file another petition of appeal." Bd. of Educ. of Cumberland Cty. Tech. Educ. Ctr. v. Bd. of Educ. of Cumberland Reg'l High Sch. Dist., Cumberland Cty., Bd. of Educ. of Millville, Cumberland Cty., EDU 12252-16, Comm'r (June 7, 2018), http://njlaw.rutgers.edu/collections/oal/.

On August 14, 2018, the application for emergent relief was denied by the Hon. Kathleen Calemmo, ALJ. On September 10, 2018, the Commissioner agreed that CCTech was not entitled to emergent relief, and directed that "this matter shall continue with proceedings at the OAL," and "[W]hile this matter is pending at the OAL, [he would] designate an individual to facilitate discussions between the parties to assist in reaching an agreement that will enable the students to participate in sports in their home districts." Up to that date, no agreement had been reached between the respective parties.[3]

On November 21, 2018, CR filed a motion for summary decision, which was joined by Millville on November 26, 2018, and assigned to me. On December 8, 2018, CCTech filed a response contending that the Commissioner had remanded the matter for further proceedings and that no reason had presented itself for the matter to be dismissed. On April 12, 2019, the motion was denied, and the matter continued.

Prior to the hearing, CR advised that CCTech and it had resolved their differences and that an MOA was pending their respective boards' approval. The hearing was held on July 25, 2019, and the record closed.

On July 29, 2019, CCTech advised that the MOA had been approved by their respective boards on July 25, 2019, which would permit CR student residents attending CCTech to participate in CR athletic activities. That matter has been resolved, and the petition insofar as it related to CR is withdrawn.

[3] The first mediation session scheduled for November 29, 2018, was postponed for a date unknown at Millville's request.

FACTUAL DISCUSSION

Background[4] (uncontested facts)

CCTech operates one of the five public high schools located in Cumberland County, New Jersey. From its inception in the 1970's until the school year ending June 30, 2016, CCTech operated as a part-time educational program whereby students would attend academic courses at the schools in their home districts (presumably where they resided) and would attend vocational courses at CCTech.

Commencing in September 2016, CCTech began operating a full-time program for ninth-graders, consisting of both vocational and academic courses, in new, larger facilities. Within four years, all students attending grades nine to twelve at CCTech will have been transitioned to full-time students. CCTech does not offer an athletic program for its students, although it has some athletic and sports facilities. The Bridgeton and Vineland public school districts have permitted their CCTech students to participate in their athletic programs. No formal protocol to handle disciplinary or other matters is in effect with those two districts and CCTech.

In April 2016, Millville advised its eighth-grade students and their parents that if they chose to attend CCTech, they would be unable to participate in sports at Millville.

Millville is a member of the New Jersey State Interscholastic Athletic Association (NJSIAA) and has adopted the bylaws, rules, and regulations of the NJSIAA that govern high-school sports and athletic activities. The applicable NJSIAA rule pertinent to the issues presented here is found in Article V, Section 4(G), CL3, of its bylaws, which provides:

> If a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her home school upon agreement of both

[4] This information was set forth in the Initial Decision of March 29, 2018 and is provided for an understanding of the present issue.

> Principals, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy.

TESTIMONY

For Petitioner CCTech

Gregory McGraw is the principal of CCTech and participated in the transition of CCTech from part-time to full-time. He is familiar with sports in the public-school setting, having previously served as a coach at CR for a number of years.

After the Commissioner's decision in June 2018, he tried to resolve the issues with CR and Millville. Those with CR were resolved with an MOA that was to be signed by the respective boards on July 25, 2019.

McGraw met with Millville on July 3, 2018, and presented a proposed agenda to resolve the issues. Millville responded to the agenda about a month or two later (P-1). Much of the proposal responses, including paragraphs 1, 2, 5, 8, 9, 10, and 12 were satisfactory to CCTech, but particular areas of disagreement remained in paragraphs 3, 4, 6, 7, and 11. McGraw reviewed each of the responses.

Paragraph 3 of the proposal response reads as follows:

> **3. Academic Clearance.**
>
> Millville agrees to the proposal outlined by Mr. McGraw whereby CCTEC students would adhere to Millville academic standards for sports eligibility. CCTEC will assign an employee to monitor CCTEC student academic performance and email weekly status reports to Millville coaches.

Millville indicated that the second sentence needed to be clarified. CCTech was willing to permit Millville athletic directors to access CCTech's Genesis system to check

on students' academic progress. CCTech was also willing to assign a counselor and to provide weekly reports to Millville to ensure academic eligibility.

McGraw noted that CCTech students played sports on Vineland and Bridgeton's teams, and that their athletic directors have access to CCTech's computer system and there have been no issues. McGraw agreed that Millville coaches needed to monitor their athletic activities in Millville to ensure eligibility.

Paragraph 4 of the proposal response reads as follows:

> **4. Transportation.**
>
> Millville agrees to the offer of CCTech providing transportation to CCTech students at its own expense.
>
> CCTech must transport its students and arrive on the same schedule as Millville students for practice and games so as not to create additional supervision burdens for Millville staff. CCTech must provide transportation at the end of each student's athletic activity back to CCTech for parental pickup so as not to create additional supervision burdens for Millville staff of CCTech students.
>
> CCTech must transport its students to and from all Millville athletic program activities so that CCTech students adhere to the same schedule as Millville students including college recruitment interviews.

McGraw testified that CCTech would transport its students to practices at the same times that practices commence. McGraw stated that it is unreasonable for CCTech to transport students from Millville back to CCTech after activities when they would be in Millville, where they presumably live. They could go home just like any other Millville athletes on the team. That was how it was working for Vineland, Bridgeton, and soon CR. CR was a bit different since its student athletes attending CCTech were from different areas, so CR had agreed to send an activity bus to CCTech to transport students.

As for the provision that "CCTech must transport its students to and from all Millville athletic program activities so that CCTech students adhere to the same schedule," McGraw had no problem with practices, but he wanted some flexibility, for example, if a student were taking a test. Practices and games start at different times, and CCTech would be willing to transport its students to the away games. Sometimes parents can transport the students, or the security team. In some cases, CCTech might be on the way to the game, so pickup could occur that way. They would try to match up transportation with the schedule.

CCTech was willing to make every effort to get students to college recruiting interviews, but wanted some flexibility in working it out. McGraw has been able to work out any issues with Vineland and Bridgeton when this came up, and has had no major problems with these towns when it came to the student athletes.

Paragraph 6 of the proposal response reads as follows:

> **6. Student Discipline.**
>
> Millville cannot agree to disparate disciplinary standards and systems for CCTech and Millville students participating in the sports program. Such disparities would result in unequal treatment of CCTech and Millville students which would be perceived as fundamentally unfair by both our students and our community.
>
> CCTech and its students would have to agree to be bound by Millville school and team disciplinary standards for their conduct while participating in the Millville sports program and further agree to submit themselves to the Millville disciplinary system including final review by the Millville Board of Education.

CCTech's position was that team discipline was Millville's and its coaches' decision and that CCTech would support that decision. But if those infractions rose to a team punishment, that should be a collaborative decision with CCTech and Millville. CCTech wants to hold its students accountable and will discipline them as much as possible as Millville does, but wants the opportunity to work it out with Millville. For example, if a student athlete were to cause a problem, but that student was in the

process of being evaluated for an IEP, that would be something that CCTech would want to decide.

McGraw agreed that all students should be held to the same standards and that there should be no disparate treatment. He thought potential disparities could be resolved with collaboration. It was unreasonable for CCTech to not have any say in discipline of a student attending its school.

McGraw did not see collaboration as a problem. He recalled an incident a year or two ago where a fistfight occurred between two girls. The principal of the school wanted a ten-day suspension for both. Although CCTech thought the punishment was excessive, the principal ultimately agreed to keep it the same for both students. In the MOA with CR, they agreed on team discipline, with the coach having that authority, but for infractions within school, CCTech needed input.

Paragraph 7 of the proposal response reads as follows:

> **7. Other Logistical Issues.**
>
> Participation in the sports program is a privilege that must be earned by Millville students by adherence to higher standards of conduct including fostering school spirit, serving as role models and school leaders and involvement in the community. It would not be fair to have Millville students earn the privilege of participation and not require the same of CCTech students. Millville must run one sports program with rules that apply equally to all participants. Therefore, CCTech students would have to meet the same standards by participating in the same activities on the same schedule as their teammates. For example, Leader's Club activities; pep rallies; nutritional program; student mentoring activities; community activities. CCTech must also transport its students to these activities at its sole expense.

McGraw noted that not all athletes are members of the Leader's Club, as it is tied to physical education and teachers' recommendations. It is not inclusive of all students or athletes. As for other activities, such as pep rallies, or other entire-team events during the school day, CCTech would make every effort to get the student there, subject

to whatever may be happening at CCTech, such as testing. It would be a collaboration between the principals. If every team member were expected to perform community service, then the Millville student attending CCTech would also be expected to participate.

McGraw agreed that team unity was important and that having all members of a team following the same rules and standards was important. He expected that they would be able to work out a way for CCTech and Millville students to meet the same standards and follow the same rules, just as CCTech had done with the other districts.

Dina Rossi Elliott, Ed.D., testified that she has been the superintendent of CCTech for seven and a half years. She stated that McGraw was accurate in his responses to Millville's concerns as presented in the agenda response proposals. She addressed the remaining proposal issues:

Paragraph 8 of the proposal responses reads as follows:

> **8. [Financial Concerns.]**
>
> Millville will pay for the general cost of the sports programs utilized by CCTech students but will not incur extra out of pocket expenses for CCTech students, e.g., uniforms—equipment—supplies or need for additional staff solely due to CCTech student participation. CCTech must pay those out of pocket expenses for its students. The estimated cost per student would be in the $300–500 range depending upon the sport.
>
> It would be unfair to ask the Millville district to use its scarce resources to pay the extra out of pocket costs for CCTech students.

Dr. Rossi was familiar with the Commissioner's decision of June 2018. Although the decision said nothing about requiring CCTech to pay for sports, CCTech decided to offer a financial reimbursement for sports because it was clear that finances were an issue. So CCTech came up with a plan that it could afford and that also would not be a

financial barrier to students participating in sports. The financial incentive to Millville also included Vineland, Bridgeton, and CR.

In determining the financial assistance to offer to districts sending students to CCTech, it created a $100,000 fund. Each of the four sending districts (Vineland, Bridgeton, CR, and Millville) would receive a portion based on their respective percentage of students enrolled as of October 15 of each year. CCTech used this number because it is part of the ASSA,[5] and the ASSA not only must be agreed upon with the sending district, but also was subject to State audit. CCTech could not use the number of students who participated in sports, because this number was always in flux and was not reliable because students get cut or quit a team. Some students might participate in three sports; others might participate in just one. It would be an unreliable statistic to count athletes because they could not be tracked financially or accurately.

CCTech thought its formula was a solid way to pay the districts. It looked at funding for 2018–2019 and used that year as the basis for their calculation. The amount it agreed upon was affordable and had minimal impact on the financial status of the district. For 2018–2019, Vineland had 317 students attending CCTech (44.77% of the total CCTech enrollment); Bridgeton had 137 students (19.35%); CR had 103 students (14.55%); and Millville had 151 students (21.33%). For year 2018–2019, Millville would have received $21,327.68. Based on the projected enrollment for 2019–2020, Millville will have approximately 21.84% of CCTech's student enrollment and would receive a payment of $21,835.44. The payment would be made to Millville in December when the ASSA is finalized.

CCTech also polled its students to see how many were interested in participating in sports, and determined that those numbers were unreliable. Some students said they might try but were not sure. Others picked sports whose seasons overlapped or were duplicates. It looked at Vineland and Bridgeton to try to get a sense of how many of the CCTech students participated in sports and what percentage participated in those

[5] Application for State School Aid.

towns. Using those numbers, it estimated that approximately thirty to forty Millville students attending CCTech would be participating in sports.

Taking all sports into consideration, CCTech made a reasonable estimate of $300–500 per student. If forty Millville students decided to play sports, the total using the highest amount of $500 per student was $20,000. Using the funding formula as determined by CCTech will provide Millville with $21,853, more than the estimated cost. Dr. Rossi noted that the Commissioner did not say that CCTech had to pay anything for its students to participate in sports activities in their resident districts. She also noted that a number of students had declined the offer to attend CCTech, and of those who declined and gave a reason, approximately twenty-five students said it was because of sports. Dr. Rossi agreed with McGraw that CCTech's cooperation with Vineland and Bridgeton has been running smoothly.

Paragraph 11 of the proposal responses reads as follows:

> **11. [Term of Agreement.]**
>
> Any agreement will be for a term of 12 months and then renegotiated by the parties.

Millville wants the agreement to be renegotiated after a year. CCTech sees this as a barrier to its students participating in sports. An ongoing cycle of starting and stopping negatively impacts students.

CCTech was able to resolve this issue with CR in their MOA by agreeing that at a specific time each year (February), they would meet to tweak the agreement before the end of the school year so that the athletes could remain on the fields and to provide their respective boards with notice of the resolution. CCTech would offer this same resolution to Millville, and objects to an automatic termination of the agreement.

As to CCTech offering sports, Dr. Rossi noted that at this time, CCTech had no plans for interscholastic sports. This was because it has a student population that may not be sizable enough to field a team; because it may have student athletes on another

district's field, which could negatively affect student recruiting or team unity in ongoing sports; and because CCTech's mission is academic and technology oriented for career and college.

Sports programs take money from the budget, and academic and technology training is costly. For example, CCTech must pay for shop equipment and culinary kitchens that are commercial grade. Combining this with academic funding makes sports teams not currently feasible. CCTech focuses its resources on career and college, and has extracurricular activities tied to that. If CCTech had a sports program, those monies would have to be budgeted as in any other district, so the cost would be included in calculating tuition and the costs would go up to sending districts.

Dr. Rossi was aware that Millville had been an Abbott district and that it was an economically challenged community. Ninety percent of its budget was from State aid. She agreed that Millville was facing budget deficits and had been cutting programs and staff, which could hurt students. She also agreed that it was a reasonable concern of Millville's that the cost of CCTech students participating in Millville sports be "cost neutral."

For Respondent Millville

Stephanie DeRose testified that she is the principal of Millville Senior High School. Her concern was discipline, and that the perception of disparity in discipline could affect the students. She did not want students to feel discriminated against and that students could be placed in a bullying situation if discipline were disparate. School discipline could result in a student being disqualified from participating in sports, so it was important that CCTech students participating in Millville sports be held to the same standard as Millville students.

As far as collaboration with McGraw, she noted that he may not always be there. Millville has in-school suspension but CCTech does not, and this could result in students not being eligible to play sports. CCTech does not have the middle level of discipline that Millville has.

DeRose noted that Millville has budgeting issues and not enough money. Sports costs vary, but the high school would have to absorb the additional costs if CCTech students played on Millville teams. She might have to cut other budget items to accommodate the students. Millville is in the process of developing its own vocational program, and she would have to sacrifice something to make sports possible. DeRose wanted the cost of sports for CCTech students in Millville to be cost neutral, and CCTech's formula was based on speculation. She acknowledged that Millville would be receiving over $21,000 under the formula developed by CCTech. Costs could change over time. She wants cost neutrality so that Millville does not have to sacrifice any of its programs to pay for CCTech students to play sports in Millville. This can be done by having costs itemized for each student athlete.

Michael Jones, a teacher of history at Millville Senior High School, is also head coach of the men's basketball team, and the spring and fall weight team. He is familiar with the dynamics of sports in Millville.

He expressed how important it is for a coach to have all his athletes adhere to the same standards and rules. Students vocalize if they see disparity. If a CCTech student participates in Millville sports and is treated differently, such disparity would affect team unity, which could negatively impact team performance.

Millville students are held to certain expectations to play sports. They are expected and required to participate in community activities and community service, such as cleaning up streets, charity work, and fundraisers. These are team bonding experiences. Millville set these parameters to help the community and to get its students to experience helping others. If CCTech students played in Millville and did not perform all these activities, it would be detrimental to the sports program.

Jones did not recall any student who did not participate in these activities, but if they did not, he would try to come up with alternatives. He could not think of any reason why CCTech students would not participate, but if they did not, he would try to find out the reason and to find something else for the student to do.

Findings

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

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).

Here, the witnesses appeared to testify credibly. Each one answered the questions directly. Each of these educator witnesses was knowledgeable, insightful, and forthright about his or her respective educational and athletic programs. They appeared to care deeply for their students and expressed their concern about how their respective programs would be impacted by the decisions being made. No witness appeared to be unreasonable in his or her view about sports participation, or in his or her ability to collaborate with others. I accept their testimony as fact. The real issue is how these facts can be applied to the particular concerns of Millville and its relationship with its students who attend CCTech and who wish to participate in Millville sports activities.

LEGAL ANALYSIS

The issue presented by CCTech is whether Millville was acting arbitrarily, capriciously, and unreasonably when it was unable to reach an agreement with CCTech to permit Millville student residents who had enrolled at CCTech to be able to participate in its athletic and sports programs.

It is clear that the Commissioner expected the parties to reach an agreement within a reasonable period of time after his decision of June 2018. The original petition covered school year 2016–2017. School year 2019–2020 is now fast approaching and no agreement has yet been reached between Millville and CCTech. Students who entered as freshman may graduate next year without having had the opportunity to play sports in their home district.

Because Millville did not have a formal policy addressing the participation of vocational-school students in its athletic programs, the policies of the NJSIAA govern. Under N.J.S.A. 18A:11-3, a board of education may join a voluntary association, such as the NJSIAA, which regulates the conduct of student activities between and among members. "The said rules and regulations shall be deemed to be the policy of the board of education and enforced first by the internal procedures of the association." N.J.S.A. 18A:11-3. The applicable NJSIAA rule pertinent to the issues presented here is found in Article V, Section 4(G), CL3, of its bylaws, which provides:

> If a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her home school upon agreement of both Principals, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy.

Thus, participation in interscholastic sports is subject to the agreement of the principals of both the vocational school and the public high school.

In G.W.S. ex rel. A.F.S. v. Petrino & Rahway Board of Education, Union County, EDU 09797-99, Comm'r (November 29, 1999), http://njlaw.rutgers.edu/collections/oal/, the Rahway school district had permitted vocational students in grades nine through twelve to participate in extracurricular activities and sports programs in their home districts. Starting in September 1999, participation was denied to ninth-graders enrolling in the vocational school. The Commissioner noted that under the NJSIAA rules, vocational-technical-school students may participate in the sports programs of their home districts upon the agreement of the (high-school) principals. Although the decision to allow participation is discretionary, "that discretionary authority must be reasonably exercised based on bona fide, legitimate considerations." The Commissioner has noted that participation in interscholastic sports may not be practicable or reasonable because of "scheduling constraints, transportation costs or logistical difficulties, or other valid considerations."

The question, then, is whether Millville, a member of the NJSIAA, and the superintendent or principal in the high school have continuing bona fide, legitimate reasons for denying CCTech students the opportunity to participate in the Millville athletic program.

Each of Millville's concerns as set forth in its proposal responses to CCTech's offers will be addressed.

3. Academic Clearance.

> Millville agrees to the proposal outlined by Mr. McGraw whereby CCTEC students would adhere to Millville academic standards for sports eligibility. CCTEC will assign an employee to monitor CCTEC student academic performance and email weekly status reports to Millville coaches.

As to whether this remains a reasonable concern, Millville indicated that it agrees with the first sentence, but wants a better way to verify academic eligibility. CCTech agreed that Millville coaches needed to be able to monitor student academic performance. CCTech was willing to permit Millville to access CCTech's Genesis system to check on students' academic progress. CCTech was also willing to assign a counselor and to provide weekly reports to Millville to ensure academic eligibility.

CCTech students play sports on Vineland and Bridgeton's teams and their athletic directors have direct access to CCTech's computer system, with no issues. The same policy would also apply to CR students as set forth in their MOA. No reason was presented why this plan would not also work for Millville.

It is not reasonable for Millville to deny CCTech students the opportunity to play sports based on this concern. Each principal can designate one or two people available for daily contact if the Millville coaches have concerns over the academic qualifications of any CCTech student athlete playing in Millville.

4. Transportation.

> Millville agrees to the offer of CCTech providing transportation to CCTech students at its own expense.
>
> CCTech must transport its students and arrive on the same schedule as Millville students for practice and games so as not to create additional supervision burdens for Millville staff. CCTech must provide transportation at the end of each student's athletic activity back to CCTech for parental pickup so as not to create additional supervision burdens for Millville staff of CCTech students.
>
> CCTech must transport its students to and from all Millville athletic program activities so that CCTech students adhere to the same schedule as Millville students including college recruitment interviews.

Millville expressed concern that if CCTech students arrived at times not in sync with its program, students would be unsupervised. CCTech has agreed to transport its students to practices at the same times as practices commence to avoid this problem.

As for CCTech transporting its students back to CCTech after games or practices in Millville, it is unreasonable for CCTech to have to transport students from Millville back to CCTech when they would already be in the city in which they reside, Millville. The students could go home, or be picked up by their parents, just as any other Millville resident athlete on the team. This was how it worked for Vineland and Bridgeton and, soon, CR, although is a bit different for CR, as its student athletes attending CCTech were from different areas. To handle this, CR will be using an activity bus to CCTech to transport its students.

As for the provision that "CCTech must transport its students to and from all Millville athletic program activities so that CCTech students adhere to the same schedule," CCTech had no problem with this, but wanted some flexibility, if, for example, a student were taking a test. Practices and games start at different times and CCTech was willing to transport its students to the away games. Parents or the security team could also assist with transportation as agreed. In some cases, CCTech might be on the way to a game from Millville so the students could be picked up at CCTech. CCTech would try to match up transportation with the practice, game, and event schedules.

CCTech was willing to make every effort to get students to college-recruiting interviews, but wanted some flexibility in working it out. Any issues that arose with Vineland and Bridgeton were resolved amicably and no major problems have occurred. CCTech thought that some flexibility and collaboration with Millville would resolve any issues. No reason was presented to believe that the principals involved could not come to a reasonable resolution of any transportation issue that might arise.

It is not reasonable for Millville to deny CCTech students the opportunity to play sports based on this concern. Each principal or his or her designee can review the practice, game, and event schedules and can work out times for pickup and drop-off that do not cause students to be unsupervised, and get the students to their games, practices, and recruiting interviews on time.

6. Student Discipline.

> Millville cannot agree to disparate disciplinary standards and systems for CCTech and Millville students participating in the sports program. Such disparities would result in unequal treatment of CCTech and Millville students which would be perceived as fundamentally unfair by both our students and our community.
>
> CCTech and its students would have to agree to be bound by Millville school and team disciplinary standards for their conduct while participating in the Millville sports program and further agree to submit themselves to the Millville disciplinary system including final review by the Millville Board of Education.

The issue of discipline and disparate treatment of CCTech students playing on Millville teams is a genuine concern for Millville, as well as for CCTech. Millville wants to retain all control over discipline of CCTech students playing sports in Millville, while CCTech wants to have input and use a collaborative practice to resolve any disciplinary issues that might arise.

Millville did not want students to feel discriminated against and wanted to prevent any bullying situations. Because school discipline could result in a student being disqualified from participating in sports, it was important that CCTech students participating in Millville sports be held to the same standards as Millville's students. Millville has in-school suspension but CCTech does not, and this could result in students not being eligible to play sports. CCTech does not have the middle level of discipline that Millville has.

CCTech's position was that team discipline was Millville's, and its coaches', responsibility and that CCTech would support their decisions. But if those infractions rose to a team punishment, CCTech thought that it should be a collaborative decision between it and Millville. CCTech wants to hold its students accountable and was willing to discipline them as much as possible as Millville does, but wanted the opportunity to work it out with Millville and have input and cooperation on any decision. CCTech proffered the example of a student athlete who might be in the process of being evaluated for an IEP. In such case, CCTech would want to have input into what discipline should be imposed.

CCTech agreed that all students should be held to the same standards and that there should be no disparate treatment. It felt that potential disparities could be resolved with collaboration between the principals or their designees. It was unreasonable for Millville to insist that CCTech not have any input into the discipline of its students participating in Millville sports and to yield final decision-making authority to the Millville BOE.

CCTech did not see collaboration as a problem. The principal of CCTech was previously able to resolve a disciplinary issue between two students. Although CCTech thought the punishment was excessive, the principal ultimately agreed to keep it the same for both students to avoid the appearance of disparate treatment. In the MOA with CR, CCTech agreed on team discipline with the coach having that authority, but for infractions within school, CCTech received input.

While disparate disciplinary treatment is a valid consideration for Millville, it would be unreasonable for it to have final say in imposing discipline on a CCTech student participating in Millville sports. The principals of the schools appeared to be reasonable and cooperative educators, seeking the best for their students. No reason was presented why they, or their designees, could not collaborate and reach agreement on any discipline to be imposed, except that they may not always be employed in these positions. This is not a sufficient basis to determine that CCTech and Millville would not be able to reasonably address any disciplinary issues that might arise.

Accordingly, it is not reasonable for Millville to deny CCTech students the opportunity to play sports based on this concern. The principals, or their designees, can collaborate and resolve any disciplinary issues that may arise.[6]

7. Other Logistical Issues.

> Participation in the sports program is a privilege that must be earned by Millville students by adherence to higher standards of conduct including fostering school spirit, serving as role models and school leaders and involvement in the community. It would not be fair to have Millville students earn the privilege of participation and not require the same of CCTech students. Millville must run one sports program with rules that apply equally to all participants. Therefore, CCTech students would have to meet the same standards by participating in the same activities on the same schedule as their teammates. For example, Leader's Club activities; pep rallies; nutritional program; student mentoring activities; community activities. CCTech must also transport its students to these activities at its sole expense.

[6] If this becomes an issue, the parties can develop alternate methods for resolving disciplinary issues.

Both districts agreed that team unity was important and that having all members of a team following the same rules and standards was also important. Millville contended that its students are held to certain expectations to be able to play sports. They are expected, and required, to participate in community activities and community service, such as cleaning up streets, charity work, fundraisers, and team bonding experiences.

Millville set these parameters to help the community and to get its students to experience helping others. It argued that if CCTech students played in Millville and did not perform all these activities, it would be detrimental to its sports program. If all the athletes did not adhere to the same standards and rules, the disparity would affect team unity, which could negatively impact team performance.

As to the activities listed by Millville, CCTech noted that not all athletes are members of the Leader's Club. As for other activities such as pep rallies, or other entire-team events that might occur during the school day, CCTech would make every effort to get its students there, subject to whatever may be happening at CCTech, such as testing. If every team member were expected to perform community service, then the Millville student attending CCTech would also be expected to participate. CCTech and Millville students could meet the same standards and follow the same rules, but this would require collaboration between the principals, recognizing that some flexibility was necessary. If a student could not participate in these activities, an alternative could be found that satisfied Millville.

It is not reasonable for Millville to deny CCTech students the opportunity to play sports based on this concern. Each principal or his or her designee can exchange schedules and proposed activities, and can reach a reasonable accommodation for Millville students attending CCTech, recognizing that some flexibility is required to assure that students are able to achieve academically as well as athletically.

8. [Financial Concerns.]

> Millville will pay for the general cost of the sports programs utilized by CCTech students but will not incur extra out of pocket expenses for CCTech students, e.g., uniforms—equipment—supplies or need for additional staff solely due to CCTech student participation. CCTech must pay those out of pocket expenses for its students. The estimated cost per student would be in the $300–500 range depending upon the sport.
>
> It would be unfair to ask the Millville district to use its scarce resources to pay the extra out of pocket costs for CCTech students.

In his decision of June 2018, the Commissioner stated, "[C]oncerns regarding the impact on student enrollment at Cumberland and Millville and corresponding State funding do not equate to bona fide legitimate reasons for denying CTech students the opportunity to participate in sports programs." CCTech v. Cumberland Reg'l & Millville, EDU 12252-16, Comm'r (June 7, 2018), http://njlaw.rutgers.edu/collections/oal/. The cost for permitting students to participate in sports was not addressed in the Commissioner's decision. Neither does NJSIAA Article V, Section 4(G), CL3, mention any reimbursement for expenses incurred by the resident student district:

> If a Vocational/Technical High School/Public Academy does not offer the particular sport in which one of its full-time students desires to participate, that student may participate in that sport at his/her home school upon agreement of both Principals, regardless of the number of sports programs offered at the Vocational/Technical High School/Public Academy.

Millville wants the cost of permitting CCTech students to play on its teams to be "cost neutral." It cites budgetary concerns, the development of new projects, and State-aid losses. No statutory or regulatory basis for this proposition has been cited.

In order to address this concern, CCTech created a fund of $100,000 as a financial incentive to be distributed to the four districts (Vineland, Bridgeton, CR, and Millville) whose students attend CCTech. It was not mandated by the Commissioner or the statute or regulations and was seen by CCTech as a reasonable way to address Millville's concerns and to reduce the costs to the districts where CCTech students play.

In determining the amount distributed from the fund, CCTech would provide each of the four districts with a portion based on their respective percentage of students enrolled as of October 15 of each year (the ASSA number). CCTech used this number because the ASSA must be agreed upon with the sending district, and was also subject to State audit, so it could be verified by any district. CCTech could not use the number of students who participated in sports because this number was always in flux and was not reliable. It is a statistic that cannot be accurately tracked or verified.

Using 2018–2019 as the basis for their calculation, Millville had 151 students attending CCTech (21.33% of the total CCTech enrollment) and would have received $21,327.68. Based on the projected enrollment for 2019–2020, Millville would have approximately 21.84% of CCTech's student enrollment and would receive a payment of $21,835.44. The payment would be made in December when the ASSA is finalized by the State.

CCTech estimated that approximately thirty to forty Millville students attending CCTech would be participating in sports. Taking all sports into consideration, CCTech made the reasonable cost estimate of $300–500 per student. If forty students decided to play sports, the total using the highest amount of $500 per student was $20,000. Using the funding formula as determined by CCTech would have provided Millville with $21,853, more than the estimated cost.

Millville objected to CCTech's proposal and countered that it wanted to be paid in accordance with an itemized list of the cost for each student athlete: Millville did not want to receive more than it was entitled to for the cost of athletic participation, nor did it want to receive less. However, CCTech felt that this counter-proposal was unwieldy. Students may try out for a sport or start and drop out. Or they may switch sports. They may participate in several sports. An accounting would not be available with any reasonable accuracy for verification by the public, unlike CCTech's proposal, which is capable of verification.

Accordingly, it is not reasonable for Millville to deny CCTech students the opportunity to play sports in Millville based on this concern, as CCTech has made a

very reasonable proposal that addresses this issue for Millville and its three other sending districts.

11. [Term of Agreement.]

> Any agreement will be for a term of 12 months and then renegotiated by the parties.

Millville wants the agreement to be renegotiated after a year. CCTech objects to an automatic termination and proposes to resolve this issue as it did with CR in their MOA by agreeing that, at a specific time each year (February), they would meet to tweak the agreement before the end of the school year so that the athletes could remain on the fields and to provide their respective boards with notice of the resolution.

The position of CCTech is reasonable. Given that it has been more than three years since this litigation commenced and the end is not yet in sight, and its students are not yet participating in sports, it would be most unreasonable to terminate the agreement after twelve months and have to start anew. It is not reasonable for Millville to want to renegotiate each year with the likely attendant delay in implementing the Commissioner's directive to permit the CCTech students to play sports in the district where they reside.

Accordingly, it is not reasonable for Millville to deny CCTech students the opportunity to play sports based on this concern.

CONCLUSION

Under the NJSIAA rules as adopted by Millville, vocational-school students may participate in the sports programs of their home districts upon the agreement of the principals. Although the decision to allow participation is discretionary, that discretionary authority must be reasonably exercised based on bona fide, legitimate considerations. Here, I **CONCLUDE** that CCTech has demonstrated by a preponderance of the credible evidence that the reasons advanced by Millville for not coming to an agreement with CCTech for the participation of its students in Millville's

athletic activities, as directed by the Commissioner, are not legitimate, reasonable, or practicable concerns. CCTech has addressed each concern of Millville with reasonable and practical solutions. Accordingly, there is no reason why CCTech students residing in Millville should be denied the opportunity to participate in Millville's athletic program.

ORDER

I **ORDER** that the application of the petitioner, Cumberland County Technical Education Center, Cumberland County, to compel the respondent, the Board of Education of the City of Millville, Cumberland County, to admit its students residing in Millville into Millville's athletic and sports programs, is **GRANTED**. The principals of the high schools shall collaborate in effectuating this 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

August 6, 2019
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: August 6, 2019

Date Mailed to Parties: August 6, 2019

SMS/cb

APPENDIX

WITNESSES

For petitioner Cumberland County Technical Education Center:

Gregory McGraw

Dina Rossi Elliott

For respondent City of Millville:

Stephanie DeRose

Michael Jones

EXHIBITS

For petitioner Cumberland County Technical Education Center:

P-1 Meeting Agenda, dated June 27, 2018

P-2 Memorandum of Agreement between CCTech and CR (not provided)

P-3 Allocation of Fund

P-4 CCTech Proposed Athletic Compensation

For respondent City of Millville:

R-1 Millville Response to 7-3-18 Meeting

OAL exhibit:

OAL-1 Letter dated July 29, 2019, approving MOA between CCTech and CR

Berdecia, Christina

From:	Berdecia, Christina
Sent:	Tuesday, August 06, 2019 12:44 PM
To:	Bloom, Randye; Greco, Margaret; Jennifer Killough; Karin Molnar; Rick Keiser
Subject:	EDU 11467-18 Cumberland Co Tech Edu Ctr BOE v. Cumberland Reg HS BOE and City of Millville BOE (Initial Decision)
Attachments:	EDU 11467-18 CCTech v. Millville BOE and Cumberland Regional BOE (Initial Decision).docx
Importance:	High

Tracking:

Recipient	Delivery	Read
Bloom, Randye	Delivered: 8/6/2019 12:47 PM	
Greco, Margaret	Delivered: 8/6/2019 12:46 PM	Read: 8/6/2019 1:25 PM
Jennifer Killough		
Karin Molnar		
Rick Keiser	Delivered: 8/6/2019 12:46 PM	

********Please confirm receipt.********

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Sincerely,

Christina A. Berdecia Judicial Assistant 1
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619
Fax No. (609) 689-4100

Judge Mary Ann Bogan Tele. No. (609) 689-4050
Judge Sarah G. Crowley Tele. No. (609) 689-4053
Judge Susan M. Scarola (Ret., on recall) Tele. No. (609) 689-4051

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

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Berdecia, Christina

From:	Berdecia, Christina
Sent:	Tuesday, August 06, 2019 12:50 PM
To:	mitchell.kizner@flastergreenberg.com; John G. Geppert; 'arobinson@robinsonlawllc.com'
Subject:	EDU 11467-18 Cumberland Co Tech Edu Ctr BOE v. Cumberland Reg HS BOE and City of Millville BOE (Initial Decision)
Attachments:	EDU 11467-18 CCTech v. Millville BOE and Cumberland Regional BOE (Initial Decision).docx
Importance:	High

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Sincerely,

Christina A. Berdecia, Judicial Assistant 1
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Mercerville, NJ 08619
Fax No. (609) 689-4100

Judge Mary Ann Bogan Tele. No. (609) 689-4050
Judge Sarah G. Crowley Tele. No. (609) 689-4053
Judge Susan M. Scarola (Ret., on recall) Tele. No. (609) 689-4051

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DECISION COVER SHEET

This decision

__X__ **has**

_____ **has not**

been e-mailed to the parties. Please process accordingly.

243-19

New Jersey Commissioner of Education

Decision

Noemia Gomes,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner – formerly a tenured secretary in the respondent Board's school district – appealed her removal from the Board's health benefits plan, and sought reimbursement for the insurance premiums she continued to pay thereafter through COBRA. The action to terminate payment of her insurance premiums occurred after Ms. Gomes had been absent from work for more than 180 days during the 2016-2017 school year. The Board contended that its actions were lawful, as it acted in compliance with the school district's collective bargaining agreement (CBA), which provides that the Board "...shall continue to pay the full premium for each employee working an average of 20 hours or more per week"; as petitioner had not been working the required number of hours, nor was she on an approved leave of absence, the Board terminated her health benefits on June 14, 2017. In a separate proceeding, the Board filed tenure charges against petitioner in February 2018, and she was subsequently dismissed from her position by an Arbitrator in a decision dated March 4, 2019. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; health insurance is a benefit subject to the CBA, and health insurance benefits are not compensation as set forth in *N.J.S.A.* 18A:6-10; however, the CBA is silent on how, or when, health insurance benefits should be terminated given the facts in this matter; petitioner had a long history of extremely poor attendance, and stopped working altogether in August 2017; prior to that date, in June 2017, the Board ceased payment of health insurance premiums for petitioner; and, for unknown reasons, the Board failed to file tenure charges against petition until February 2018. The ALJ concluded that the Board should have proceeded with the filing of tenure charges instead of waiting until eight months after the termination of petitioner's health benefits before filing charges. Accordingly, the ALJ ordered the Board to reimburse petitioner for the cost of health benefits for the period from the date benefits were terminated in June 2017 to the date the Board certified tenure charges in February 2018, in the amount of $40,276.46.

Upon review, the Commissioner concurred that health insurance benefits for a tenured employee are controlled by the CBA and are not compensation under *N.J.S.A.* 18A:6-10. However, the Commissioner found that the ALJ erred in determining that the Board was required to file tenure charges in order to terminate petitioner's health benefits. Accordingly, the Initial Decision of the OAL was rejected as the final decision in this matter. Petitioner is not entitled to reimbursement for the cost of any health benefit premiums. 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.

September 19, 2019

243-19

OAL Dkt. No. EDU 17465-17
Agency Dkt. No. 214-9/17

New Jersey Commissioner of Education

Final Decision

Noemia Gomes,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the parties pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto.

Petitioner, a tenured secretary, challenges her removal from the Board's health benefit plan after she was absent from work more than 180 days during the 2016-17 school year. Regarding health benefits, the school district's Collective Bargaining Agreement (CBA) provides: "The Board shall continue to pay the full premium for each employee working an average of at least 20 hours or more per week." As petitioner had not been working an average of 20 hours per week, nor was she on an approved leave of absence, the Board terminated petitioner's health benefits on June 14, 2017. Thereafter, the petitioner filed the within appeal.[1] The Board subsequently certified tenure charges against petitioner on February 22, 2018. In a

[1] Petitioner continued to pay her health insurance premiums through COBRA following her termination from the Board's health benefit plan.

separate proceeding on the tenure charges, petitioner was dismissed from her position by an Arbitrator in a decision dated March 4, 2019.

In the instant Initial Decision, the Administrative Law Judge (ALJ) found that health insurance is a benefit subject to the CBA, and is not compensation pursuant to the tenure law, *N.J.S.A.* 18A:6-10. However, the ALJ found that the CBA did not provide guidance as to how, or when, health insurance benefits should be terminated. As such, the ALJ concluded that the Board should have proceeded by filing tenure charges first, instead of waiting until eight months after the termination of petitioner's health benefits before filing the charges. Accordingly, the ALJ ordered the Board to reimburse petitioner for the cost of health benefits in the amount of $40,276.46, representing petitioner's out of pocket costs from the date the benefits were terminated on June 14, 2017, to the date the Board certified tenure charges on February 22, 2018.

In its exceptions, the Board maintains that the ALJ properly determined that health benefits are governed by the CBA and are not considered compensation under *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:28-5. However, the Board takes exception to the ALJ's conclusion that petitioner is entitled to reimbursement for health benefits through the date upon which the Board certified tenure charges against petitioner. The Board argues that the ALJ erred in finding that the CBA did not delineate how or when termination of health benefits should occur. The CBA states that an employee must work a minimum of 20 hours per week to quality for health benefits. As such, there is no need for further detail regarding how or when to terminate health benefits since a staff member who does not work at least 20 hours does not qualify for such benefit. Here, the Board emphasizes that petitioner was not working an average

of 20 or more hours per week when the benefit was terminated, nor was she on an approved leave of absence.

The Board also contends that the ALJ erred in finding that the ability to terminate health insurance benefits hinges on the filing of tenure charges, as there is no support for such a finding. The ALJ's determinations contradicted one another: he first found that the CBA is the controlling document regarding the payment of health insurance premiums, and that health insurance benefits are not compensation under the tenure laws; he then concluded, however, that tenure charges should have been filed pursuant to the tenure laws in order to terminate petitioner's health benefits. The Board maintains that health benefits are not contemplated by the tenure laws, so the filing of tenure charges should not be a prerequisite to the termination of premium payments, especially since health benefits under the CBA cover non-tenured employees in addition to tenured employees.

Alternatively, the Board argues that the ALJ concluded the respondent was untimely in filing tenure charges, yet the ALJ failed to conduct any fact-finding on the issue before reaching his conclusion. The Board maintains that the tenure laws do not set forth specific timeframes for the filing of tenure charges in matters, such as this one, wherein petitioner abandoned her position. Additionally, tenure charges are fact specific and are part of a lengthy process. The Board contends that the ALJ improperly made the determination that eight months was an unreasonable period of time to wait before certifying tenure charges, without first conducting fact-finding as to the history of petitioner's attendance issues or why the Board certified charges when it did.

In reply to the Board's exceptions, petitioner argues that the ALJ properly found that the CBA does not provide guidance on how or when to terminate health insurance

premiums. Petitioner contends that the Board cannot act unilaterally by canceling health benefits anytime it chooses; rather, such decisions should be part of the collective negotiation process. Petitioner disputes the Board's interpretation of the ALJ's finding that the Board was required to file tenure charges in order to terminate the payment of health premiums. Instead, petitioner argues that the ALJ found that the Board waited a lengthy time to file tenure charges without explanation, and that in effect, the board terminated petitioner – a tenured employee – by ceasing to pay her salary and insurance payments, thereby bypassing the tenure laws. Petitioner further contends that the issue of the timeliness of the tenure charges was not raised *sua sponte* by the ALJ, and was instead raised by petitioner in her cross motion for summary decision. As such, petitioner urges the Commissioner to reject the Board's exceptions and adopt the Initial Decision without modification.

Upon review, the Commissioner agrees with the ALJ that health insurance benefits for a tenured employee are controlled by the CBA, and are not considered compensation for the purposes of *N.J.S.A.* 18A:6-10. The Commissioner has made clear that "the term 'compensation' with respect to the tenure right protections provided by education law is by now well-established, having been explicitly defined as encompassing **only salary.**" *Thomas Manna v. Board of Education of the Somerset County Vocational Technical School District, Somerset County*, Commissioner's Decision No. 178-10, June 14, 2010, at 4 (emphasis in original). Additionally, the Commissioner has found that health insurance benefits – in addition to other benefits such as accumulated sick leave – are not preserved and protected by the tenure statutes, and instead are "a contractual benefit subject to collective bargaining negotiations." *Manna, supra*, at 5; *Arlene C. Allen, et al v. Board of Education of the Township of Clark, Union County*, Commissioner Decision No. 189-04, April 30, 2004, *aff'd* State Board,

September 1, 2004. As such, the Commissioner agrees that petitioner's health benefits are governed by the CBA.

However, the Commissioner disagrees with the ALJ's determination that the Board was required to file tenure charges in order to terminate petitioner's health benefits. As the payment of health benefit premiums is controlled by the CBA, and is not considered salary under *N.J.S.A.* 18A:6-10, the termination of health benefits cannot logically be impacted in any way by the filing of tenure charges. The Commissioner agrees with the Board that, as petitioner did not work for 20 hours per week and was not on an approved leave, she was not eligible for health benefits under the CBA. As the Commissioner found in *Manna, supra*, when the petitioner went from a full-time position to a part-time position following a reduction in force, "because petitioner did not qualify as 'eligible' for health insurance benefits pursuant to the Contract, he possesses no entitlement to this benefit." Similarly, here, petitioner has no entitlement to health insurance benefits if she does not meet the minimum requirement of working 20 hours per week. Accordingly, the Board's action in terminating the payment of petitioner's health benefit premiums was not arbitrary, capricious, or contrary to the law.

The Commissioner does not find petitioner's reply exceptions to be persuasive. Contrary to petitioner's argument, the Board is not able to act unilaterally and cancel health benefits anytime it chooses. The Board must act in accordance with the eligibility requirements for health benefits, which were part of the collective negotiation process and are set forth in the CBA. Additionally, the termination of petitioner's health insurance premiums did not effectively terminate her employment and bypass the tenure laws. As detailed above, health insurance benefits are not compensation pursuant to *N.J.S.A.* 18A:6-10.

Accordingly, the Initial Decision of the OAL is rejected as the final decision in this matter for the reasons expressed herein. Petitioner is not entitled to reimbursement for the cost of any health benefit premiums. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/19/19
Date of Mailing: 9/20/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 17465-17

AGENCY REF. NO. 214-9/17

NOEMIA GOMES,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Paul W. Tyshchenko, Esq., for Petitioner (Caruso, Smith, Picini, attorneys)

Nishali Amin Rose, Esq., for Respondent (Floria, Perrucci, Steinhardt & Cappelli, attorneys)

Record Closed: May 24, 2019 Decided: Jume 21, 2019

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Noemia Gomez, appeals her removal from Respondent Board's health benefit plan.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on November 17, 2017, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A pre-hearing telephone conference was held on December 1, 2017, and a Pre-Hearing Order was entered on the same date.

Petitioner's counsel submitted correspondence requesting an adjournment of the March 21, 2018, hearing date, and that the matter be placed on the inactive list pending the outcome of a tenure charge hearing. Respondent's counsel joined in the request. The matter was placed on the inactive list by order dated March 26, 2018. The matter was continued on the inactive list by order dated September 28, 2018.

By letter dated October 17, 2018, Petitioner's counsel requested the matter be restored to the active list. The matter was thereafter restored to the active list.

Respondent filed a motion for summary decision, and brief in support of said motion, dated March 5, 2019. Petitioner filed a cross-motion for summary decision, and brief in support of said motion and in opposition to Respondent's motion for summary decision, dated April 15, 2019. Respondent filed its reply brief in opposition to the Petitioner's cross-motion on April 26, 2019. Petitioner filed her reply brief on May 9, 2019.

The undersigned requested supplemental briefs, which were due on or before May 24, 2019.

The record closed on May 24, 2019.

FACTUAL DISCUSSION

The following **FACTS** are not in dispute:

1. Petitioner was hired by Respondent Board in February 2008 as an administrative secretary.
2. Petitioner was hired as a twelve-month employee.
3. Petitioner obtained tenure during her third year of continuous full-time employment.
4. Health insurance benefits were provided to Petitioner pursuant to the Collective Bargaining Agreement (CBA) between the parties.
5. During the 2016-2017 school year commencing on July 1, 2016, and ending June 30, 2017, Petitioner was absent from work for one (1) illness day, eleven and one-half (11.5) vacation days, one and eighty-eight hundreds (1.88) personal days, fifty-three and thirty-eight one hundredths (53.38) sick days, one hundred seven (107) days on leave of absence, and seven (7) unexcused absences.
6. By letter dated June 13, 2017, the Respondent Board, through its Interim Assistant Superintendent for Human Resources Francisco Cuesta, informed Petitioner that her health benefits would be terminated effective June 14, 2017.
7. The basis for Respondent's termination of health benefits was that Petitioner did not work full time or on an approved leave of absence in order to qualify for health benefits.
8. The CBA provides in pertinent part at Article XVII as follows: "The Board shall continue to pay full premium for each employee working an average of at least 20 hours or more per week."
9. Petitioner has not been at work since August 23, 2017, which is an unpaid, unapproved leave of absence.
10. Petitioner avers that she paid her own health insurance premiums through COBRA from June 2017 through November 2018, totaling $40,279.46.
11. The Respondent certified tenure charges against Petitioner on February 22, 2018.
12. On March 4, 2019, Petitioner was dismissed from her position with Respondent following a hearing on the tenure charges.

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

The parties do not dispute the facts in the instant matter. Rather, the parties dispute whether or not Respondent Board's termination of medical benefits for Petitioner are permitted pursuant to statutory and case law. Accordingly, the matter is ripe for summary decision.

Initially, Respondent asserts that Petitioner's submissions on the instant motion and cross-motion should not be considered as they were not timely filed. Respondent cites N.J.A.C. 1:1-12.5(b) which sets forth the time frames for filing responsive papers, which is twenty (20) days from the date of service of a motion for summary decision. Respondent also asserts that Petitioner failed to submit a signed affidavit in support of her cross-motion for summary decision.[1] A signed affidavit was thereafter submitted.

[1] Petitioner submitted an unsigned affidavit.

Petitioner does not dispute that her response and cross-motion were not timely filed, and that an unsigned affidavit was submitted, and offers an excuse for same. I need not delve into the merits of the excuse here.

N.J.S.A. 1:1-3(b) states:

> Except as stated in (c) below, procedural rules may be relaxed or disregarded if the judge determines that adherence would result in unfairness or injustice. The judge shall make such determinations and state the reasons for doing so on the record.

Respondent suffers no prejudice from the late filing. Striking Petitioner's response and cross-motion would be a Draconian response, and one not merited herein. It would be more prudent to consider all papers filed regarding the motion and cross-motion for summary decision and to render an opinion on the merits of same.

Respondent asserts in its motion for summary decision that it correctly terminated health insurance benefits to Petitioner in accordance with the CBA, citing Article XVII thereof, which states in pertinent part, "The Board shall continue to pay the full premium for each employee working an average of at least 20 hours or more per week . . . ." It is not disputed that Petitioner did not work an average of twenty hours or more per week.

In support of its argument, Respondent cites Allen v. Board of Education of the Township of Clark, Union County, Commissioner's Decision No. 189-04 (April 30, 2004), https://www.nj.gov/education/legal/commissioner/2004decisions.shtml, affirmed, State Board (September 1, 2004), affirmed, A-754-04T2. In said decision the Commissioner found that payment upon retirement for unused sick leave is not compensation. Such payment for unused sick leave is a benefit subject to collective bargaining.

Respondent argues that, likewise, the payment of health benefit premiums is also a benefit subject to collective bargaining and that the CBA is controlling herein.

In further support of its argument Respondent cites Manna v. Board of Education of the Somerset County Vocational Technical School District, Somerset County, Commissioner Decision No. 178-10 (June 14, 2010), https://www.nj.gov/education/legal/commissioner/2010decisions.shtml, the Commissioner interpreted Basset v. Board of Education of the Borough of Oakland, 223 N.J. Super. 136 (App. Div. 1988). Therein the Commissioner determined that health insurance benefits are not preserved and protected by this statute[2] but, rather – as recognized by the ALJ – are a contractual benefit subject to collective bargaining negotiations.

Manna involved a teacher whose hours were reduced below thirty-five hours per week, thereby rendering him ineligible to receive health insurance benefits. Manna argued that this was a reduction in compensation pursuant to N.J.S.A. 18A:28-5 and therefore impermissible.

Respondent's position is that the CBA is controlling herein and that the termination of payment for health insurance premiums for Petitioner was justified thereunder. Respondent further asserts that, as health insurance is a benefit subject to the CBA, it is not compensation pursuant to N.J.S.A. 18A:6-10. I agree.

Petitioner argues that both Allen and Manna are not controlling and that DePasquale v. State of N.J., 211 N.J. 40 (2012) is controlling. I disagree. The issue in DePasquale was the compensation of New Jersey Judges and Justices. It did not involve public employees. Further, DePasquale was decided on the New Jersey Constitution provision regarding the diminishment of the salaries of sitting Judges and Justices.

Petitioner also asserts that the termination of health insurance by Respondent violates N.J.S.A. 18A:6-10(b), which provides that "No person shall be dismissed or

[2] N.J.S.A. 18A:25-8.

reduced in compensation" . . . "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle."

It is clear that health insurance benefits for a tenured school employee are controlled by the CBA. This is supported by both Allen and Manna. However, the CBA is silent as to how, or when, health insurance benefits should be terminated given the facts herein. In the instant matter Petitioner simply stopped going to work. After a long history of extremely poor attendance Petitioner stopped working altogether on August 23, 2017. Prior to that date, on June 14, 2017, Respondent ceased payment of health insurance premiums for Petitioner. For unknown reasons Respondent failed to file tenure charges against Petitioner until February 22, 2018.

While I have determined that the CBA is the controlling document concerning the payment of health insurance premiums, and that health insurance benefits are not compensation as set forth in N.J.S.A. 18A:6-10, It is clear from the undisputed facts that tenure charges should have been filed as set forth in N.J.S.A. 18A:6-10.

As the CBA offers no guidance on how to terminate payment of health insurance premiums given the facts herein the only reasonable way for Respondent to proceed would be to timely file tenure charges. It did not. Rather, Respondent waited eight months from the time it stopped payment of Petitioner's health insurance premium to the time tenure charges were filed. Why Respondent waited is not explained.

Petitioner notes that she was not reinstated to health insurance benefits by Respondent on the 120th day after the filing of tenure charges.

N.J.S.A. 18:6-14 states in pertinent part:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be

> paid beginning on the one hundred twenty-first day until such determination is made.

N.J.S.A. 18:6-14 is not applicable in the instant matter. Petitioner was not suspended. She did not report to work at all from August 23, 2017. Further, N.J.S.A. 18:6-14 refers only to reinstatement of salary.

Based upon the foregoing, I **CONCLUDE** that Respondent's motion for summary decision should be denied. I further **CONCLUDE** that Petitioner's cross-motion for summary decision should be granted.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **DENIED**; and,

It is further **ORDERED** that Petitioner's cross-motion for summary decision is **GRANTED**; and,

It is further **ORDERED** that Respondent shall reimburse Petitioner for the cost of health benefits premiums paid by her from the date such benefits were terminated by Respondent (June 14, 2017) through the date of tenure charges were certified (February 22, 2018) totaling $40,279.46; and,

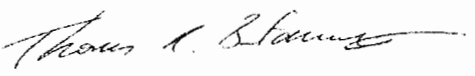
It is further **ORDERED** that no reimbursement shall be made until such time Petitioner submits adequate documentation as to the payment of insurance premiums by way of canceled checks and/or receipts from the insurance provider; and

It is further **ORDERED** that reimbursement to Petitioner shall be made within sixty (60) days after receipt of such adequate documentation.

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

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

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



June 21, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Moving Papers

For Petitioner:

Memorandum of Law in Opposition to Respondent's motion for summary decision and in Support of Her Cross-Motion for Summary Decision dated April 15, 2019

Certification of Petitioner (Exhibit A of Memorandum of Law)

Reply letter brief dated May 9, 2019

Supplemental brief dated May 23, 2019

For Respondent:

Memorandum of Law in Support of Motion for Summary Decision dated March 5, 2019, with Exhibits A through C

Reply letter brief dated April 26, 2019

Supplemental letter brief dated May 24, 2019

Exhibits:

J-1 Collective Bargaining Agreement between City of Elizabeth Board of Education and The Elizabeth Education Association (July 1, 2009 – June 30, 2012)

Pleadings:

Petition for Relief

Answer and Affirmative Defenses

244-19

New Jersey Commissioner of Education

Final Decision

M.R., on behalf of minor child, N.R.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that his child was ineligible to receive a free public education in respondent's school district. Petitioner asserted that he is domiciled in Elizabeth and that his daughter spent most of her time with him during the relevant time period, from November 2018 through her graduation from high school in June 2019. The Board contended that a residency investigation had demonstrated that M.R. lived in East Orange, and N.R. lived in Union with her mother; the Board filed a counterclaim for tuition.

The ALJ found, *inter alia*, that: the testimony provided by M.R. at hearing in this matter was credible, and no persuasive evidence to the contrary was presented by the Board; M.R. resides in Elizabeth in a shared apartment situation, and both his name and his daughter's name appear as residents on the property lease; both M.R. and L.R., the mother of N.R., gave credible testimony describing the time spent by N.R. between their two homes; N.R. did share her time between the separate domiciles of her two parents, but primarily spent four nights per week in Elizabeth during the school year. The ALJ concluded that M.R. is domiciled in Elizabeth, and has met his burden of demonstrating that N.R. was properly enrolled in the Elizabeth public schools and eligible for a free education therein. The ALJ ordered that the Board's demand for tuition set forth in its counterclaim be dismissed; further, as N.R. has graduated from high school, the continued free attendance in the Elizabeth public schools requested in the petition is now moot. The petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter.

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, 2019

244-19

OAL Dkt. No. EDU 03909-19
Agency Dkt. No. 33-2/19

New Jersey Commissioner of Education

Final Decision

M.R., on behalf of minor child, N.R.,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) that petitioner sustained his burden of demonstrating that he was a domiciled in Elizabeth from November 30, 2018 through the end of the 2018-19 school year. As such, the minor child, N.R., was entitled to a free public education in the District's schools during that time. Additionally, the Commissioner agrees with the ALJ that the issue of N.R.'s continued free attendance in the District is moot as she has graduated from high school.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board's counterpetition for tuition is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/19/19
Date of Mailing: 9/20/19

[1] The Commissioner was not provided with a transcript of the August 7, 2019 hearing at the OAL.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03909-19
AGENCY REF. NO. 33-2/19

M.R., ON BEHALF OF MINOR CHILD, N.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

M.R., pro se

Christina DiPalo, Esq., for respondent (La Corte, Bundy, Varady and Kinsella, attorneys)

Record Closed: August 7, 2019 Decided: August 12, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.R., appeals the determination of respondent, the Elizabeth Board of Education, that he is not domiciled in its district. The Board had determined that his daughter was ineligible to attend the public schools, and counterclaims for tuition.

Petitioner filed an appeal with the Commissioner of Education (the Commissioner) on February 13, 2019. The Board filed an answer on March 4, 2019, and the contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on March 20, 2019. The case was scheduled for hearing on April 24, 2019, and May 3, 2019. The April date was adjourned at the request of the Board. The Board then requested an adjournment of the May 3, 2019, date, and the matter was rescheduled for July 10, 2019. This date was again adjourned at the request of the Board. All adjournments were granted with petitioner's consent.

The hearing ultimately proceeded on August 7, 2019; the parties presented documentary and testimonial evidence and the record closed. In the interim, N.R. graduated from high school. M.R. thus no longer seeks his daughter's continued attendance in the Elizabeth schools. The Board continues to press its entitlement to tuition under N.J.S.A. 18A:38-1. The Board contests M.R.'s residency in Elizabeth for the period from November 30, 2018, until N.R.'s graduation from high school in June 2019.

FINDINGS OF FACT

On November 30, 2018, the Board sent a Notice of Initial Determination of Ineligibility to M.R. at an address it had on file in East Orange. The letter was signed for by "R," M.R.'s last name.[1] A Board level residency hearing took place on January 28, 2019. Investigator William Buteau was present at the Board hearing, and related that M.R. had advised that he lived in Elizabeth with his girlfriend L.P. M.R. produced a lease that listed himself and N.R. as occupants of the apartment. His driver's license, however, bore the East Orange address. When asked for his Elizabeth address at the Board hearing, M.R. initially offered the incorrect street number; he later corrected himself. After hearing Buteau's testimony, M.R. told me he made this error because the Board hearing was a frightening and unfamiliar situation, and he was stressed and confused. M.R. seemed similarly stressed and uncertain about the process when he appeared at the OAL.

[1] M.R.'s mother lives at that address and has the same last name.

Buteau testified that he conducted surveillance at the Board's request on January 29, 2019, and January 30, 2019. He observed a vehicle owned by L.R., N.R.'s mother, transport N.R. from Union to school in Elizabeth both mornings. Based on Buteau's findings, and on the information supplied at the hearing, the Board determined that M.R. resided in East Orange, and that N.R. resided with her mother in Union. On February 5, 2019, the Board wrote to M.R. and advised that the Board had determined that he did not reside in Elizabeth, and that N.R. was not eligible to attend the public schools. Importantly, I **FIND** that the sole basis expressed in the Notice of Final Ineligibility for his daughter's removal was M.R.'s purported domicile outside of Elizabeth. The concern that N.R. resided with her mother went entirely unmentioned. The Notice advised M.R. that he had a right to appeal to the Commissioner. N.R. appealed the findings in the February 5, 2019, letter; N.R. remained in school in Elizabeth in the interim as required by law.

M.R. appeared at the OAL hearing with L.R. He explained that together he and L.R. had decided that their daughter should live with him in Elizabeth. N.R. was not having a successful experience in the Union schools, where she had attended high school previously. M.R. has lived in Elizabeth since October 2017; N.R. started to attend school in Elizabeth at that time. Until 2016 he had lived in Union, and then temporarily relocated to Berkley Heights before moving to Elizabeth.

M.R. produced a lease between L.P. and Elizabeth Gardens, LLC, for the period from February 1, 2018, until February 1, 2019. Although he is not a signatory to that lease, M.R.'s name and that of his daughter appear as additional occupants. A similar one-year lease was executed on February 1, 2019. M.R. indicated however, that he has lived at the address noted on the lease with L.P., who he described as a friend, since October 2017. He shares the rent for the apartment. While M.R. stated that he pays half of an $1,100 per month rental fee, the two leases reflected entirely different rental amounts: $1,270 per month in 2018, and somewhat curiously, only $1,025 per month in 2019.

M.R. also produced three 2019 bills for his Visa account, all with the same Elizabeth address as that on L.P.'s lease. He provided me with a copy of his driver's license and explained that when he appeared at the residency hearing before the Board, his license reflected the East Orange address where his mother resides. M.R. stated that he has not resided with his mother since 1989, but never changed the address on his license. In an effort to avoid any further confusion about where he lives, M.R. changed his license in June 2019 to reflect the Elizabeth address.

M.R. explained the living arrangements once N.R. came to live with him in Elizabeth. He was emphatic that she usually stayed with him during the week and spent only weekends with her mother in Union. He stated that N.R. spent Monday through Thursday nights at his home. Both M.R. and L.R. readily admitted that there were occasional times when N.R. would spend the night mid-week with her mother. But L.R. urged that this would happen no more than one or two times per month. During the summer, N.R. would spend more time with her mother in Union.

M.R. seemed genuinely confused by the Board's cross-petition for tuition. He asserted without equivocation that he lived in Elizabeth, and that his daughter spent most of her time with him there during the relevant time period. He urged that he brought her to Elizabeth because she had been bullied in Union, and the schools there seemed powerless to rectify the situation. M.R. was incredulous that there would be any reason why his daughter could not attend school in Elizabeth. He was firm that his only objective in having his daughter to live with him in Elizabeth was to obtain a proper education for his child, and that he was not trying to cheat anyone.

A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1998). M.R. showed an inability to recall some details; for example, the rental amount quoted at the hearing was not the sum reflected on the leases. This was reminiscent of his inability to correctly offer the

correct street address at the Board level hearing. But overall, I found his assertion that he lived in Elizabeth believable and I heard no persuasive evidence to the contrary. Board Investigator Buteau attempted to raise some question about whether N.R. spent most of her time in Elizabeth, but he offered nothing to support the Board's finding that M.R. himself did not reside in Elizabeth.[2] Indeed, since the Board had directed him to conduct surveillance, Buteau could have easily followed M.R. and offered proof that M.R. did not spend the night in Elizabeth. It is noteworthy that no such evidence was presented. I **FIND** that M.R. resides in Elizabeth at the address reflected on the lease he presented at the hearing. I likewise believed both M.R. and L.R. when they described the time spent by N.R. between their two homes. I **FIND** that N.R. shared her time between her parents' homes, but primarily spent four nights per week in Elizabeth during the school year.

The Board produced a budget worksheet that reflected the daily rate for high school students, and also shared a school calendar. Per Buteau's testimony, I **FIND** that the Board seeks tuition reimbursement for 125 school days at a tuition rate of $79.79 per day, for a total sum of $9,973.75.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school 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 principal establishment, and to which whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. ex rel minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001).

[2] Buteau's surveillance proof that on two nights in January 2019 N.R. spent school nights in Union with her mother was consistent with her parents' testimony that she did sometimes stay with her mother mid-week, albeit infrequently.

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner 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.

I **CONCLUDE** that M.R. is a domiciliary of Elizabeth. Since the determination of the Board was based on a finding that he did not reside in Elizabeth, I further **CONCLUDE** that M.R. has met his burden of demonstrating that N.R. was properly enrolled in the Elizabeth public schools and was eligible for a free education.

Due process required that the Board provide M.R. with any and all bases for its determination of ineligibility; as its determination that he did not reside in Elizabeth was the only basis expressed in its February 5, 2019, Notice of Final Ineligibility, my analysis can end here. But in the interest of thoroughness, I will note that the administrative code offers guidance where, as here, a child shares her time between divorced or separated parents who live in two different school districts. N.J.A.C. 6A:22-3.1(a)(1)(i) provides that

> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
> > i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.

This regulation evinces a regulatory recognition that in today's world custody arrangements are often changing and fluid and are often determined by parents

informally and without court intervention. The regulation in essence allows divorced parents to informally decide where their child will attend school. Since the evidence revealed that N.R. spent more nights than not in Elizabeth during the school year, N.J.A.C. 6A:22-3.1(a)(1)(i) makes it plain and I **CONCLUDE** that she was domiciled in Elizabeth from November 2018 until she graduated from high school in June 2019.

Having determined that N.R. was eligible for school attendance from November 30, 2018, until the end of the school year in June 2019, I **CONCLUDE** that there is no basis for the award of tuition sought by the Board's counterclaim, and it should be dismissed.

ORDER

Based on the foregoing, together with the record as a whole, I **ORDER** that the Board's demand for tuition as set forth in its counterclaim be **DISMISSED**. Insofar as N.R. has graduated from high school, the relief sought by the petition, that is, continued free attendance in the Elizabeth public schools, is moot and likewise is **DISMISSED**.

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

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

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

August 12, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 12,2019

Date Mailed to Parties:

sej

APPENDIX

Witnesses

For Petitioner

M.R., pro se

L.R.

For Respondent

William Buteau, Investigator

Exhibits

For Petitioner

P-1 Lease

P-2 Driver's license

P-3 Visa Bill

P-4 Visa Bill

P-5 Visa Bill

P-6 Lease

For Respondent

R-1 Investigatory Report with attachments

R-2 Notice of Final Ineligibility

R-3 Tuition Rates

R-4 School calendar

245-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

September 19, 2019

Stephen R. Fogarty, Esq.
Fogarty & Hara
21-00 Route 208 South
Fair Lawn, New Jersey 07410

Howard A. Vex, Esq.
Vex-Law
Waterview Plaza
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Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962

Re: *Board of Education of the Delaware Valley Regional High School District, Hunterdon County v. Board of Education of the Hunterdon County Vocational School District, Hunterdon County and Board of Education of the North Hunterdon-Voorhees Regional High School District, Hunterdon County, Agency Docket No. 191-8/19*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondents' responses to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

LOR/JKH/BCM

c: County Superintendent
State Law Library

VIA E-MAIL ONLY

246-19

AGENCY DKT NO. 198-8/19

IN THE MATTER OF THE TENURE	:	
HEARING OF MONIQUE KIRKLAND,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	

For the Petitioner, Jonathan L. Williams, Esq.
No appearance by or on behalf of Respondent, Monique Kirkland

This matter was opened before the Commissioner of Education on August 9, 2019, through tenure charges of conduct unbecoming, chronic absenteeism, insubordination, neglect, and other just cause certified by Kevin R. West, Superintendent of Schools for the East Orange Board of Education, together with supporting evidence against respondent, Monique Kirkland, a tenured secretary in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address on August 9, 2019.

On August 12, 2019, the Office of Controversies and Disputes (C&D) directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. Having received no response to the first notice, on August 27, 2019, C&D sent a second and final notice to respondent – via both certified and regular mail – again directing her to file an answer to

the charges. To date, no reply to the tenure charges has been received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has been employed by the District as a tenured secretary at the East Orange Campus High School. On or about November 28, 2018, respondent requested an intermittent health leave of absence for a "seasonal" asthma condition. In January 2019 the Board approved a fifteen (15) day intermittent leave of absence effective from December 21, 2018 through June 30, 2019. However, respondent has been continuously absent since on or about January 8, 2019. Having exhausted her fifteen (15) days of intermittent leave as of January 28, 2019, and her accrued sick leave as of February 22, 2019, respondent has been on unpaid leave ever since. Respondent's health benefits were terminated effective April 1, 2019 for failure to make her required contributions. Further, although she was never approved for such, as of April 2, 2019, her twelve (12) weeks of statutorily protected extended leave of absence would have expired. At no point during this time has Ms. Kirkland responded to, acknowledged, or complied with the District's repeated requests for medical verification in accordance with the Board's verification of sick leave policy. Respondent has communicated that she is "out of state" despite being allegedly too unwell to come to work. She has not reported to her job since January 8, 2019.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of conduct unbecoming a school employee, chronic absenteeism, insubordination, and neglect of duty have been proven and overwhelmingly warrant the respondent's dismissal. Accordingly, summary

decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/19

Date of Mailing: 9/23/19

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

247-19

New Jersey Commissioner of Education

Final Decision

Debra Venedam,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner – a taxpayer in the respondent's school district – alleged that the Board violated its stated policy regarding the filling of Board vacancies when it failed to vote in public session on a vacancy in December 2018. The Board contended that its actions in filling the vacancy in question were at all times in compliance with its Bylaw #143 and *N.J.S.A.* 18A:12-15, and filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: the issue for determination here is whether the Board's motion to dismiss should be granted, or whether petitioner is entitled to an evidentiary hearing to show that the Board vacancy was improperly filled; petitioner failed to show that she standing to bring this matter, as she had no specific personal and concrete stake in the outcome of the Board vote; petitioner named individual Board members in her petition, but failed to name the Board as a whole as a party to this matter; petitioner did not allege any violations of Title 18A by the Board, nor did she demand any remedy or relief unter Title 18A; and the respondent Board appears to have fully complied with its Bylaw #143, which contains the Board's policy regarding the filling of vacancies. The ALJ concluded that the Board was in compliance with bylaw #143 and petitioner failed to show that there was any genuine issue of material fact herein. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon review, the Commissioner concurred with the ALJ that the Board complied with its policy regarding the filling of Board vacancies, and therefore the petition must be dismissed. However, the Commissioner disagreed with the remaining findings of the ALJ, specifically on the issues of standing, the naming of indispensable parties to the case, and jurisdiction, as the petitioner did allege a violation of New Jersey school laws. Accordingly, the Initial Decision of the OAL was adopted as modified herein, and the petition was dismissed.

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

September 19, 2019

247-19

OAL Dkt. No. EDU 06455-19
Agency Dkt. No. 58-3/19

New Jersey Commissioner of Education

Final Decision

Debra Venedam,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioner – a taxpayer in respondent's district – alleges that the Board violated its stated policy regarding the filling of Board vacancies when it failed to vote in public session on a vacancy in December 2018. Regarding board vacancies, the Board's "District Policy #143: Board Member Election and Appointment," states: "In considering candidates who have expressed an interest in the vacancy, the Board of Education will interview interested candidates in public. Deliberation may occur in executive session, but the board must vote to appoint a candidate to a vacancy in public session so that the public can see the decision making process." In this case, the Board interviewed five candidates for the vacant position in public session on December 18, 2018. The Board then deliberated on the candidates' qualifications in an executive session, during which the Board determined that none of the five candidates were qualified to fill the vacancy. Accordingly, no vote to fill the vacant seat

occurred during the public session that followed the executive meeting; rather, a motion was made, seconded, and unanimously approved to re-advertise the vacancy. Petitioner contends that the executive session deliberations were in fact a Board vote on the vacancy, which should have occurred in a public session pursuant to Policy #143.

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the Board complied with its policy because it interviewed interested candidates in public and deliberated in executive session, as permitted in the bylaws. The Board did not vote on candidates in executive session, but rather decided not to vote on any of the five candidates, as none of them were qualified for the position. Thereafter, the Board advertised the position again, conducted interviews of additional candidates at the next Board meeting – in January 2019 – and voted on the resulting nominee in a public session as required by the relevant Board policy. As the ALJ stated, "The plain meaning of bylaw #0143 was that, if a Board chose to nominate a candidate, the final vote on the candidate was to take place in public session." (Initial Decision at 6) Since the Board fully complied with its policy regarding the filling of Board vacancies, the Commissioner agrees that the within petition must be dismissed.

The Commissioner disagrees, however, with the remaining findings of the ALJ – specifically, on the issues of standing, the naming of indispensable parties to the case, and petitioner's alleged failure to demand any remedy or relief under New Jersey's school laws. Petitioner does in fact have standing as a taxpayer to challenge the application of a school policy, given New Jersey's "venerable liberal application of standing criteria, . . . particularly in taxpayer suits and the like[.]" *Ridgewood Education Association, et al. v. Ridgewood Board of*

Education, 284 *N.J. Super.* 427, 431 (App. Div. 1995) (internal citations omitted).[1] Additionally, petitioner did not fail to name an indispensable party. Pursuant to *N.J.A.C.* 6A:3-1.16, the Department of Education has traditionally provided leniency, where appropriate, when considering the pleadings of *pro se* litigants. Accordingly, when the within petition named each member of the Board individually, rather than the Board as a whole, the Office of Controversies and Disputes adjusted the filing to indicate that the petition was against the Board, as this was petitioner's clear intent. The petition was transmitted to the OAL with the corrected caption, indicating that the respondent was the Marlboro Township Board of Education. Finally, the Commissioner does have jurisdiction over this matter as the petition alleged a violation of Board policy, which clearly falls under the school laws. *N.J.S.A.* 18A:6-9.

Accordingly, the Initial Decision of the OAL is adopted – as modified herein – as the final decision in this matter. The petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/19/19
Date of Mailing: 9/23/19

[1] The ALJ cited the State Board's decision in *Ridgewood*, 94 *N.J.A.R.* 2d (EDU) 137 (1993), for the proposition that a taxpayer does not have standing absent a public and private interest that is detrimentally impacted. However, the State Board's decision was subsequently reversed by the Appellate Division.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION TO DISMISS IN LIEU OF ANSWER

OAL DKT. NO. EDU 6455-19
AGENCY DKT. NO. 58-3/19

DEBRA VENEDAM,

Petitioner,

v.

MARLBORO TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY[1]**,**

Respondent.

Debra Venedam, petitioner, pro se

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: June 17, 2019 Decided: July 1, 2019

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

---

[1] This matter was transmitted to the Office of Administrative Law (OAL) with the respondent name listed as the "Marlboro Township Board of Education," but petitioner filed this matter listing the respondents as individual members of the Marlboro Board of Education and Board employees: Robyn Wolf; Dr. Randy Heller; Stephen Shifrinson, Dara Enny, Ellen Xu, Susan Shrem; Vlad Goldfarb; Dr. Eric Hibbs; Cindy S. Barr-Rague; and Joseph Roselle. Petitioner stated that the controversy was between her and the listed individuals.

STATEMENT OF THE CASE

Petitioner has alleged that respondent, the Marlboro Township (Monmouth County) Board of Education (the Board), failed to fill a Board vacancy in accordance with Board bylaw #0134, and has demanded audio recordings and transcriptions of executive session minutes and written explanations from all respondents as to their purported actions. Respondent denied said allegation and has filed a motion to dismiss in lieu of an answer.

PROCEDURAL HISTORY

On March 12, 2019, petitioner filed a complaint with the Commissioner of Education, New Jersey Department of Education (DOE), alleging that the Board violated its policy by failing to take a vote in public session when attempting to fill a vacancy on the Board. Respondent filed a motion to dismiss in lieu of an answer with an accompanying brief on April 26, 2019. Petitioner did not file an answer or responsive brief. The DOE Bureau of Controversies and Disputes transmitted petitioner's claim to the Office of Administrative Law (OAL), where it was filed on May 13, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A.52:14F-1 to -13. A telephone prehearing call took place on June 17, 2019, and the record closed on that date.

FACTUAL DISCUSSION

Petitioner did not file an answer to respondent's motion to dismiss in lieu of an answer, nor did she file a brief, statement of facts or sworn affidavits in response to respondent's motion, nor did she file any documentation disputing the preliminary statement or statement of facts and procedural history provided in respondent's motion to dismiss in lieu of an answer and brief. The parties had not stipulated to any joint statement of facts.[2] Based upon the parties' submissions, and for purposes of deciding the motion to dismiss in lieu of an answer, I **FIND** the following:

[2] A copy of petitioner's "Petition" of appeal to the "Commissioner of Education of New Jersey" dated March 12, 2019, was provided to this court. It contained a narrative that purported to be a factual summary of this matter. This narrative was taken into consideration in setting out the facts of this matter.

1. A vacancy on the Marlboro Township Board of Education became effective on November 20, 2018. Board bylaw #0143, regarding board vacancies, stated, "In considering candidates who have expressed an interest in the vacancy, the Board of Education will interview interested candidates in public. Deliberation may occur in executive session, but the board must vote to appoint a candidate to a vacancy in public session so the public can see the decision making process." (Petition, at 1.) The vacancy must be filled within sixty-five days of the vacancy. (Respondent Brief, at 12.)

2. Five candidates were invited by the Board for interviews at the Board meeting of December 18, 2018. The candidates were interviewed in public session, and their qualifications were then discussed in closed executive session. The Board members determined that none of the five candidates were qualified to fill the vacancy. The Board returned to open public session, and Board president, Robyn Wolfe, announced that the Board could not reach a consensus decision to appoint a new member. Mrs. Wolf made a motion to re-advertise the vacancy, which was seconded and approved unanimously by the Board. (Petition, at 2.)

3. On December 19, 2018, Mrs. Wolfe sent out a district-wide email explaining bylaw #0143 and stating that since it was clear from the Board's executive session discussion that no candidate had the support of the majority of the remaining Board members, no motion to nominate had been made by any member, resulting in the Board unanimously deciding to re-advertise for the vacancy. Mrs. Wolfe announced in her email that the next round of interviews would take place in January (2019). The vacancy was filled at the Board's January 22, 2019 meeting. (Petition, at 3.).

LEGAL DISCUSSION AND CONCLUSION

The issue is whether the respondent Board's motion to dismiss should be granted, or whether petitioner is entitled to an evidentiary hearing to show that the Board vacancy was filled improperly.

A summary decision may be granted when the papers and discovery that have been filed show that there was no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). "An adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. See Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). The non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962).

Respondent asserted that petitioner lacked standing to file the underlying petition, that petitioner failed to state a claim upon which relief could be granted, and that the Board of Education was an indispensable party whom petitioner failed to name as a respondent. Respondent also argued that the Board had complied with the requirements of bylaw #0143 and that, therefore, there were no genuine issues as to any material facts which would require an evidentiary hearing.

Respondent was correct in stating that a party filing a petition must have a specific, personal, and concrete stake in the outcome in order to receive effective legal and judicial redress. Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107-08 (1971). A lack of standing precludes a court from entertaining any of the substantive issues presented by a petitioner for determination. Watkins v. Resorts Int'l Hotel and Casino, 124 N.J. 398, 424 (1991). It is not sufficient for a petitioner to claim they had standing based on being a taxpayer, unless they made a showing that they had both a public and private interest which was detrimentally impacted. Ridgewood Education Association, et.al. v. Ridgewood Board of Education, 94 N.J.A.R. 2d (EDU) 137 (1993).

Petitioner did not offer any information indicating that she had a specific, personal and concrete stake in the outcome of the Board vote to fill a vacancy, and made no showing that she suffered any detrimental impact, either personal or public.[3] Accordingly, I **FIND** that petitioner lacked standing to file the within petition.

A petitioner is obligated to name as a party "any person or entity indispensable to the hearing of a contested case. Failure to name an indispensable party may be grounds for dismissal of the petition pursuant to N.J.A.C. 6A: 3–1.10." N.J.A.C. 6A:3-1.3(b). In the within matter, petitioner had asserted irregularities by the Marlboro Township Board of Education in adhering to one of its own rules. Any vote taken would have constituted an action taken by the Board itself, not individual Board members. While petitioner named individual Board members in her petition, she failed to name the Marlboro Township Board of Education as a party.

Accordingly, I **FIND** that the Marlboro Township Board of Education was an indispensable party to the within action and **FIND** that petitioner failed to name the Marlboro Township Board of Education as a party to this litigation.

Respondent argued that the within petition should be dismissed for failure to state a claim, in that petitioner had alleged a violation of a Marlboro Township Board of Education policy but had not asserted any violation of school laws under Title 18A of the New Jersey statutes. Respondent correctly cited to N.J.S.A. 18A:6-9, which states that the Commissioner of Education is empowered to adjudicate "all controversies and disputes arising under the school laws." The Commissioner of Education only has jurisdiction over disputes "primarily" and "directly" arising under the school laws set out in Title 18A. See Board of Education of Hamilton v. Fraleigh, 93 N.J.A.R. 2d (EDU) 538; Fair Lawn Board of Educ. v. Mayor of Fair Lawn, 143 N.J.Super. 259, 266 (Law Div. 1976), aff'd 153 N.J.Super. 480 (App. Div. 1977).

Petitioner had not alleged any violations of Title 18A by respondent. Petitioner did not demand any remedy or relief under Title 18A. Respondent had suggested that

[3] Additionally, petitioner failed to assert that there was any harm suffered by the public or students within the school district.

the relief sought by petitioner would arise from the New Jersey Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6, et. seq. Violations of OPMA would properly be filed in Superior Court, not before the Commissioner of Education. However, whether petitioner's demand for relief would be resolved under OPMA was irrelevant because petitioner failed to assert violations under Title 18A. While N.J.S.A. 18A:12-15 addresses the timelines to be followed when filling a Board of Education vacancy, that statute does not address how a board must consider a candidate's qualifications, or whether consideration of the candidate's qualifications is permitted during executive session or whether the vote must be taken in open public session. Regardless, while petitioner asserted that the Commissioner of Education may hear and determine controversies under school law, specifically citing N.J.S.A. 18A:6-9, she failed to plead that respondent committed a violation of any statute under Title 18A.

Accordingly, I **FIND** that petitioner failed to state a claim upon which relief could be granted.

Finally, respondent appeared to have fully complied with its bylaw #0143. The Board interviewed interested candidates for the vacancy in public, as required by bylaw #0143. The Board conducted its deliberations over the five candidates in an executive session, as permitted by bylaw #0143. The Board ultimately filled its vacancy at its meeting of January 22, 2019, within the sixty-five-day time period required by bylaw #0143.

Bylaw #0143 did not contain a requirement that the Board must nominate and vote on a candidate upon completion of interviews. Such an interpretation would force boards of education to conduct public votes on candidates that might not have met the requirements of the position. The plain meaning of bylaw #0134 was that, if a Board chose to nominate a candidate, the final vote on the candidate was to take place in public session.

Further, typical board of education bylaws, Robert's Rules of Order, and procedures from time immemorial dictate that a motion must first be made and seconded before a vote could take place. If a board was dissatisfied with candidates for

a position, there was nothing in law or the respondent's bylaws that obligated any board member to have to make a motion to take a vote on unsatisfactory candidates.

In the within matter, no board members opted to make a motion to appoint a candidate on December 18, 2018. Without such a motion, no vote in public session could have taken place. However, a motion was made when the Board returned to public session on December 18, 2018, when Board president Wolfe made a motion to re-advertise the vacancy and interview additional candidates. That motion was made, seconded and approved unanimously, which then became the official Board action in this matter. Petitioner had not raised any issues with regard to the motion and vote which ultimately took place on January 22, 2019, in which the vacancy was finally filled.

Accordingly, I **FIND** that the Board's actions were in compliance with bylaw #0143.

Therefore, I **CONCLUDE** that because petitioner lacked standing to file the within petition, failed to name an indispensable party, and failed to state a claim upon which relief could be granted, this matter is ripe for summary decision. I **CONCLUDE** that because respondent was in compliance with bylaw #0143 and because petitioner failed to show that there was any genuine issue as to a material fact, respondent is entitled to prevail as a matter of law.

ORDER

I hereby **ORDER** that respondent Board's motion to dismiss in lieu of an answer is **GRANTED**. I further **ORDER** that 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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

July 1, 2019
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 7/1/19

Date Mailed to Parties: 7/1/19

JNR/dw

APPENDIX

EXHIBITS

For petitioner:

Petition to the "Commissioner of Education of New Jersey," dated March 12, 2019

For respondent:

Motion and brief, dated April 26, 2019

250-19

Agency Dkt. No. 217-8/19

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Shakiela Felder, School District of the City of Newark, Essex County.

For the Petitioner, Bernard Mercado, Esq.

No appearance by or on behalf of Respondent, Shakiela Felder

This matter was opened before the Commissioner of Education on August 26, 2019, through tenure charges of conduct unbecoming and other just cause certified by Roger Leon, Superintendent of the Newark Public School District ("District"), together with supporting evidence against respondent, Shakiela Felder, a tenured teaching staff member in the District's employ. The District provided respondent with written notice of such certification at the respondent's last known address, via certified mail, on August 23, 2019.

On August 27, 2019, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that the respondent was employed by the District as a tenured teacher when she was approved for an unpaid personal leave of absence from October 26, 2015 through June 30, 2016. Respondent subsequently requested an extension of her leave of absence from September 1, 2016 through September 1, 2017, which was also approved by the District. Respondent failed to return to duty in September 2017 and remained on unapproved, unpaid absence for the entire 2017-2018 and 2018-2019 school years. Respondent has not provided any answer to multiple correspondences from the District, continues to remain AWOL, and has not provided any explanation for her AWOL status. Respondent has effectively abandoned her position. Ms. Felder's actions constitute conduct unbecoming of a tenured teacher and have disrupted the delivery of instruction to students, as well as the normal operations of the school to which she was assigned.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of conduct unbecoming a teaching staff member and other just cause have been proven and overwhelmingly warrant the respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/19
Date of Mailing: 9/23/19

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

OAL Dkt. No. EDU 4681-15
Agency Dkt. Nos. 31-2/15

New Jersey Commissioner of Education

Final Decision

S.R. and A.R., on behalf of minor child, R.R.; T.C., on behalf of minor child, J.C.; and R.E., on behalf of minor child, S.E.,

Petitioners,

v.

Board of Education of the Central Regional School District, Ocean County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/19
Date of Mailing: 9/26/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION APPROVING SETTLEMENT
OAL DKT. NO. EDU 04681-15
AGENCY DKT. NO. 31-2/15

S.R. AND A.R., ON BEHALF OF MINOR CHILD, R.R.; T.C. ON BEHALF OF MINOR CHILD, J.C.; AND R.E., ON BEHALF OF MINOR CHILD, S.E.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,
Respondent.

Jerry L. Tanenbaum, Esq., for petitioners (Mattleman, Weinroth, and Miller, P.C., attorneys)

Mark G. Toscano, Esq., for respondent (Comengo Law Group, attorneys)

Record Closed: August 19, 2019 Decided: August 20, 2019

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

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

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

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

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

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

8/20/19
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 8-21-19

Date Mailed to Parties: 8-21-19

Attachment

COMEGNO

MARK G. TOSCANO, ESQUIRE
MEMBER NJ AND PA BARS

521 PLEASANT VALLEY AVENUE
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August 19, 2019

FACSIMILE AND EMAIL

Honorable Patricia M. Kerins, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville (Hamilton Twp.), NJ 08619

Re: S.R. and A.R. o/b/o minor child R.R.; et al. v. Central Regional School District BOE
Agency Ref No.: 31-2/15
OAL Dkt. NO.: EDU-04681-15

Dear Judge Kerins:

As Your Honor is aware, our firm represents the Central Regional School District Board of Education ("Board") in the above-captioned matter.

In follow-up to our recent communications with Your Honor, enclosed please find a fully executed copy of the Settlement Agreement and General Release, a copy of the resolution from the Board's meeting on August 15, 2019 approving the Settlement Agreement and General Release and a fully signed Stipulation of Dismissal.

This matter is concluded, and the Petitioners' Petition of Appeal has now been dismissed pursuant to the enclosed Stipulation of Dismissal, we would respectfully submit that the Telephone Status Conference presently scheduled for September 10, 2019 is no longer necessary and request that same be adjourned.

Thank you for Your Honor's consideration of this request.

Respectfully Submitted,

MARK G. TOSCANO, ESQUIRE

MGT/
Enclosures
c: Jerry L. Tanenbaum, Esquire (email)
Triantafillos Parlapanides, Ed.D., Superintendent (email)
Kevin O'Shea, Business Administrator/Board Secretary (email)

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
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(856) 234-4114
(856) 234-4262 Fax
Attorneys for the Central Regional School District Board of Education

BY: MARK G. TOSCANO, ESQUIRE

S.R and A.R. o/b/o R.R.,
T.C. o/b/o J.C.,
R.E. o/b/o S.E.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Reference: 31-2/15

OAL Docket No.: EDU – 04681 – 2015 S

SETTLEMENT AGREMEENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Agreement") is made effective as of the last date on which it is executed by either party to this Agreement ("Effective Date"), and is by and between, Petitioners, S.R and A.R. o/b/o R.R. and R.R., T.C. o/b/o J.C. and J.C., and R.E. o/b/o S.E. and S.E (collectively the "Petitioners"), and the Central Regional School District Board of Education ("Board"). Petitioners and the Board are each singularly referred to herein as "Party", and collectively referred to herein as "Parties."

WHEREAS, the Board operates the Central Regional High School; and

WHEREAS, R.R., J.C. and S.E. were students in the Central Regional School District that attended Central Regional High School; and

WHEREAS, Petitioners previously initiated a Petition of Appeal against the Board, in an administrative case captioned "S.R and A.R. o/b/o R.R., T.C. o/b/o J.C., R.E. o/b/o S.E. v. Board of Education of the Central Regional School District ("Petition"), in response to the Board's previous determination that there was insufficient evidence to find that an act of harassment, intimidation, and bullying ("HIB") was committed against R.R., J.C. and S.E.; and

WHEREAS, the Parties, following arms-length negotiations, amicably settled all disagreements and controversies between them, including all claims asserted in the Petition, and any and all related claims which could have been asserted, whether they are presently known or unknown; and

WHEREAS, Each Party vigorously and wholly denies the positions of the other and enters into this Agreement, without any admission of liability or retraction of allegations, for reasons including to avoid the expense, time, and inconvenience of future litigation; and

WHEREAS, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties enter into this Agreement to outline their agreement, release claims, and express the full and complete terms of same;

NOW, THEREFORE, THE PARTIES HEREBY AGREE THAT:

1. In exchange for reimbursement by the Board of attorney's fees and costs incurred in the above matter in the amount of TWENTY THOUSAND DOLLARS ($20,000.00) within thirty (30) days of the Effective Date, Petitioners agree to withdraw and release the Board from all claims arising from the alleged incidents of HIB that were contained in the respective HIB Incidents reports filed by Petitioners with the Board and that were outlined in the Petition, effective upon execution of this Agreement. Specifically:

    a. Petitioners, for themselves and their successors and assigns, hereby fully, finally, and irrevocably release, acquit, and forever discharge and holds harmless the Board and its successors, agents, assigns, trustees, employees, directors, officers, and/or attorneys of, from, and against any and all liability, claims, counterclaims, third party actions, causes of action, or suits at law, or in equity, indemnity of whatever nature, demands, damages, costs, attorney fees, and/or expenses, of any kind whatsoever, whether known or unknown, suspected or unsuspected, asserted or unasserted, and/or discovered or yet to be discovered, that arise from, or that relate in any way to the incident(s) of alleged incidents of HIB that were contained in the respective HIB Incidents reports filed by Petitioners with the Board and that were outlined in the Petition, or that could have been raised or brought in the Petition, or which otherwise could have been brought for any reason whatsoever, or are based directly or indirectly on any action or omission occurring on or prior to the Effective Date of Releases, except as otherwise set forth in this Agreement.

    b. It is further understood and agreed that as of the Effective Date, the purpose and intent of the foregoing Agreement is to ensure that neither the Board nor Petitioners will incur liability of any kind to each other, or any other person, or entity, arising out of, or in connection with, the transactions, incidences, and/or occurrences associated with the alleged incidents of HIB that were contained in the respective HIB Incidents reports filed by Petitioners with the Board and that

were outlined in the Petition.

c. Without limiting the generality of the foregoing, Petitioners specifically release, relinquish, waive and forever give up any and all claims that they may have, or ever had, against the Board, associated with the alleged incidents of HIB that were contained in the respective HIB Incidents reports filed by Petitioners with the Board and that were outlined in the Petition and the subsequent investigation and findings of the investigation for same under: (1) the Constitution of the United States; (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; (3) the Civil Rights Act of 1866 and 1871, 42 U.S.C. §1981, and 42 U.S.C. §1983 et seq.; (4) the Americans with Disabilities Act, 42 U.S.C. §12101 et seq.; (5) the New Jersey Anti-Bullying Bill of Rights, N.J.S.A. 18A:37-13.1 et seq.; (6) the Rehabilitation Act of 1973, 29 U.S.C. §791 et seq., (7) the Constitution of the State of New Jersey; (8) the New Jersey Law Against Discrimination, N.J.S.A. §10:5-1 et seq.; (9) the State of New Jersey's Education Law, N.J.S.A. §18A:1-1 et seq.; (10) Title 6A of the New Jersey Administrative Code; (11) any and all actions based on violations of Board Policies or Regulations ; and (12) any Federal or State common law claims, doctrines or precedents, including alleged claims of negligence, negligent supervision and/or tortious conduct.

d. Petitioners agree to indemnify and hold harmless the Board, its current and former members, officers, directors, agents, servants, employees, successors, attorneys, assigns and affiliates, of and from any and all claims, liabilities, demands, causes of action, costs, expenses, attorneys' fees, damages, indemnities, and obligations of every kind and nature, in law, equity, or otherwise, known and unknown, suspected or unsuspected, disclosed or undisclosed, initiated by R.R., J.C. and S.E. upon reaching the age of majority, arising out of or in any way related to agreements, events, acts, omissions or conduct which relate in any way or are premised upon this Agreement. In the event that the Board shall be required to defend any such action(s) initiated by R.R., J.C. and/or S.E., upon R.R., J.C. and/or S.E. reaching the age of majority, and for a period of three (3) years thereafter, the Board shall be permitted to hire counsel of its own choice to defend against same, at the sole cost of Petitioners.

2. The Parties warrant and represent that they have not, in any way, assigned or transferred by agreement, operation of law or otherwise, any claims against any the other Party.

3. This Agreement shall be binding upon the Parties and their respective affiliates, heirs, executors, administrators, successors, and assigns, and shall inure to the benefit of each Party and its respective successors and assigns.

4. This Agreement is dispositive of all present issues in dispute between the Parties hereto and is intended to constitute a final resolution of all disputes between the Parties, from the beginning of time through the execution of this Agreement by the Plaintiffs, other than any action to enforce the terms of this Agreement.

5. The Parties agree and promise that, to the extent permitted by law, they will not disclose, in any manner whatsoever, any information regarding the existence or terms of this Agreement to any person or organization, public or private, except that the Parties may disclose said information to their attorneys, accountants, other professionals, and the appropriate taxing authorities, and such information may also be disclosed to members of the Board, the Superintendent, the Business Administrator, and the District/Board Attorney.

   Notwithstanding any other provision of this Agreement, the Parties agree that if any Party is required to disclose documents and/or other information concerning the terms of this Agreement pursuant to subpoena, Court Order or any applicable State and Federal law, including, but not limited to the Open Public Records Act, the Party receiving the request under subpoena, Court Order or any applicable State and Federal law, shall have the right to disclose such information without violating any of the terms and/or provisions of this Agreement. Upon all other inquiries, the Parties shall only respond that the matter has been resolved to the satisfaction of those concerned.

6. The Parties agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving either of the Parties, except to the extent necessary to enforce the terms of this Agreement.

7. As this Agreement fully and completely resolves the Petition which remains pending, the Petition shall be withdrawn, with prejudice, by Petitioners, immediately upon execution of this Agreement. The Parties both authorize their respective attorneys to sign and file the Stipulation of Dismissal with Prejudice, attached hereto. Petitioners agree to have their counsel file the Stipulation of Dismissal with Prejudice, attached hereto, and provide to the Board's counsel a copy of same, stamped "filed" by the administrative tribunal. Petitioners further agree to take any and all other necessary action, if any, to withdraw the Petition, with prejudice, immediately upon execution of this Agreement.

8. Neither Party shall be considered a "prevailing party" for any purpose, and both Parties shall be responsible for their own counsel fees. The Parties mutually waive any claims for attorneys' or professionals' fees, with the understanding that each Party shall be responsible for their own fees and costs.

9. In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

10. This Agreement is contingent upon Board approval and ratification.

11. The Parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey. All disputes arising under or relating to this Agreement or the breach of this Agreement shall be brought exclusively in the State courts of the State of New Jersey.

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

IN WITNESS WHEREOF, each of the Parties hereto, intending to be legally bound hereby, has executed this Agreement under seal on the days and years indicated below.

FOR THE CENTRAL REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION:

By _____ Dated 8/15/19
Louis Tuminaro, Board President

By _____ Dated: _____
Kevin O'Shea, Business Administrator

FOR PETITIONERS, S.R and A.R. o/b/o R.R. and R.R.

By: _____ Dated: 8/9/19
Sue Rice

By: _____ Dated: 8/9/19
Al Rice

By: _____ Dated: 8/9/19
Rachel Rice

FOR PETITIONERS, T.C. o/b/o J.C. and J.C.,

By: _____ Dated: 8/6/19
Tara Cunningham

By: _____ Dated: 8/6/19
Jade Cunningham

For Petitioners R.E. o/b/o S.E. and S.E,

By _____ Dated 8/8/19
Robyn Ann Edler

By _____ Dated: 8/8/19
Shannan Edler

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
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Attorneys for the Central Regional School District Board of Education

BY: MARK G. TOSCANO, ESQUIRE

S.R and A.R. o/b/o R.R., T.C. o/b/o J.C., R.E. o/b/o S.E., Petitioners, v. BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Reference: 31-2/15 OAL Docket No.: EDU – 04681 – 2015 S **STIPLUATION OF DISMISSAL WITH PREJUDICE**

It is hereby STIPULATED and AGREED between counsel for Petitioners, S.R and A.R. o/b/o R.R. and R.R., T.C. o/b/o J.C. and J.C., and R.E. o/b/o S.E. and S.E ("Petitioners"), and counsel for Respondent, the Central Regional School District Board of Education ("Respondent"), on account of the parties' Settlement Agreement and General Release, that Petitioners' Petition of Appeal, filed against Respondent, be dismissed in its entirety, with prejudice, and without costs to either party.

MATTLEMAN, WEINROTH & MILLER, P.C.
Counsel for Petitioners

By: _____
JERRY TANENBAUM, ESQ.

Dated: 8/12/19

COMEGNO LAW GROUP, P.C.
Counsel for Respondent

By: _____
MARK G. TOSCANO, ESQ.

Dated: 8-16-2019

Central Regional School District

509 FOREST HILLS PARKWAY
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www.centralreg.k12.nj.us

TRIANTAFILLOS PARLAPANIDES, Ed.D.
Superintendent of Schools

KEVIN O'SHEA, CPA
School Business Administrator/ Board Secretary

At their meeting on August 15, 2019, Mr. George Dohn, seconded by Mrs. Susan Cowdrick, moved that the Board authorize the settlement agreement as per Docket # EDU-04681-2015S.

Motion approved on a roll call vote as follows: 8 members present; 1 member absent – 7 members voted in favor; 1 member abstained

CERTIFICATION

I, Kevin O'Shea, Business Administrator/Board Secretary, certify that this is a record of the action that took place at the August 15, 2019 Board Meeting.

Kevin O'Shea
Business Administrator/Board Secretary

253-19

OAL Dkt. No. EDU 07550-19
Agency Dkt. No. 68-4/19

New Jersey Commissioner of Education

Final Decision

J.G., on behalf of minor children, J.G. and J.G.,

Petitioner,

v.

Board of Education of the City of Orange, Essex County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled August 7, 2019 OAL hearing, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/19
Date of Mailing: 9/26/19

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

OAL Dkt. No. EDU 15888-18
Agency Dkt. No. 258-10/18

New Jersey Commissioner of Education

Final Decision

Chris Brzozowski,

Petitioner,

v.

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

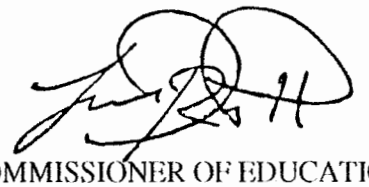
Respondent.

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

Several terms of the agreement precede the consideration of the Agreement by the Commissioner of Education, including that Petitioner's employment will be subject to the terms of the Collective Bargaining Agreement "from the date this Agreement is executed" and that Petitioner will be recognized as a tenured Assistant Administrative Secretary at Step 12 "[f]rom this point forward." The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

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

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 9/25/19
Date of Mailing: 9/26/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 15888-18

AGENCY DKT. NO. 258-10/18

CHRIS BRZOZOWSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,
Respondent.

Rita Barone, Esquire, for petitioner (Purcell, Mulcahy & Flanagan, attorneys)

Eric L. Harrison, Esquire, for respondent (Methfessel & Werbel, attorneys)

Record Closed: September 10, 2019 Decided: September 11, 2019

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 1, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

September 11, 2019
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 9/16/2019

Date Mailed to Parties:

mph

Eric L. Harrison - ID #033381993
METHFESSEL & WERBEL, ESQS.
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Attorneys for Highland Park Board of Education
Our File No. 86834 ELH

RECEIVED
2019 SEP -4 P 4:07
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CHRISTOPHER BRZOZOWSKI Petitioner, V. HIGHLAND PARK BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION AGENCY REF NO.: 258-10/18 OAL DOCKET NO. EDU 15888-2018 S **SETTLEMENT AGREEMENT**

THIS AGREEMENT made this 19th day of August, 2019 by and between the Highland Park Board of Education (the "Board"), and Christopher Brzozowski ("Petitioner"), who is currently employed by the Highland Park Board of Education:

WHEREAS, Petitioner was employed by the Board commencing on July 1, 2004 in a secretarial position subject to tenure rights under N.J.S.A. 18A:17-2; and

WHEREAS, Petitioner was previously employed by the Board in a confidential secretarial position; and

WHEREAS, Petitioner's confidential position was eliminated and he was placed on leave with full pay and benefits in May of 2018; and

WHEREAS, on July 16, 2018, Petitioner was appointed to a 10-month paraprofessional position; and

WHEREAS, on October 15, 2018, Petitioner filed a Petition of Appeal asserting certain claims against the Board in the Office of Controversies and Disputes, New Jersey Department of Education, with the OAL Docket Number EDU 15888-2018 S (hereinafter referred to as "the Petition"); and

WHEREAS, the parties have reached an agreement to fully and finally settle any and all of Petitioner's claims against the Board, including those not asserted in the Petition, arising out of Petitioner's employment by the Board, as well as all other actions and claims which Petitioner has, had, or otherwise may have against the Board from the beginning of time, through the date on which this Agreement is executed by Petitioner; and

WHEREAS, by entering into this agreement, the Board does not admit any liability whatsoever and specifically denies any and all allegations of wrongdoing; and

WHEREAS, the parties would like to reduce to writing their agreement regarding the terms of Petitioner's employment;

NOW, THEREFORE, the Board and Petitioner agree as follows:

1. The terms of this Agreement cover Petitioner's 2018-2019 and 2019-2020 contracts of employment.

2. The parties enter into this Agreement with the understanding that Petitioner's employment from the date this Agreement is executed will be subject to the terms of the applicable Collective Bargaining Agreement. The terms of this Agreement do not alter, amend, modify, supersede, cancel or terminate any of the terms of the Collective Bargaining Agreement.

3. From this point forward, the Board recognizes that Petitioner is a tenured Assistant Administrative Secretary who is currently at Step 12 on the contractual salary guide.

4. Pursuant to this position, Petitioner henceforth will work 12 months per year, subject to the terms and conditions of the applicable Collective Bargaining Agreement.

5. Commencing retroactively on September 1, 2018, the Board will provide Petitioner with an annual salary of $57,501 plus 3% longevity, totaling $59,226, subject to the terms of the Collective Bargaining Agreement.

6. The Board agrees to provide Petitioner with retroactive pay for the months of July and August 2018 by reimbursing him a total of $5,376.20, equal to the monetary value of the 32 days of vacation and personal time he accrued at the end of the 2017-2018 school year and two vacation days he has accrued at the end of the 2018-2019 school year.

7. Commencing retroactively on July 1, 2019, the Board will provide Petitioner with an annual salary of $58,665 plus 3% longevity,

totaling $60,425, subject to the terms of the Collective Bargaining Agreement.

8. The paycheck he receives on July 30, 2019 will reflect the salary he earned for the entire month of July 2019, including retroactive pay for the days he did not work during that month.

9. In light of the fact that his compensation for the months of July and August 2018 will include the monetary value of two vacation days he has accrued at the end of the 2018-2019 school year, he will have 20 vacation days and 3 personal days to use at the start of the 2019-2020 school year.

10. In exchange for the consideration and other promises set forth above, Petitioner agrees:

a. To adhere to the hours set by the principal of the building where he works, which are as follows: 7:15 a.m. to 3:15 p.m.;

b. To withdraw, with prejudice, the Petition before the Commissioner of Education, bearing OAL Docket Number EDU 15888-2018 S;

c. To knowingly and voluntarily release, waive, acquit, disclaim and forever discharge the Board, its partners, members, officers, employees, agents, servants and all other persons, who or which are or might be liable from any and all claims which the Petitioner has or might

have against them, their successors, heirs and executors from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies or any other proceedings with any administrative agency, or court or any other forum, under any federal, state or local laws or regulations, including, but not limited to, claims arising under the Americans with Disabilities Act, the National Labor Relations Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Workers' Compensation Act, New Jersey Wage and Hour laws, and/or any other federal, state or local employment, human rights, civil rights, wage-hour, pension or labor law, rule, statute, regulation, constitution or ordinance and/or public

policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, loss of consortium, or any action similar thereto against the Board, including any claim for attorneys' fees, that the Petitioner, her heirs, executors, administrators, successors, and assigns, now have, ever had, or may hereafter have, whether known or unknown, suspected or unsuspected, based upon any conduct arising out of the Petitioner's employment with the Board from the beginning of time, up to and including the date of execution of this Agreement. This Paragraph is not intended and shall not preclude the Petitioner from instituting proceedings seeking to enforce the terms of this Agreement.

d. To refrain from filing any proceeding, action, charge or complaint regarding the employment of the Petitioner

with the Board from the beginning of time up to and including the date of the execution of this Agreement. It is expressly understood and agreed, however, that Petitioner reserves the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

11. Each party shall be fully responsible for the payment of its own attorneys' fees and related costs in this matter through the date of each party's execution of this Agreement.

12. It is understood and agreed that this is a compromise settlement, reached collaboratively to avoid the expense and risk of litigation, and is not to be construed as either an admission that the Board violated Petitioner's tenure rights under N.J.S.A. 18A:17-2 or violated any provision of the New Jersey Law Against Discrimination or the New Jersey Conscientious Employee Protection Act.

13. This Agreement is not an admission by either party of any liability, wrongdoing, or the violation of any law, statute, or regulation, nor shall it be cited as precedent or used as evidence in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms.

14. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability and shall not be referred to in any subsequent

proceeding by any party other than to enforce the express terms of this Agreement. In the event that this Agreement is not fully executed and approved by all parties hereto, it shall become null and void and shall neither constitute an admission of any party, nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

15. The parties recognize that each has had the opportunity to consult with legal counsel and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

16. All parties understand and agree that the terms set forth in this Agreement, including, but not limited to the confidentiality and non-disparagement provisions stated herein shall survive the signing of this Agreement.

17. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

18. This Agreement contains the entire agreement between the parties hereto and is intended to resolve all disputes and issues between them as of the date of execution of this Agreement.

19. This Agreement fully supersedes any and all prior Agreement or understandings between the parties.

20. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioner are not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioner.

21. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

22. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

23. This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid.

24. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes this Agreement shall be deemed to have been drafted jointly

by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

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

WITNESS:

BY: _____

DATED: _____

BY: _____
BOARD PRESIDENT,
HIGHLAND PARK BOARD OF EDUCATION

DATED: 8/20/19

WITNESS:

BY: _____

DATED: 7/23/19

BY: _____
CHRISTOPHER BRZOZOWSKI

DATED: 8/15/19

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

THE FOLLOWING RESOLUTION WAS APPROVED AT THE REGULAR PUBLIC MEETING HELD ON AUGUST 19, 2019, IN THE HIGHLAND PARK SCHOOL DISTRICT:

Approval of Legal Settlement

I move that the Board of Education accept the recommendation of the superintendent to approve the legal settlement agreement with employee #4726.

Moved: Mark Krieger Seconded: Michelle McFadden-DiNicola Vote: 6-0
Absent: 3-Anne Gowen; Rob Magaziner; Rob Roslewicz.

Yes: Darcie Cimarusti, President; Ruth Beyer; Monique Coleman; Mark Krieger; Michelle McFadden-DiNicola and Christopher Woodward.

It is hereby certified that the foregoing is a true and correct copy of a resolution adopted by the Highland Park Board of Education at a meeting of the said Board on August 19, 2019.

Linda A. Hoefele
Business Administrator/Board Secretary

9/5/19
Date

RECEIVED
2019 SEP 10 P 1:13
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

OAL Dkt. No. EDU 07595-19
Agency Dkt. No. 72-4/19

New Jersey Commissioner of Education

Final Decision

S.N., on behalf of minor children, A.N. and A.N.,

Petitioner,

v.

Board of Education of the Township of Deptford, Gloucester County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled August 12, 2019 OAL hearing, has been reviewed. Petitioner did not file an explanation for his failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/19
Date of Mailing: 9/26/19

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

256-19

OAL Dkt. No. EDU 04813-19
Agency Dkt. No. 43-2/19

New Jersey Commissioner of Education

Final Decision

Kristen Martello,

Petitioner,

v.

Board of Education of the Borough of Berlin, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petitioner has voluntarily agreed to dismiss the petition of appeal. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/19
Date of Mailing: 9/26/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 04813-19
AGENCY DKT. NO. 43-2/19

KRISTEN MARTELLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,
Respondent.

Beth Lynn Finkelstein, Esq., for petitioner

William C. Morlock, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: September 9, 2019 Decided: September 10, 2019

BEFORE **KATHLEEN M. CALEMMO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner requested a hearing to challenge the respondent's decision not to renew her contract. Thereafter, the matter was transmitted to the Office of Administrative Law on April 8, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Prior to the hearing, the parties reached and executed a settlement agreement, thereby resolving this litigation. The parties request that this matter be dismissed with prejudice.

I have reviewed the Agreement to Settle and Dismiss Matter and I **FIND**:

1. The parties have voluntarily agreed to settle their dispute and dismiss the complaint as evidenced by their signatures or their representatives' signatures.

2. The Agreement to Settle and Dismiss Matter fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the Agreement to Settle and Dismiss the Complaint meets the requirements of N.J.A.C. 1:1-19.1 and that the dismissal should be approved. Accordingly, I approve the Agreement herein and **ORDER** that these proceedings be concluded.

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

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

September 10, 2019
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: 9/10/2019

Date Mailed to Parties:

KMC/tat

9/9/19

File No. 17100-80
Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Berlin Board of Education

DR. KRISTEN MARTELLO Petitioner, v. BERLIN BOARD OF EDUCATION, Respondents.	OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU-4813-19 Agency Ref. No.: 43-2/19 CIVIL ACTION **AGREEMENT TO SETTLE AND DISMISS MATTER**

It is hereby stipulated and agreed by and among Dr. Kristen Martello and Berlin Board of Education ("all parties"), that the above referenced litigation has been resolved, by separate confidential agreement, and that all parties request that the matter be dismissed with prejudice by issuance of a final Order.

PARKER McCAY, P.A.

WILLIAM C. MORLOK, ESQUIRE
Attorney for Berlin Board of Education

Dated: 9/6/19

N.J.A.S.A.

BETH L. FINKELSTEIN, ESQUIRE
Attorney for Dr. Kristen Martello

Dated: 9/4/2019

9/9/19

RESOLUTION OF THE BERLIN BOROUGH BOARD OF EDUCATION APPROVING SETTLEMENT AGREEMENT IN MARTELLO V. BERLIN BOROUGH BOARD OF EDUCATION

WHEREAS, Kristin Martello ("Martello") was a Superintendent, formerly employed by the Berlin Borough Board of Education ("Board"); and

WHEREAS, a Petition was filed by Martello, under docket numbers Office of Administrative Law ("OAL") Docket. No.: EDU 04813-2019S; Agency Ref. No.: 43-2/19, captioned Martello v. Berlin Borough Board of Education (the "Lawsuit"); and

WHEREAS, the Board and Marello have determined to amicably resolve the lawsuit, having entered into a Confidential Settlement Agreement and General Release, which is now before the Board, the terms of which are hereby incorporated by reference; and

WHEREAS, the Board wishes to avoid the undue expenditure of time, resources and costs associated with ongoing litigation, as well as the uncertainty of outcome attendant to all such proceedings, and thus desires to amicably resolve this matter with certainty and in the best interests of the public; and

WHEREAS, the Board has fully considered the terms of the Confidential Settlement Agreement and General Release and finds them to be acceptable in all respects;

NOW THEREFORE, BE IT RESOLVED that the Board hereby approves the Confidential Settlement Agreement and General Release referenced above and the resolution of the above litigation according to the terms and conditions of said Separation Agreement and General Release; and

BE IT FURTHER RESOLVED that the Board President and Board Secretary are hereby authorized and directed to execute the aforementioned Separation Agreement and General Release for the above-referenced matter.

AYES: 7

NAYS: 0

ABSTAIN: 0

CERTIFICATION

I hereby certify that the above is a true and correct copy of a resolution of the Berlin Borough Board of Education which was approved at its duly constituted meeting held on August 14, 2019.

Dated: 8/16/19

Cande Kristoff
Business Administrator/Board Secretary

PARKER McCAY

COUNSEL WHEN IT MATTERS.℠

9/9/19

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

P: 856.596.8900
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TELECOPY TRANSMITTAL COVER PAGE

Date: **2019-09-06 16:29:37 EDT**

Please deliver the following document(s) to: **Honorable Kathleen Calemmo, ALJ**

Transmittal from: **Christiana M. Himel**

Phone Number: **856-596-8900**

Message:

Christiana M. Himel
Legal Assistant
School Law

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258-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

October 1, 2019

Katherine A. Gilfillan, Esq.
Schenk Price Smith & King, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932

William P. Hannan, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New jersey 07102

Re: *Parsippany-Troy Hills Education Association v. Board of Education of the Parsippany-Troy Hills School District, Morris County, Agency Docket No. 220-8/19.*

Dear Counsel:

I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent's answer. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely.

Lamont O. Repollet, Ed.D.
Commissioner

LOR/JKH/JS

c: County Superintendent
State Law Library

VIA E-MAIL ONLY

New Jersey Commissioner of Education

Final Decision

Lisa Healy,

Petitioner,

v.

Board of Education of the Township of Hardyston, Sussex County,

Respondent.

Synopsis

Petitioner requested that the Hardyston Board of Education (Board) recognize her tenured status and place her at step five (5) on the salary guide. Petitioner had been employed by the Board as a teacher from September 1994 until April 1999, becoming tenured on or about September 1, 1998. Beginning in April 1999, petitioner was granted several leaves of absence for pregnancy, child-care, and medical reasons. She failed to return to work following the expiration of her child-care leave at the end of the 2000-2001 school year, having filed an application for Social Security Disability Insurance benefits in October 2000. Beginning in the 2015-2016 school year, petitioner became re-employed by the Board as a substitute teacher on an intermittent basis, and in February 2018, petitioner was re-employed as a full-time teacher. She filed the within petition on November 20, 2018. The respondent Board filed a motion to dismiss.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner was hired by the Board as a non-tenured teacher at Step 1 of the school district's salary guide on February 13, 2018, but petitioner did not file her appeal disputing the salary step and non-tenured status until December 14, 2018 – well beyond the ninety-day window for filing a petition of appeal; petitioner's contention that she never submitted a letter of resignation and therefore remained an active employee from 1999 until her return to full-time employment in 2015 is without merit, as is her argument that *N.J.S.A.* 18A:6-10 applies in this case. The ALJ concluded that the within appeal must be dismissed as untimely. Accordingly, the Board's motion for summary decision was granted.

Upon review, the Commissioner concurred with the ALJ that the petition of appeal was time-barred under Accordingly, in a decision dated July 22, 2019, the Commissioner adopted the Initial Decision as the final decision, and dismissed the petition. Subsequently, petitioner filed a motion to re-open the case based on counsel for petitioner's certification that his office did not receive the Initial Decision, and thus had no opportunity to file exceptions. Following the submission of petitioner's exceptions and the Board's reply thereto, the Commissioner comprehensively reviewed the new filings and the record. Finding petitioner's exceptions to be unpersuasive, the Commissioner again concurred with the ALJ that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition was dismissed.

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

September 26, 2019

OAL Dkt. No. EDU 208-19
Agency Dkt. No. 279-11/18

New Jersey Commissioner of Education

Final Decision

Lisa Healy,

Petitioner,

v.

Board of Education of the Township of Hardyston, Sussex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed by the petitioner, Lisa Healy, and the Hardyston Board of Education's reply thereto.[1] In this case, the petitioner is seeking to have the Board recognize her tenured status and place her on Step Five, rather than Step One, of the salary guide. The Administrative Law Judge (ALJ) granted summary decision in favor of the Board, finding that the petition of appeal was untimely filed under *N.J.A.C.* 6A:3-1.3(i). The ALJ also reached the merits of the case and determined that the petitioner resigned from her position as a tenured teacher in 1999 based on her own conduct and admissions, and that she was not an active tenured employee at the time of her recent re-hire by the District in February 2018.

In her exceptions, the petitioner contends that the ALJ erroneously granted summary decision in favor of the Board. With respect to the 90-day rule, the petitioner argues that

[1] After receipt of the Commissioner's decision dated July 22, 2019, the petitioner filed a motion to re-open this case based upon the fact that counsel for the petitioner certified that his office did not receive the Initial Decision and thus did not have the opportunity to file exceptions. By Order dated August 6, 2019, the Commissioner re-opened this matter to enable the petitioner to file exceptions to the Initial Decision.

the ALJ applied an improper trigger date for the limitations period. The petitioner maintains that she did not receive notice that she was placed on Step One of the salary guide until she received her first pay check in September of the 2018-2019 school year. The petition of appeal was filed on November 20, 2018, well within the requisite 90-day period. The Initial Decision is clearly erroneous as evidenced by the fact that the ALJ stated that the petitioner did not file her appeal until December 14, 2018, which was the date that the Board filed its answer. Further, while it is true that she was hired by the Board at Step One of the salary guide on February 13, 2018, petitioner contends that was hired in a substitute position. It was not until September of the 2018-2019 school year, when she began teaching on a permanent basis, that petitioner first learned that she was not being given credit for her prior years of teaching experience, and she timely filed her petition on November 20, 2018. Therefore, the petition of appeal should not be dismissed as untimely.

The petitioner also takes exception to the ALJ's determination that she resigned from the District in April 1999. Petitioner asserts that she never resigned from her employment with the District nor did the District ever file tenure charges against her, so she remained an employee throughout her leave and must be returned to the appropriate step on the salary guide. The petitioner argued that the case law relied upon by the Board in its submissions at the OAL was not analogous to the circumstances in the case at bar. The petitioner emphasizes that she never submitted a formal letter of resignation. The petitioner also reiterated the arguments advanced below contending that she had no choice but to select "resign" on her application to withdraw her pension funds because the only two options available on the form were "resign" or "dismiss." Therefore, the decision of the ALJ must be reversed on both counts and the petitioner should be found to be a tenured employee of the Board, thereby affording her the rights of the Tenure Act.

In reply, the Board asserts that for the reasons articulated in the Initial Decision as well as the Board's submissions, the Initial Decision should be adopted as the final decision in this matter. Although the ALJ did incorrectly state that the filing date of the petition was December 14, 2018, which was the date the Board filed its answer, this minor error does not change the fact that the petition is time-barred. The petitioner was appointed to a permanent position created by the retirement of a staff member on February 13, 2018, and she was placed at Step One of the salary guide as a non-tenured employee. Contrary to the petitioner's claim, she was not hired as a substitute at that time, but was appointed as a full-time, permanent employee assigned to fill a vacancy created by a retirement. The petitioner was aware of her salary and tenure status upon her appointment, as she accepted her placement and its concurrent compensation and began receiving paychecks at the Step One level of the salary guide through the end of the 2017-2018 school year. Thus, as the ALJ correctly found, the petitioner's claim accrued on the date of the Board's action on February 13, 2018; therefore, the petition must have been filed within 90 days of the date, or by May 14, 2018. Yet the petition was not filed until November 20, 2018. As such, the ALJ's determination that the petition of appeal was filed out of time is fully supported by the law and the record in this case.

Should the merits of this case be reached, the Board maintains that the ALJ correctly found that the petitioner effectively resigned from her employment with the District. The petitioner withdrew her pension payments and indicated on her withdraw form that she withdrew the funds because of her "resignation due to illness." Moreover, the petitioner failed to contact the District for at least 16 years after the date on which her initial leave expired. During the intervening years, petitioner was in fact employed as a substitute teacher by at least two different school districts – including the respondent's district – at the same time. Beginning in the 2015-2016 school year the petitioner served as a substitute with the Hardyston Township Schools until she

was appointed to a permanent position with the district in February of 2018. Accordingly, petitioner was clearly not an active employee at the time she was rehired by the Board to a permanent teaching position on February 13, 2018.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's determination – for the reason outlined in the Initial Decision – that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). In so doing, the Commissioner notes that the Initial Decision did incorrectly state that the filing date of the petition was December 14, 2018; as the actual filing date was November 20, 2018.

Under *N.J.A.C.* 6A:3-1.3(i), a 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." 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). The "notice of a final order, ruling or other action" of the Board contemplated by the rule has been defined as notice "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.

In this case, the petitioner had notice of her salary and non-tenured status upon her appointment in February 2018 as a full-time, permanent employee assigned to fill a vacancy created by the retirement of a staff member. Further, the petitioner accepted her placement and began receiving paychecks at the Step One level of the salary guide through the end of the 2017-2018 school year. The petitioner's claim accrued on the date of the Board's action on February 13, 2018, but her petition was not filed until November 20, 2018 – well beyond the 90-day window for the filing of a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.3(i). The

Commissioner finds the exceptions submitted by the petitioner to be unpersuasive as they largely replicate the arguments advanced at the OAL, which were fully considered and appropriately addressed by the ALJ in the Initial Decision.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 9/26/19
Date of Mailing: 9/30/19

[2] Since the petition of appeal was appropriately dismissed as untimely, it is not necessary to render a decision on the remaining legal issues decided by the ALJ in the Initial Decision; however, the Commissioner is in accord with the ALJ's determination – for the reasons set forth in the Initial Decision – that the petitioner effectively resigned from her tenured employment with the District through her own actions and admissions.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00208-19
AGENCY DKT. NO. 279-11/18

LISA HEALY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,
Respondent.

Jesse Humphries, Esq., for petitioner (Oxfeld Cohen, attorneys)

Joseph Roselle, Esq., for respondent (Schenck Price Smith & King, attorneys)

Record Closed: May 22, 2019 Decided: June 13, 2019

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Lisa Healy (Healy) requests that Hardyston Board of Education (District) recognize her tenured status and place her at step five (5) on the salary guide. Healy was employed as a teacher at the District from September 1994, until April 1998.

Healy became re-employed by the District as a substitute teacher on an intermittent basis beginning in the 2015-2016 school year and as a full-time teacher in February of 2018.

PROCEDURAL HISTORY

Petitioner filed the instant petition with the New Jersey Commissioner of Education, which was received on November 20, 2018, by the Department of Controversies and Disputes (Department).

Respondent Hardyston Board of Education filed an answer and affirmative defenses with the Department which was received on December 17, 2018.

The matter was transmitted as a contested case on December 18, 2018, to the Office of Administrative Law (OAL) where it was received on December 20, 2018.

Respondent filed a Motion to Dismiss with the undersigned on May 20, 2019. Petitioner's response to respondent's motion and cross-motion was filed on May 22, 2019. The parties did not request oral argument. The written submissions are sufficient to dispose of the matter.

STATEMENT OF FACTS

The following facts are undisputed, and I **FIND** them to be the **FACTS** of the case:

1. Healy began employment in the Hardyston School District in September of 1994, teaching second grade at the Hardyston Elementary School.
2. Pursuant to the provisions of N.J.S.A. 18A:28-5 et seq., Healy became tenured in the District on or about September 1, 1998.
3. On or about January 22, 1999, Healy wrote to Dr. Anne Wilkins, then-District Superintendent, requesting a leave of absence due to pregnancy.

4. Healy's request for a leave was granted. Healy left the District on April 19, 1999, when the District went on spring vacation.
5. On or about May 12, 1999, Healy was diagnosed with Hodgkin's Lymphoma and immediately began treatment.
6. Via letter dated July 21, 1999, Healy informed then-Superintendent Wilkins that she wished to extend her Family Leave until October 26, 1999, and requested that she be placed on maternity leave thereafter through June 30, 2000.
7. Via an undated letter, but which was received in the District's offices on February 16, 2000, Healy requested an extension of her child care leave for the 2000-2001 school year.
8. The Board granted Healy's request, informing her of same via letter dated March 28, 2000.
9. At the time of her leave from the District, Healy was on Step 5 of the salary guide.
10. Healy did not return to work upon the expiration of her child-care leave at the end of the 2000-2001 school year.
11. Healy was later diagnosed with additional medical problems, including, but not necessarily limited to, radiation pneumonitis, hypothyroidism, hyperthyroidism, and cardio-vascular disease.
12. On October 25, 2000, Healy filed an application for Social Security Disability Insurance benefits. In a decision dated September 26, 2001, (Federal) Administrative Law Judge Dennis O'Leary granted Healy's Social Security Disability application retroactive to May 14, 1999.

13. As Healy did not have sufficient years in the Teacher's Pension and Annuity Fund (TPAF), she could not apply for a Disability Pension from the Division of Pensions and Benefits.

14. On May 18, 2001, Healy did apply for a withdrawal of her TPAF pension funds from the Division of Pensions and Benefits. On her application, she indicated that she terminated her employment in the Hardyston School District in April of 1999, resigning due to illness.

15. Healy did not submit a letter of resignation to the Hardyston School District. There is no such letter contained in Healy's District personnel file.

16. The Board did not file tenure charges against Healy for abandonment of her position.

17. In the spring of 2015, Healy was sufficiently recovered to be able to substitute teach. Healy was informed by the Board of Education that they approved her as a substitute teacher at its August 11, 2015, meeting. Healy thereafter served as a substitute teacher on an intermittent basis beginning in the 2015-2016 school year.

18. On or about March 7, 2017, the Vernon Township School District sent notice to the Hardyston School District, informing the Board that Vernon wished to hire Healy as a substitute teacher and asked that Hardyston verify Healy's employment.

19. On March 16, 2017, Healy was appointed by the Vernon Township Board of Education as a substitute teacher, effective March 17, 2017.

20. In or about January of 2018, the Hardyston Board of Education advertised for a permanent elementary teaching position in order to fill a mid-year vacancy

created when the previous teacher retired. Healy applied for that position and was interviewed by Michael Ryder, Chief School Administrator.

21. After the interview, Mr. Ryder recommended that Healy be appointed to the permanent position.

22. At the Board's February 13, 2018, meeting, a motion was passed to hire Healy for a full-time teaching position at Step 1 of the Masters salary schedule as set forth in the collective negotiations agreement between the Board and the Hardyston Township Education Association.

23. Healy did not object at the time to her placement on the salary guide and thanked Mr. Ryder for the opportunity.

24. On May 8, 2018, the Board of Education approved a motion to renew Ms. Healy's contract for the full 2018-2019 school year as a non-tenured certified staff member.

25. Healy is currently on Step 2 of the Masters salary guide.

26. Healy now seeks credit on the salary guide for her previous five years' experience in the District.

LEGAL DISCUSSION

In the case at bar, both sides seek relief pursuant to N.J.A.C. 1:1-12.5, which 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." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." I **FIND** there is no issue of material

fact in dispute with regard to the foregoing matter and I **CONCLUDE** the matter is ripe for Summary Decision.

I. THE APPEAL WAS NOT FILED TIMELY AND IS BARRED

N.J.A.C. 6A:3-1.3(i) states in pertinent part:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

Healy disputes the District's hiring her as a non-tenured teacher at Step 1 of the pay scale and not taking into account her prior years of service. Healy was hired as a non-tenured teacher at Step 1 of the salary guide via unanimous District Board approval on February 13, 2018. The forgoing petition appealing the District Board's action was filed on December 14, 2018; approximately ten months after Healy's hire at Step 1. Thus, I **FIND** the foregoing petition of appeal was filed more than ninety days after the alleged adverse action and I **CONCLDE** that the foregoing petition of appeal is out of time and therefore barred by N.J.A.C. 6A:3-1.3(i).

II. PETITIONER RESIGNED FROM HER INITIAL EMPLOYMENT WITH THE DISTRICT

In the case at bar, it is undisputed that Healy went out on planned maternity leave beginning April 19, 1999, and did not return to work for the 1999-2000 and 2000-2001 school years. It is further undisputed that Healy applied for a withdrawal of her TPAF funds from the Division of Pensions and Benefits on May 18, 2001, indicating on her withdrawal application that she had resigned from her employment at Hardyston in April of 1999 due to illness. Healy now argues that since she never submitted a formal letter of resignation, that she remained an active employee from 1999 up until her return to full time employment with the District in 2015. I disagree.

Petitioner sites Capodilupo v Board of Education of West Orange Township, Essex County, 218 N.J. Super. 510, 515 (App. Div. 1987), which states that "the tenure act should be liberally construed to achieve its beneficent ends." Ibid. (quoting Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 74 (1982)). Notwithstanding this general directive to liberally interpret the tenure act, Healy fails to cite any precedent that would explain how an individual, who has had no communication with a district for such an extended period of time, could possibly remain an "active employee" of that district, especially where the individual applied for Social Security Disability Benefits and withdrew her pension payments. Further, Healy indicated on her TPAF withdrawal form that her reason for withdrawing the pension payments was "resignation due to illness." Based on the foregoing, I **FIND** that Healy resigned from her position as a tenured teacher in 1999 based on her own conduct and admissions. I **CONCLUDE** that Healy was not an active tenured employee at the time of her recent re-hire by the District (February 13, 2015).

III. N.J.S.A. 18A:6-10 DOES NOT APPLY

Healy further argues that since she was never formally dismissed by the District during her sixteen-year absence, that she, then, remained an active employee during that period of time. Healy cites N.J.S.A. 18A: 6-10, which states that no person shall be dismissed or reduced in compensation without formal written charges being brought against her. Since Healy was never served with written tenure charges by the District as required by N.J.S.A. 18A: 6-10, she claims she was never formally dismissed by the District. Thus, she argues, she remained an active employee of the District during her absence. As I have already found that Healy resigned from her teaching position in 1999, I **CONCLUDE** the above-referenced statute does not apply to the case at bar as Healy was not an active tenured employee during her extended absence.

ORDER

It is hereby **ORDERED** that petitioner's Motion for Summary Decision be **DISMISSED**. It is further **ORDERED** that respondent Hardyston Board of Education's

Motion for Summary Decision be **GRANTED**; it is further **ORDERED** that the foregoing petition of appeal is hereby **DISMISSED** and the Respondent's decision to hire Lisa Healy as non-tenured at Step 1 of the pay scale be **UPHELD**.

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

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

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

June 13, 2019
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 6/13/19

Date Mailed to Parties: _____

id

New Jersey Commissioner of Education

Decision

Crystal Saylor,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

Synopsis

Petitioner – formerly employed by the respondent Board's school district, most recently as Administrative Assistant to the Superintendent – appealed her termination from employment, alleging that she was a tenured secretary and entitled to statutory tenure protections. Petitioner began employment with the Board in 2010 as a secretary and was promoted in 2011 to the position of Administrative Assistant to the Assistant Superintendent. In 2015, petitioner was promoted to Administrative Assistant to the Superintendent, the position in which she remained until her termination in June 2018 for conduct unbecoming a public employee. The Board contended that its actions were lawful, as petitioner was employed in a position without union or statutory rights when she was terminated; further, she had never earned tenure in any of her positions with the school district.

The ALJ found, *inter alia*, that: the issue here is whether petitioner was protected from summary termination under the tenure laws, such that she would have the right to be returned to her position with back pay from June 5, 2018; *N.J.S.A.* 18A:17-2 governs the tenure of individuals who are employed by school districts in secretarial or clerical positions; the preponderance of evidence demonstrates that petitioner never acquired tenure rights pursuant to *N.J.S.A.* 18A:17-2 while she served as a secretary in the Business Department, where she worked for less than three years performing basic secretarial and clerical tasks; petitioner's duties changed significantly in her "confidential" positions as Administrative Assistant to the Assistant Superintendent and Administrative Assistant to the Superintendent; when she was terminated, petitioner was employed in a position without union or statutory rights. The ALJ concluded that petitioner does not have tenure, was never awarded tenure, and was last employed in a position that would not earn tenure. Accordingly, the ALJ affirmed the Board's action to terminate petitioner's employment and dismissed the petition.

Upon review, the Commissioner concurred with the determination of the ALJ in this matter and adopted the Initial Decision as the final decision, for the reasons expressed therein. The petition was dismissed.

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

September 26, 2019

OAL Dkt. No. EDU 15592-18
Agency Dkt. No. 219-8/18

New Jersey Commissioner of Education

Final Decision

Crystal Saylor,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.[1]

In this matter, petitioner challenges her termination from respondent's district, alleging that she was a tenured secretary and was entitled to statutory tenure protections. By way of background, petitioner began her employment with the Board on January 16, 2010 as a secretary in the Business Department, in which role she answered phones and typed documents.[2] She was promoted to the position of Administrative Assistant to the Assistant Superintendent, Clara Herrera, effective November 16, 2011.[3] On or about July 15, 2015, after Clara Herrera was promoted to Superintendent of Schools, petitioner was promoted to the position of

[1] The Commissioner was not provided with a transcript of the May 20, 2019 hearing at the OAL.

[2] Petitioner earned an annual salary of $33,000.

[3] Petitioner's annual salary was $40,000 during the 2011-12 and 2012-13 schools years and increased to $41,616 in the 2013-14 school year.

Administrative Assistant to the Superintendent.[4] In this role, she was given additional responsibilities, including preparing agendas for Board meetings, coordinating professional development for District-wide staff, overseeing the Read Across America program in the District, renewing contracts for the early childhood program, and arranging accommodations for out-of-district seminars. She remained in that position until she was terminated for conduct unbecoming a public employee on June 5, 2018.

Following a hearing on the matter, the Administrative Law Judge (ALJ) found that petitioner does not have tenure, never earned tenure, and was last employed in a position that would not earn tenure. The ALJ explained that petitioner was not employed as a secretary in the Business Department long enough to earn tenure, and could only earn tenure if she maintained a "secretarial or clerical position" without a break to a non-secretarial position. The ALJ found that when petitioner became an Administrative Assistant, she was no longer in a secretarial position and was instead a "confidential" employee, as she had additional job responsibilities beyond that of a secretary. Accordingly, the Board was permitted to terminate petitioner.

In her exceptions, petitioner argues that she earned tenure as a secretary. Although her duties and responsibilities increased upon her promotion to Administrative Assistant, petitioner maintains that her new duties were not out of the ordinary for a secretary. Petitioner cites *Rita Hibo and Susan Arillo v. Board of Education of the West Essex Regional School Distrtict,* EDU 1226-96, Initial Decision (November 12, 1997), *adopted* Commissioner's Decision No. 659-97, decided December 29, 1997, for the proposition that because her position as Administrative Assistant to the Superintendent did not require any specialized training or skill, and since she simply handled routine work for her supervisor, she was a secretary for purposes of tenure. Petitioner further emphasizes that whether Superintendent Herrera referred to her title as

[4] Petitioner's annual salary increased to $72,500.

a Confidential Secretary is irrelevant because the Board did not present evidence to demonstrate that petitioner was a "confidential" employee pursuant to the PERC definition. Instead, the substance of petitioner's job duties demonstrate that she was not a confidential employee.

Additionally, petitioner argues that the ALJ misinterpreted *DiNapoli v. Board of Education of the Township of Verona*, 434 *N.J. Super.* 233 (App. Div. 2014), *certif. denied,* 217 *N.J.* 589 (2014), as the case actually supports petitioner's position. In that case, the petitioner did not keep her tenure when she left a tenured secretary position to move to a separately tenurable position as Assistant Business Administrator, which requires a certification. Petitioner maintains that her position did not require a certification and she never transferred out of a secretarial position. Therefore, she contends that she earned tenure by the time she was promoted to Administrative Assistant to the Superintendent, and her tenure rights must transfer with her as the position was inherently the same.

Petitioner also argues that the ALJ ignored *Lisa Salimbene v. Board of Education of the Township of Dennis, Cape May County*, EDU 9322-10, Initial Decision (October 5, 2011), *remanded* Commissioner's Decision No. 511-11, decided November 10, 2011, which is directly on point. In that matter, the ALJ found the petitioner was the tenured Secretary to the Elementary School Principal and had rights to the position of Administrative Assistant to the Superintendent over a non-tenured secretary, as the job qualifications were very similar.[5] Petitioner maintains that since she was promoted from Administrative Assistant to the Assistant Superintendent to Administrative Assistant to the Superintendent, she has an even stronger claim

[5] Although the job qualifications were similar, the Commissioner found that the job descriptions for the positions were quite different. Accordingly, the Commissioner remanded the matter for further fact-finding on the issue of whether the petitioner had the skills required for the position of Administrative Assistant to the Superintendent.

as to why her tenure rights should transfer, as the responsibilities in her positions were more similar than the petitioner's positions in *Salimbene*.

Moreover, petitioner contends that even if she was a confidential employee without statutory tenure rights, her employment contract indicated that she was tenured when she was Administrative Assistant to the Assistant Superintendent, so her tenure should extend to her promotion, as the positions were substantially similar. Accordingly, petitioner contends that she had obtained tenure, and therefore the Board improperly terminated her.

In reply, the Board argues that the ALJ correctly found that petitioner was not a tenured secretary. The Board maintains that petitioner admitted that her duties were well beyond that of a secretary in the Business Department. For example, as Administrative Assistant to the Superintendent, petitioner drafted agendas for Board meetings, coordinated professional development for District-wide staff members, oversaw the Read Across America program, and renewed contracts for the early childhood program, as opposed to her position as a secretary, where she answered phones and sorted mail. The Board points out that the increases in her annual salary – from $33,000 when she started as a secretary to $72,500 when she became Administrative Assistant to the Superintendent – further demonstrate her increased responsibilities.

The Board distinguished the cases cited by petitioner in her exceptions. Additionally, the Board contends that regardless of whether petitioner's 2013-14 employment contract used the word "tenured," the contract is irrelevant because tenure is acquired by law and not by contract. The Board maintains that the only secretarial position that petitioner held was secretary to the Business Department, and she was not in that position for the three years required to earn tenure pursuant to *N.J.S.A.* 18A:17-2. The Board points out that *N.J.S.A.*

18A:17-2 does not extend tenure beyond the time that the employee holds the secretarial position, so even if petitioner had earned tenure as a secretary, she would have relinquished her tenure when she transferred to the positions of Administrative Assistant to the Assistant Superintendent and Administrative Assistant to the Superintendent. As such, the Board argues that it acted within its authority when it terminated petitioner.

Upon review, the Commissioner agrees with the ALJ that petitioner was not employed as secretary when she held the position of Administrative Assistant to the Superintendent, and therefore did not have tenure rights when she was terminated. When petitioner transferred from a secretary in the Business Department to Administrative Assistant to the Assistant Superintendent and then to Administrative Assistant to the Superintendent, her responsibilities, as well as salary, increased dramatically. She went from answering phones and typing documents to preparing for Board meetings, coordinating District-wide professional development activities, renewing contracts for the early childhood program, and coordinating the Read Across America program. The ALJ appropriately relied upon *Joanne Burger v. Board of Education of the Borough of Maywood, Bergen County*, Commissioner's Decision No. 191-11, decided May 19, 2011, *affirmed* 2012 *N.J. Super. Unpub. LEXIS* 1244 (App Div. 2012), *certif. denied,* 212 *N.J.* 431 (2012), where the ALJ, Commissioner, and Appellate Division all found that a tenured secretary was not entitled to the position of Administrative Assistant to the Superintendent over a non-tenured employee, after the hours of her secretary position were reduced as part of a reduction in force. Just as the Administrative Assistant to the Superintendent in *Burger* was not considered to be a secretary because of her increased responsibilities – including supervising other secretaries in the Superintendent's office, coordinating district-wide administrative activities, overseeing the hiring of substitute teachers,

and preparing for Board meetings – the petitioner's job responsibilities also extended far beyond her former duties as a secretary, so the positions are not substantially similar.

The Commissioner does not find petitioner's exceptions, or the cases she cites, to be persuasive. Contrary to petitioner's assertion, *Hibo, supra*, does not support her position, because her job duties as Administrative Assistant to the Superintendent are far more in depth than the duties of the secretaries in that case, which involved routine tasks such as sorting mail, typing correspondence, and handling phone calls.

In *DiNapoli*, *supra*, the Appellate Division found that DiNapoli did not retain her tenure when she transferred from a tenured secretary position to Assistant Board Secretary, a certificated position. Petitioner's argument that since her position as Assistant to the Superintendent did not require a certificate, she did not leave her secretarial position, is of no moment. It is clear that the reasoning in *DiNapoli* applies equally when an employee transfers out of a tenured secretary role and into a non-secretarial position, regardless of whether that new position requires a certificate. Further, the Appellate Division in *DiNapoli* explained that "the language of *N.J.S.A.* 18A:17-2 limits the retention of tenure to the time during which the employee holds a secretarial office, position or employment." 434 *N.J. Super.* at 239. As such, when petitioner transferred out of her secretarial position, she relinquished any tenure rights that she had earned.

Petitioner relies on *Salimbene*, *supra*, for the proposition that secretarial tenure rights apply to the position of Administrative Assistant to the Superintendent, because the job qualifications are similar. Petitioner's reliance is misplaced because the Commissioner remanded that matter to the OAL for further fact-finding as to whether the petitioner could perform the job duties of Administrative Assistant to the Superintendent, because although the

job qualifications were similar, the job descriptions were vastly different. Additionally, *Salimbene* predates *Burger*, which is on point and found that a tenured secretary was not entitled to the position of Administrative Assistant to the Superintendent over a non-tenured employee due to the higher-level, district-wide responsibilities performed by the Administrative Assistant. Here, once again, petitioner held more advanced, district-wide responsibilities that were well beyond the role of a secretary.

Finally, petitioner's 2013-14 employment contract did not provide her with tenure because tenure rights are statutory under *N.J.S.A.* 18A:17-2, and not contractual. *DiNapoli*, *supra*, 434 *N.J. Super.* at 237. As such, petitioner was not a tenured employee when she held the position of Administrative Assistant to the Superintendent and was terminated by the Board.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 9/26/19
Date of Mailing: 9/30/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 15592-18
AGENCY DKT. NO. 219-8/18

CRYSTAL SAYLOR,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., on behalf of petitioner Crystal Saylor (Oxfeld Cohen, attorneys)

Lester E. Taylor, III, Esq., for respondent Board of Education of the Town of West New York (Florio Perucci Steinhardt & Cappelli, attorneys)

Record Closed: June 21, 2019 Decided: July 8, 2019

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Crystal Saylor (petitioner or Saylor) appeals her termination effective June 5, 2018, from the Board of Education of the Town of West New York (Board) under cover of August 23, 2018. The Board filed its Answer to the Petition on Appeal under cover of October 11, 2018. The matter was transmitted to the Office of Administrative Law (OAL), on October 26, 2018, for hearing as a contested case pursuant to N.J.S.A.

52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The central issue is whether petitioner held a tenured position from which she could not be summarily terminated.

On November 28, 2018, and January 10, 2019, I held case management conferences telephonically with the parties in which discovery, potential motion practice, and hearing dates were discussed. A hearing was thereafter scheduled for May 13, 2019, but was adjourned at the request of one or both parties. The plenary hearing was ultimately held on May 20, 2019. Post-hearing briefs were permitted and the record closed on June 21, 2019, with receipt of the written closing statements as the final submissions.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Petitioner commenced employment with the Board on January 16, 2010, as a Secretary assigned to the Business Department at an annual salary of $33,000. [P-A, B.] She described her responsibilities at that time as clerical, attending to phones, typing documents, etc. Petitioner continued in her position within the Business Department under annual contracts for the next school year, with an increase in her salary to $34,304 (2010-2011). [P-C.] As set forth in her evaluation in March 2011, Saylor was not tenured at that time.

Petitioner was transferred to the position of Administrative Assistant to the Assistant Superintendent, Clara Herrera, at a salary of $40,000 during the 2011-2012 school year. The Board Resolution had an effective date of November 16, 2011 (P-G) but the Contract has a date of July 1, 2011. Petitioner remained in the title of Administrative Assistant for the 2012-2013 and 2013-2014 school years. [P-H, I.] For the 2013-2014 school year, her salary increased to $41,616 (P-J), and the contract stated that she was "tenured."

On or before July 1, 2015, Herrera was promoted to Superintendent of Schools. [P-L.] On or about July 15, 2015, Saylor was approved for a promotion as her Secretary or Administrative Assistant at a substantially increased salary, recommended by Herrera, of $72,500. [P-M, N.] Saylor testified that her large salary increase was justified because her duties then included, in addition to answering the phone and making appointments, preparing for meetings and workshops, preparing documents for monthly Board meetings, communicating with parents and resolved concerns/issues, and fulfilling requests for supplies. Saylor further testified that following her promotion to Administrative Assistant to the Superintendent, she was given additional duties, including drafting agendas for the Board meetings, coordinating professional development for staff members District-wide; she was responsible for the Read Across America program in the District, she renewed contracts for the early childhood program(s), and arranged accommodations for out-of-district seminars.

On June 5, 2018, petitioner was relieved of her duties "immediately" for conduct unbecoming a public employee, and given sixty (60) days pay in lieu of notice. [P-O, P.] Under cover of August 1, 2015, counsel for Saylor adviced the Board that it was their position that petitioner had tenure rights as someone who held a "secretarial or clerical position" for more than three years, and was thus entitled to a hearing for cause before she could be terminated. [P-Q.]

On cross-examination, petitioner was asked to review the several contracts and resolutions that impacted her positions over the years. She acknowledged that tenure requires "three years and a day." Petitioner could not recall the conversations that took place as she was transferred with Herrera to be the Superintendent's Administrative Assistant but it was definitely discussed between them. While petitioner stated that she was not provided the reasons for her termination, she admitted that the termination notice did set forth the reason.

Clara Herrera testified for the Board with respect to the hiring and supervision of petitioner as her confidential secretary. Herrera has worked for the district for almost forty years. She has been the Superintendent for the Board since July 1, 2015, prior to which

she was the Assistant Superintendent for Payroll and Personnel, as well as a Principal for over a decade.

Herrera stated that she and petitioner used to work together quite a number of years earlier before petitioner took a long break from Board employment. Herrera recalled petitioner contacting her as soon as it was announced that Herrera was being promoted to the position of Assistant Superintendent. She agreed to have Saylor work as her Administrative Assistant. Herrera explained that this position is sometimes referred to as a Confidential Secretary to a Board Cabinet level position, of which there are five, overseen by the Superintendent. As she understood, persons in those positions did not acquire tenure, although a few have been tenured before they were promoted or transferred into such a position. In this case, petitioner did not have tenure rights before becoming Herrera's assistant.

Herrera explained that, unlike a secretary in the Business Department, petitioner had authority to speak on her behalf, to access confidential documents, and other non-secretarial tasks. When Herrera was being promoted to Superintendent, the Administrative Assistant who had been working for the then-Superintendent was retiring. So Herrera specifically spoke with petitioner about moving her into that position along with her own promotion. She described the increased duties and hours, which she thought might be a burden on petitioner's family, but also told her that she would advocate for a substantial increase in salary.

On cross-examination, Herrera confirmed that she was unaware of any policy on tenure for Administrative Assistants. She elaborated on the "confidential" aspect of positions that assist the Cabinet members and reiterated that they are non-tenured.

LEGAL DISCUSSION

The issue at hand is whether petitioner was protected from summary termination under the tenure laws such that she would have the right to be returned to her position with back pay from June 5, 2018.

Tenure statutes are "designed to aid in the establishment of a competent and efficient school system by affording to [covered employees] a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). In general, they are meant to protect competent and qualified employees who have completed a probationary period from removal for "unfounded, flimsy, or political reasons." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963).

To acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met. See Picogna v. Bd. of Educ. of Cherry Hill, 143 N.J. 391, 400 (1996); Kletzkin v. Bd. of Educ. of Spotswood, 136 N.J. 275, 278 (1994); Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982); Zimmerman, 38 N.J. at 72. Tenure "arises only by passage of the time fixed by the statute . . . ." Canfield v. Bd. of Educ. of Pine Hill, 97 N.J. Super. 483, 490 (App. Div. 1967) (Gualkin, J., dissenting), rev'd on dissent, 51 N.J. 400 (1968).

N.J.S.A. 18A:17-2 specifically governs the tenure of individuals who are employed by school districts in secretarial or clerical positions.

> 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:17-2.]

Petitioner argues that this provision protected her employment with the Board even after she became the confidential secretary to Herrera. A claimant of tenure in situations such as this one imposes upon petitioner the burden of presenting sufficient competent and credible evidence of facts essential to her claim. Here, petitioner must prove by a preponderance of competent and credible evidence that the respondent employed her in a clerical position in order for her claim for tenure to succeed. Wright and E. Orange Personnel Ass'n v. E. Orange Bd. of Educ., 99 N.J. 112, 118-19 (1985). See also DiNapoli v. Bd. of Educ. of Twp. of Verona, 434 N.J. Super. 233, 238 (App. Div. 2014).

As the preponderance of the credible and documentary evidence demonstrates, petitioner never acquired tenure rights while she served as a secretary of the Business Department. With respect to the question whether she could tack on her service to Herrera to her less-than-three years with the Business Department, the DiNapoli court set forth the answer thusly:

> Rather, the language of N.J.S.A. 18A:17-2 limits the retention of tenure to the time during which the employee holds her secretarial office, position or employment. The Commissioner's conclusion that secretarial staff maintain tenure upon transfer to nonsecretarial positions is unfounded under the express terms of the statute.

An alternative legal means by which petitioner could have acquired tenure rights is if she earned same as the Administrative Assistant or Confidential Secretary to Herrera.[1] Yet factually, petitioner was in that position for less than three years also. Accordingly, petitioner can only succeed on her argument herein if she maintained a "secretarial or clerical position" throughout this relevant period with no break for a transfer to a nonsecretarial position. I **CONCLUDE** that she did not so maintain.

> The State unclassified service shall not be subject to the provisions of this title unless otherwise specified and shall include the following:
>
> h. One secretary and one confidential assistant to each department head, board, principal executive officer and commission. Each certification and appointment hereunder shall be recorded in the minutes of the Civil Service Commission;
>
> [N.J.S.A. 11A:3-4.][2]

As our courts have made clear, a "confidential" secretary or assistant is more of a confidante and less of a secretary.

> A confidential secretary is privy to the most critical policymaking decisions and has access and exposure to the policymakers as well. It is a position of trust. Those charged with the responsibility of making policy for what they perceive to be the public good cannot have their attention diverted by even a suggestion that those in whom they confide, either directly or indirectly, are not committed to the same view or vision. While this case implicates significant constitutional principles, it resolves itself as a matter of common sense. By assuming a position of confidence such as the secretary to a high-level cabinet officer, an individual assumes a degree of knowledge and access which limits his or her ability to associate freely and without restriction even though such conduct might otherwise be protected by the Federal or State Constitutions.

---

[1] Petitioner argues that her employment contract from July 1, 2013, noted that she was tenured. Respondent speculates in its post-hearing submission, although without any evidentiary testimony having been presented on the point, that such contract might have been created or edited by petitioner herself. For other reasons set forth herein, I need not reach this issue. I do take cognizance, however, of the fact that no Board Resolution noted petitioner as tenured.

[2] In State service, each department head, principal executive officer, board and commission may appoint one unclassified secretary and one unclassified confidential assistant. N.J.A.C. 4A:3-1.4(a).

> The job specifications for the position of "confidential secretary" to the Secretary of State (and to the Assistant Secretary of State) confirms that its inherent duties are similar to those of the unprotected "confidential" position of secretary to the mayor in City of North Olmstead, supra,whose inherent duties were summarized as follows: "[The] mayor's secretary must undertake those functions in relation to the flow of information, whether by writing, speech, or personal visit, to and from the mayor's office, that the mayor wants the secretary to perform." 927 F.2d at 913-914. An office holder may legitimately compel the loyalty and commitment necessary for the office holder to effectively fulfill his or her responsibilities. Plaintiff's position is not protected by the federal or state constitutions as a matter of law.
>
> [Weisel v. Hooks, 277 N.J. Super. 78, 86-87 (Ch. Div. 1994).]

OAL decisions have concurred and been upheld. Petitioner's job description for Secretary to the Business Department was consistent with the common understanding of the duties of a secretary. However, the duties of the Administrative Assistant to the Superintendent are significantly different. Her duties as an Administrative Assistant to the Assistant Superintendent are not interchangeable with her duties as Secretary to the Business Department. As an Administrative Assistant to the Assistant Superintendent, Saylor performed work that a secretary would not, including preparation for workshops and Board meetings. Petitioner was a "confidential" employee, who admittedly was responsible to "stand in" for the Superintendent as the supervisor of the office when she was out of the office. Burger v. Borough of Maywood Board of Education, EDU 7616-10 Initial Decision (Apr. 4, 2011), Final Decision Comm'r (May 19, 2011) http://lawlibrary.rutgers.edu/oal/search.shtml.

> The administrative assistant was a confidential employee and, along with the secretary to the school business administrator, was employed on a twelve month basis under a separate employment contract and excluded from the collective negotiation agreement. The administrative assistant was the sole staff member in the Superintendent's office.
>
> The responsibilities of an administrative assistant were defined in a job posting issued by the Central Office of Administration, and included: coordinating workflow in the school system; performing secretarial duties including typing

> scheduling, fielding telephone calls, filing, etc.; supervising the activities of other secretarial and clerical personnel assigned to the Superintendent's office; maintaining district-wide personnel records; facilitating new-student registrations and residency checks; maintaining a filing system; scheduling workshops and conferences for the Superintendent; overseeing the hiring, qualification, and scheduling of substitute teachers; preparing and submitting of all State reports; preparing all Board communications, agendas, and minutes; facilitating background checks for new hires and substitutes; preparing conference and workshop materials and purchases; acting as a liaison and "voice of the district" at all times, with the public, parents, and the district attorney; and performing other duties as assigned by the Superintendent.
>
> [Burger v. Bd. of Educ., 2012 N.J. Super. Unpub. LEXIS 1244, *4-5 (App. Div. June 5, 2012).]

Based on the foregoing facts and applicable law, I **CONCLUDE** that petitioner was employed as an Administrative Assistant to the Superintendent, without union or statutory rights. Therefore, she does not have tenure, was never awarded tenure, and was last employed in a position that would not earn tenure.

ORDER

Accordingly, and for the reasons articulated above, it is **ORDERED** that the termination action of respondent the Board of Education of the Town of West New York is hereby **AFFIRMED**. It is further **ORDERED** that the appeal of petitioner for relief under Title 18A is hereby **DISMISSED** with prejudice consistent with the reasons set forth above.

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

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

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

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

July 8, 2019

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Crystal Saylor

For Respondent:

Clara Herrera

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-A Board Resolution, dated December 9, 2009
P-B Employment Contract, dated January 16, 2010
P-C Employment Contract, dated July 1, 2010
P-D Evaluation, dated March 25, 2011
P-E Board Resolution, dated June 30, 2011
P-F Employment Contract, dated July 1, 2011
P-G Board Resolution, dated November 9, 2011
P-H Board Resolution, dated May 24, 2012
P-I Board Resolution, dated June 27, 2013
P-J Employment Contract, dated July 1, 2013
P-K Employment Agreement, dated May 5, 2014
P-L Board Resolution, dated May 13, 2015
P-M Board Resolution, dated July 15, 2015
P-N Salary Change Form, dated July 16, 2015
P-O Letter from Cardenas to Saylor, dated June 5, 2018
P-P Letter from Cardenas to Saylor, dated June 5, 2018
P-Q Letter from Oxfeld to Cardenas, dated August 1, 2018
P-R Decision of Appeal Tribunal, dated September 25, 2018

For Respondent:

[Relied On Petitioner's Exhibits]

Agency Dkt. No. 244-9/19
SEC Dkt. No. D08-19

New Jersey Commissioner of Education

Final Decision

In the Matter of Jenny Brown, Board of Education of the Borough of Ringwood, Passaic County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that the respondent ultimately resigned from the Board after the issuance of its July 23, 2019 Order to Show Cause, but prior to the SEC's August 30, 2019 meeting; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon school board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/19
Date of Mailing: 10/09/19

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

Before the School Ethics Commission
Docket No.: D08-19
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Jenny Brown,
Ringwood School District Board of Education, Passaic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on July 23, 2019, and mailed on July 24, 2019, through regular and electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its special meeting on August 30, 2019.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2019. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 1, 2019, from the Passaic County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her Disclosure Statements by

July 10, 2019, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Passaic County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated July 11, 2019, and informed Respondent that failure to file her Disclosure Statements by July 19, 2019, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by July 19, 2019, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on July 23, 2019. By email dated August 19, 2019, the Business Administrator (BA) for the Ringwood School District advised that Respondent submitted a letter of resignation on August 5, 2019, and that same would be accepted by the Ringwood School District Board of Education at its meeting on August 26, 2019. Despite her resignation, Respondent still has not filed her completed Disclosure Statements, or otherwise responded to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**. The Commission additionally notes that, but for Respondent's resignation from the Board, it would have pursued her removal.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing

to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2019

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D08-19

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Ringwood School District (District); and

Whereas, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2019; and

Whereas, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 23, 2019, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent submitted a letter of resignation to the District's Business Administrator on August 5, 2019, and same will be accepted by the Ringwood School District Board of Education at its meeting on August 26, 2019;

Whereas, despite her resignation, Respondent still has not filed her Disclosure Statements or otherwise filed a response to the OTSC; and

Whereas, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file her Disclosure Statements; and

Whereas, at its special meeting on August 30, 2019, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its special meeting on August 30, 2019, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at its special meeting on August 30, 2019.

Kathryn A. Whalen

Kathryn A. Whalen, Director

OAL Dkt. No. EDU 00214-19
Agency Dkt. No. 267-10/18

New Jersey Commissioner of Education

Decision

T.F., on behalf of minor child, J.B.,

Petitioner,

v.

Board of Education of the White Township Consolidated School District, Warren County,

Respondent.

The record of this matter, the proposed 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 part of this settlement appears to have been conducted on the record on May 10, 2019, and a Board resolution was passed on May 20, 2019; subsequently, a hand-written addendum was drafted by petitioner on August 23, 2019. The Board resolution indicates that:

> Petitioner has agreed to withdraw all aspects of her petition except the portion relating to the out of County HIB investigation. As proposed by the ALJ, and as agreed by Petitioner on the record on May 10, 2019, the White Township Board of Education agrees to submit the December 6, 2017 HIB allegation to an out of county HIB experienced person to conduct this investigation. Both sides agree to be bound by this decision with no appeals.

As the language of the resolution indicates that petitioner is withdrawing her petition "except for the portion relating to the out of county HIB Investigation," and given that

the Commissioner does not have a record of what was discussed on the record on May 10, 2019, it is unclear to the Commissioner whether the entire matter was settled or whether a portion of the petition remains active.

Accordingly, the Commissioner hereby remands this matter to the OAL for execution of a more complete 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.

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/19
Date of Mailing: 10/09/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00214-19
AGENCY DKT. NO. 267-10/18

T.F. ON BEHALF OF J.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE WHITE TOWNSHIP CONSOLIDATED SCHOOL DISTRICT, WARREN COUNTY

Respondent.

T.F. for petitioner, J.B., pro se

Robert Tosti, Esq., for respondent (Purcell, Mulcahy & Flanagan, attorneys)

Record Closed: August 27, 2019 Decided: August 27, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 20, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by 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 settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 27, 2019
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: August 27, 2019

Date Mailed to Parties: August 29, 2019
lr
Attachment

Motion carried as follows: Ms. Nusser-Meany – yes, Ms. Howell – yes, Mrs. Sroka – yes, Mrs. Lensi – yes, Mrs. Smith – yes, Mrs. Williams – yes, Mrs. Nikolopoulos – yes, Ms. Lee – yes and Mr. Panetta – yes.

ADJOURNMENT
A motion was made by Mrs. Lensi and seconded by Mrs. Nikolopoulos to adjourn the meeting at 8:08 p.m. Motion carried as follows: Ayes – 9, Nay – 0, Abstentions – 0.

Respectfully Submitted,

Dawn Huff
Business Administrator
Board Secretary

8-23-19

I agree to the Settlement Proposal

Regarding the:

December 6, 2017 HIB
to be sent out of county -
as stated in court on May 10, 2019
with Judge Morejon.

and

as passed unanimously by the
White Township Board of Education
on May 20, 2019. (ATTACHED)

Clarified with Mr. Thompson today, 8-23-19.

Theresa Fiorentino

Theresa Fiorentino

White Township Consolidated School
565 County Route 519
Belvidere, NJ 07823
Phone: 908-475-4773
FAX: 908-475-3627
http://www.whitetwpsd.org

William Thompson
Chief School Administrator

Dawn Huff
Business Administrator

Additional Motion – 5/20/19

APPROVE A SETTLEMENT PROPOSAL

A motion was made by [illegible] and seconded by [illegible] to approve the following settlement proposal:

Petitioner has agreed to withdraw all aspects of her petition except the portion relating to the out of County HIB investigation. As proposed by the ALJ, and as agreed by Petitioner on the record on May 10, 2019, the White Township Board of Education agrees to submit the December 6, 2017 HIB allegation to an out of county HIB experienced person to conduct this investigation. Both sides agree to be bound by this decision with no appeals.

In Executive Session:

[illegible]

5-20-19

[illegible]

Block Motion – Shared Services - continued

1. Approve a Child Study Team Services Shared Services Agreement

To approve a Child Study Team Services Shared Services Agreement between the Boards of Education of Belvidere, Hope, White and Harmony Townships.

2. Approve a Special Services Administration Shared Services Agreement

To approve a Special Services Administration Shared Services Agreement between the Boards of Education of Belvidere, Hope, White and Harmony Townships.

OLD BUSINESS

None

NEW BUSINESS

Mrs. Lensi asked if a reminder about the upcoming drama club play could be sent out.
Mrs. Sroka asked if the Board could be represented at the upcoming Kindergarten registration to welcome parents and students.

ACKNOWLEDGE RECEIPT OF HIB INCIDENTS

A motion was made by Mrs. Lensi and seconded by Mrs. Nikolopoulos to acknowledge receipt of one HIB investigation deemed a HIB incident since last meeting. Motion carried as follows: Ayes – 9, Nays – 0, Abstentions – 0.

OPEN PUBLIC COMMENT

Mr. Fiorentino asked if the group has to meet in the School Library. Ms. Lee noted that the Board holds their meetings in the library when the Municipal Building is in use by another group.

EXECUTIVE SESSION

A motion was made by Mrs. Nikolopoulos and seconded by Mrs. Lensi to convene to Executive Session at 7:40 p.m. to discuss a legal matter. Motion carried as follows: Ayes – 9, Nays – 0, Abstentions – 0.
Be it resolved by the White Township Board of Education that it shall meet in closed session this evening to discuss a legal matter.
The board will publicly disclose information pertaining to the topics discussed as soon thereafter and once the reasons for non-disclosure no longer exist.
The topics to be discussed are within the exemptions that are permitted to be discussed in private session pursuant to P.L. 1975c chapter 321.
A motion was made by Mrs. Nikolopoulos and seconded by Mrs. Lensi to adjourn the Executive Session at 8:05 p.m. Motion carried as follows: Ayes – 9, Nays – 0, Abstentions – 0.

APPROVE A SETTLEMENT PROPOSAL

A motion was made by Mrs. Nikolopoulos and seconded by Ms. Lee to approve the following settlement proposal: Petitioner has agreed to withdraw all aspects of her petition except the portion relating to the out of County HIB investigation. As proposed by the ALJ, and as agreed by Petitioner on the record on May 10, 2019, the White Township Board of Education agrees to submit the December 6, 2017 HIB allegation to an out of county HIB experienced person to conduct this investigation. Both sides agree to be bound by this decision with no appeals.

264-19SEC

Agency Dkt. No. 243-9/19
SEC Dkt. No. D05-19

New Jersey Commissioner of Education

Final Decision

In the Matter of Kelly Scaturro, Board of Education of the Borough of Monmouth Beach, Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that the respondent ultimately filed disclosure statements on the same day that the SEC issued its July 23, 2019 Order to Show Cause; therefore, the SEC recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon school board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/19
Date of Mailing: 10/09/19

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

Before the School Ethics Commission
Docket No.: D05-19
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Kelly Scaturro,
Monmouth Beach Elementary School District Board of Education, Monmouth County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on July 23, 2019, and mailed on July 24, 2019, through regular and electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its special meeting on August 30, 2019.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2019. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 1, 2019, from the Monmouth County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her

Disclosure Statements by July 10, 2019, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Monmouth County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated July 11, 2019, and informed Respondent that failure to file her Disclosure Statements by July 19, 2019, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by July 19, 2019, an OTSC was issued by the Commission at its meeting on July 23, 2019. On the same day that the Commission issued an OTSC (July 23, 2019), Respondent filed her completed Disclosure Statements. Although Respondent filed her Disclosure Statements, she has not disputed that her Disclosure Statements were not timely filed, or otherwise submitted anything, in writing, explaining why a penalty should not be imposed.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. Although Respondent ultimately filed her Disclosure Statements on July 23, 2019, her filing was nearly ninety (90) days late, and was submitted only after multiple correspondence and reminders were sent to Respondent reiterating her statutory obligation to file her Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: August 30, 2019

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D05-19

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Monmouth Beach Elementary School District Board of Education; and

Whereas, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2019; and

Whereas, Respondent failed to file her Disclosure Statements by April 30, 2019; and

Whereas, at its meeting on July 23, 2019, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent filed her Disclosure Statements on July 23, 2019, although they were required to be filed no later than April 30, 2019; and

Whereas, Respondent did not dispute that her Disclosure Statements were not timely filed; and

Whereas, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to timely file her Disclosure Statements; and

Whereas, at its special meeting on August 30, 2019, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2019, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on August 30, 2019.

Kathryn A. Whalen, Director

OAL Dkt. No. EDU 00243-19
Agency Dkt. No. 296-12/18

New Jersey Commissioner of Education

Final Decision

C.I. and C.G., on behalf of minor child, Y.I.,

Petitioners,

v.

Board of Education of the Township of Maple Shade, Burlington County,

Respondent.

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

Upon review, the Commissioner observes that the President of the Maple Shade Township Board of Education signed the agreement on behalf of the Board. Despite the erroneous assertion made by Board counsel in the August 27, 2019 letter – attached to the Initial Decision as J-2 – *N.J.A.C.* 6A:3-1.13 clearly requires that when a district board of education is a party to a contested matter, a proposed settlement agreement must either include a copy of the Board resolution approving the settlement or the signature of the Board's attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Board President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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.

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/19
Date of Mailing: 10/09/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00243-19
AGENCY DKT. NO. 296-12/18

C.I. AND C.G., ON BEHALF OF MINOR CHILD, Y.I.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,
Respondent.

C.I. and C.G., petitioners, pro se

Victoria S. Beck, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: August 27, 2019 Decided: September 3, 2019

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 4, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the settlement agreement is attached and fully incorporated herein.

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

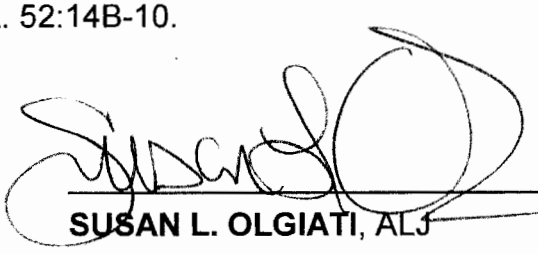
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement (J-1.) No Board resolution is necessary. (J-2.)

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

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

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

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



September 3, 2019
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: 9-4-19

Mailed to Parties: 9/5/19

/vj

J-1

SETTLEMENT AGREEMENT

This Settlement Agreement and General Release (the "Agreement") is entered into by and between C.I. & C.G. o/b/o Y.I., and the Maple Shade Township Board of Education (hereinafter "Board"), with its mailing office located at 170 Frederick Avenue, Maple Shade, NJ 08052 (C.I. & C.G. o/b/o Y.I. and Board hereinafter collectively, "the Parties").

WHEREAS, Y.I. is a student currently enrolled in the Maple Shade Township School District;

WHEREAS, C.I. and C.G. are currently domiciled in Maple Shade, New Jersey,

WHEREAS, a dispute previously arose as to Y.I.'s domicile and his enrollment as a student in the Maple Shade Township School District; and

WHEREAS, the Parties in good faith have negotiated concerning the above, and have a desire to settle this matter in an amicable way, and hereby agree as follows:

1. While C.I. and C.G. continue to be domiciled in Maple Shade, NJ, Y.I. shall remain enrolled as a student in the Maple Shade Township School District.

2. The Board will waive any entitlement to payment of tuition by C.I. and C.G. o/b/o Y.I. for Y.I.'s previous and current attendance in the Maple Shade School District.

3. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties.

4. C.I. and C.G. o/b/o Y.I. acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

RECEIVED
2019 JUN 14 P 12: 22
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN WITNESS HEREOF, the Parties have set their hands this 6 day of June, 2019.

BY: _____ DATED: 5/20/19
Michael McClure, President
Maple Shade Township School District
Board of Education

BY: _____ DATED: 6/5/2019
C.I. and C.G. o/b/o Y.I.

J-2

PARKER McCAY

Parker McCay P.A.
9000 Midlantic Drive, Suite 300
Mount Laurel, NJ 08054

P: 856-596-8900
F: 856-856-9631
www.parkermccay.com

Victoria S. Beck, Esquire
P: 856 810-5840
F: 856 810-5852
vbeck@parkermccay.com

RECEIVED
2019 AUG 27 A 11:00
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

August 27, 2019

File No.: 06310-42

VIA E-MAIL
Hon. Susan L. Olgiati
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049

Re: C.I. and C.G. obo Y.I. v. Maple Shade Twp. BOE
Docket No. EDU 00243-18

Dear Judge Olgiati,

This firm is counsel to the Maple Shade Board of Education in the above-referenced matter. This correspondence is meant to advise the Court that the settlement agreement in this matter, which was previously fully executed and submitted to Your Honor, was not submitted to the full Board of Education for approval, as no Board approval was necessary. Thus, there are no certified board minutes or resolution relating to same.

Should Your Honor have any questions, or wish to discuss this further, I would be happy to make myself available at the Court's convenience.

Respectfully submitted,

Victoria S. Beck

VICTORIA S. BECK

VSB/em
cc: Cruz Ingles and Carmen Garcia (via Regular Mail)

4836-5066-8962, v. 1

268-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

October 16, 2019

VIA EMAIL ONLY

Nicholas Poberezhsky, Esq.
Caruso Smith Picini
60 Route 46 East
Fairfield, New Jersey 07004

Dennis McKeever, Esq.
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street
Westfield, New Jersey 07090

Re: *In the Matter of the Tenure Hearing of Robert DeLude, School District of the Township of Middlesex, Middlesex County. Agency Dkt. No. 227-8/19.*

Dear Counsel,

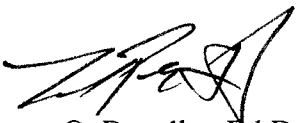
I have reviewed the materials filed in connection with respondent, Robert DeLude's request to hold the tenure charges in abeyance until the entry of a final disposition in a related Department of Child and Families (DCF) matter pending at the Office of Administrative Law (OAL). In the alternative, the respondent seeks to have the tenure charges consolidated with the DCF case pending at the OAL.

Although the DCF case may stem from same conduct alleged in the tenure charges, under New Jersey's Tenure Employees Hearing Law certain procedures must be followed when boards of education certify tenure charges against an employee. Regardless of the outcome of the DCF case, the Tenure Hearing Law must be complied with, and it is not appropriate to delay the tenure proceedings while the respondent challenges the substantiated finding of child abuse by DCF. The statutory provisions also require the Commissioner to refer the charges to an arbitrator. *N.J.S.A.* 18A:6-17.1.[1] Thus, the matter cannot be consolidated with the DCF case that is pending before an Administrative Law Judge.

[1] The case cited by the respondent in support of consolidation of this matter with the DCF matter was before the enactment of the *N.J.S.A.* 18A:6-17.1.

Accordingly, the respondent's request to hold the tenure charges in abeyance and for consolidation with the pending DCF case is hereby DENIED.[2] The respondent is directed to file an answer to the tenure charges within 15 days after the receipt of this decision. Thereafter, the matter will be referred to an arbitrator pursuant to *N.J.S.A.* 18A:6-17.1.

Sincerely,



Lamont O. Repollet, Ed.D
Commissioner

c: State Law Library
Executive County Superintendent

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

269-19

New Jersey Commissioner of Education

Final Decision

P.S., on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County; Michael Vinella Principal; and Glen Pazinko, Assistant Principal,

Respondents.

Synopsis

Pro se petitioner filed an appeal in January 2019, opposing the Board's imposition of a penalty of one Saturday detention upon her son, T.S., following his involvement in a conversation about school shootings with two other male students. Petitioner, *inter alia*, questioned the process followed by school administration in this matter and contended that the Board had acted in an arbitrary and capricious manner in assigning discipline to her son after a search of their home revealed no weapons or evidence that T.S. was planning a school shooting. The Board argued that T.S. had violated the district's policies and regulations regarding student discipline and the student code of conduct by making what could be considered terroristic threats against the school, and the discipline of a one-day Saturday detention was the appropriate punishment.

The ALJ found, *inter alia*, that: the issue for resolution here is whether the alleged statements by T.S. warrant the discipline of a one day detention, and if so, whether the Board acted appropriately in issuing that penalty to T.S.; the preponderance of evidence showed that T.S. voluntarily made statements to two other students in the school cafeteria – and later admitted to making statements to two other students – regarding school shootings, including asking what would happen if a shooter came into the school, and asking if the police could disarm the shooter if the shooter was using an AR-15 (rifle); the imposition of discipline was appropriate in this case; and the petitioner failed to carry her burden of proof to show that the Board's action was unlawful, arbitrary, capricious, or unreasonable. Accordingly, the ALJ affirmed the Board's decision in this matter and dismissed the petitioner's appeal.

Upon comprehensive review and for the reasons stated in the Initial Decision, the Commissioner concurred with the ALJ's findings and determination in this case. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

October 15, 2019

OAL Dkt. No. EDU 02475-19
Agency Dkt. No. 10-1/19

New Jersey Commissioner of Education

Final Decision

P.S., on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County; Michael Vinella, Principal; and Glen Pazinko, Assistant Principal,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.

By way of background, this matter involves a conversation about school shootings between T.S. and two other students on November 13, 2018, in which T.S. is alleged to have said the following: "If I came into the school and shot it up how may people do you think I could kill?"; "I'll shoot the cops"; "I've made a list before"; and "I would do it with an AR-15." (Initial Decision at 5). The principal and superintendent became aware of the situation after a student notified a guidance counselor. Thereafter, they informed the school resource officer, and the East Brunswick Police conducted a search of petitioner's home for weapons, finding none. According to police, T.S. admitted to making the comments, but claimed it was in a joking manner with no serious intent. The Board imposed a Saturday detention on T.S. as discipline for

the infraction, but agreed that the incident would be listed in T.S.'s school record as "inappropriate language" rather than a "threat."

Petitioner filed an appeal challenging the Board's determination. After a hearing on the merits, the Administrative Law Judge (ALJ) found that petitioner did not meet her burden of demonstrating that the Board's action was unlawful, arbitrary, capricious, or unreasonable. The ALJ noted that the principal "testified credibly that he gave due consideration to a number of factors when imposing discipline on T.S., including the findings of no credible threat by the EB Police and the EBHS guidance department, the statements of all the students, and the fact that this was T.S.'s first violation of the Handbook." (Initial Decision at 11). While the district's policies and regulations authorized a greater penalty, the Board decided on a Saturday detention. As such, the ALJ concluded that the Board was reasonable in its determination that T.S. should serve a one-time suspension and that his record should reflect his violation of the student handbook.

In her exceptions, petitioner contends that the assistant principal forced students to give untrue statements about what they heard T.S. say. Additionally, petitioner alleges that the assistant principal acted inappropriately by interrogating T.S. in a room alone and forcing him to sign an admission.

Upon review, the Commissioner agrees with the ALJ – for the reasons expressed in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner, or contrary to law, when it imposed a Saturday detention on T.S. for his comments relating to school shootings. The Commissioner does not find petitioner's exceptions to be persuasive. In the Initial Decision, the ALJ addressed her argument that her son was the victim of a scheme by other students, and that the school administration acted in bad faith by "creating a

narrative to satisfy a preordained decision." (Initial Decision at 11). The Commissioner agrees with the ALJ that petitioner failed to present credible evidence to support her theories.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/19
Date of Mailing: 10/16/19

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

OAL Dkt. No. EDU 02475-19
Agency Dkt. No. 10-1/19

New Jersey Commissioner of Education

Final Decision

P.S., on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County; Michael Vinella, Principal; and Glen Pazinko, Assistant Principal,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.

By way of background, this matter involves a conversation about school shootings between T.S. and two other students on November 13, 2018, in which T.S. is alleged to have said the following: "If I came into the school and shot it up how may people do you think I could kill?"; "I'll shoot the cops"; "I've made a list before"; and "I would do it with an AR-15." (Initial Decision at 5). The principal and superintendent became aware of the situation after a student notified a guidance counselor. Thereafter, they informed the school resource officer, and the East Brunswick Police conducted a search of petitioner's home for weapons, finding none. According to police, T.S. admitted to making the comments, but claimed it was in a joking manner with no serious intent. The Board imposed a Saturday detention on T.S. as discipline for

the infraction, but agreed that the incident would be listed in T.S.'s school record as "inappropriate language" rather than a "threat."

Petitioner filed an appeal challenging the Board's determination. After a hearing on the merits, the Administrative Law Judge (ALJ) found that petitioner did not meet her burden of demonstrating that the Board's action was unlawful, arbitrary, capricious, or unreasonable. The ALJ noted that the principal "testified credibly that he gave due consideration to a number of factors when imposing discipline on T.S., including the findings of no credible threat by the EB Police and the EBHS guidance department, the statements of all the students, and the fact that this was T.S.'s first violation of the Handbook." (Initial Decision at 11). While the district's policies and regulations authorized a greater penalty, the Board decided on a Saturday detention. As such, the ALJ concluded that the Board was reasonable in its determination that T.S. should serve a one-time suspension and that his record should reflect his violation of the student handbook.

In her exceptions, petitioner contends that the assistant principal forced students to give untrue statements about what they heard T.S. say. Additionally, petitioner alleges that the assistant principal acted inappropriately by interrogating T.S. in a room alone and forcing him to sign an admission.

Upon review, the Commissioner agrees with the ALJ – for the reasons expressed in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner, or contrary to law, when it imposed a Saturday detention on T.S. for his comments relating to school shootings. The Commissioner does not find petitioner's exceptions to be persuasive. In the Initial Decision, the ALJ addressed her argument that her son was the victim of a scheme by other students, and that the school administration acted in bad faith by "creating a

narrative to satisfy a preordained decision." (Initial Decision at 11). The Commissioner agrees with the ALJ that petitioner failed to present credible evidence to support her theories.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/19
Date of Mailing: 10/16/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02475-19
AGENCY DKT. NO. 10-1/19

P.S. ON BEHALF OF MINOR CHILD, T.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY; MICHAEL VINELLA, PRINCIPAL; AND GLEN PAZINKO, ASSISTANT PRINCIPAL,
Respondents.

P.S. on behalf of minor child, **T.S.,** petitioner, pro se

Frances L. Febres, Esq., for respondents (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Record Closed: August 26, 2019 Decided: August 28, 2019

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE

Petitioner P.S. on behalf of minor child, T.S. (P.S.), appeals the decision of respondents, Board of Education of the Township of East Brunswick (Board), Middlesex County, Dr. Michael Vinella (Vinella), Principal of East Brunswick High School (EBHS), and Glen Pazinko, Assistant Principal of EBHS, to impose the penalty of detention on her son T.S.

PROCEDURAL HISTORY

On January 14, 2019, P.S. filed a petition of appeal against respondents with the Office of Controversies and Disputes of the New Jersey Department of Education (DOE). On February 1, 2019, respondents filed an answer by which they denied all claims. On February 5, 2019, DOE transmitted this matter to the Office of Administrative Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Prehearing telephone conferences were held on April 2 and May 29, 2019, and a hearing was held on June 4, 2019, after which the record remained open for the parties to obtain transcripts of the hearing and submit written closing summations. On July 9, 2019, the parties received the transcript. On July 11 and 16, 2019, the parties participated in telephonic settlement conferences. The parties were unable to reach settlement[1] and respondent submitted a post-hearing brief on August 8, 2019. Petitioner submitted her post-hearing brief on August 14, 2019. Neither party filed a response brief; the record closed on August 26, 2019.

FACTUAL DISCUSSION AND FINDINGS

By way of background, this matter involves an incident that took place on November 13, 2018, in the EBHS cafeteria. T.S. and two other male students, F.A. and N.D., had a discussion about school shootings. Although there is some dispute over whether this discussion was or could have been overheard,[2] a student who was not at the same table alerted a guidance counselor of the discussion by email, and the guidance counselor in turn forwarded the student email to Vinella after school hours. Vinella notified Superintendent Dr. Victor Valeski (Valeski). They decided to contact the school resource officer (SRO), who contacted the East Brunswick

---

[1] In her post-hearing brief, P.S. questions the intention of respondent to negotiate in good faith and asserts that the refusal of the Board to approve the proposed settlement is further evidence of a pattern of bad faith. Ltr. Br. of Pet'r (August 12, 2019) at 3. Although the proposed settlement is not part of the record, for clarity, I note that while counsel for respondent presented a settlement agreement to the Board after petitioner accepted its terms, the Board voted against the agreement.

[2] See, P-7, transcript of voice message from F.A. in which he states "me, [N.D. and T.S.] were the only ones that heard it."

Police Department (EB Police). That same evening, the EB Police conducted a search of T.S.'s home for weapons. Weapons were not found. I **FIND** the preceding as **FACTS.**

Petitioner's letter of appeal includes a detailed description of events occurring on, before, and following the above-described incidents, and petitioner seeks forms of relief which are outside the jurisdiction of this tribunal. Therefore, prior to taking testimony, I reminded the parties that the dispute in this matter is limited to whether the decision of the EBHS administration in imposing the penalty of detention on T.S. was appropriate. The decision of the EBHS administration to investigate an allegation that students, including T.S., were making statements regarding school shootings is not at issue, nor is the decision of the administration to notify the SRO of the allegations and/or the subsequent actions of the EB Police except to the extent, if any, that the conclusions of the EB Police were considered by the administration in determining the penalty imposed on T.S.

Petitioner P.S. and her husband, V.S., testified and introduced documentary evidence. Respondent called Vinella to testify and introduced documentary evidence. Based on the testimony and documentary evidence, I **FIND** the following additional **FACTS:**

T.S. is a male student at EBHS. On November 13, 2018, he was fifteen years old and a sophomore at EBHS. Prior to the incident in question, T.S. had not been disciplined by the EBHS administration.

EBHS publishes a "Student/Parent Handbook" (Handbook) each year. (R-1.) At the beginning of the school year, the students watch a video review of the Handbook, which is available to students and parents online. A summary of the Handbook is included in the EBHS agenda books; all students must by signature state that they have received the Handbook.

The Handbook describes the various forms of discipline that may be administered, including detention. (R-1 at 23.) Infractions that may result in discipline are defined. (R-1 at 25-28.) The Handbook includes no specific prohibition against talking about school shooting(s) but

the Handbook states that additional behavior(s) not described may be subject to punishment. Specifically, the Handbook defines the infraction of "Administrative Action" as follows:

> Any other inappropriate student behavior/act not mentioned in this book may be subject to administrative action. These incidents may include, but are not limited to, behaviors/acts which result in violence to another's person or property or which threaten the safety of others in the school, on school property, on school buses, or at any school activity. These actions may result in consequences that range from an immediate informal hearing to expulsion from school. Parent/ guardian notification is required. Serious violations shall be reported in writing to the [EB Police], and a formal criminal complaint shall be filed by the administration as appropriate. The foregoing is not meant to preclude any criminal or civil action taken by the student victim or his/her parents/guardians.
>
> [(R-1 at 28.)]

The Board has adopted policies and regulations regarding student discipline and a code of conduct. (District Policy, R-2; District Regulations, R-3.) The District Policy provides in pertinent part:

> The Student Discipline/Code of Conduct Policy and Regulation shall be disseminated annually to all school staff, students and parents. . . . Policy and Regulation 5600 include a description of school responses to violations of behavioral expectations established by the Board that, at a minimum, are graded according to the severity of the offenses, and consider the developmental ages of the student offenders and their histories of inappropriate behaviors pursuant to N.J.S.A. 6A:16-7.1(c)5. . . . Any student to be disciplined shall be provided the due process procedures for students and their families as set forth in Policy and Regulation 5600 and N.J.A.C. 6A:16-7.2-7.4.
>
> [(R-2.)]

The District Regulations on discipline provide for detention as an option for just two types of pupil misconduct:

> Minor behavior on the part of the pupil that impedes orderly classroom procedures or interferes with the orderly operation of the school.
>
> Misbehavior whose frequency or seriousness tends to disrupt the learning climate of the school.
>
> [(R-3.)]

Vinella described the purpose of discipline as to "help change behavior," alert students to problems with behavior, and deter future inappropriate behavior, Tr. (June 4, 2019), at 13, and to ensure the safety of students as well as to "ensure appropriate discussions take place in school." Id. at 26. When issuing discipline, Vinella stated he considers the event in question, subsequent events that result, the grade and cognition levels of the student, and the student's disciplinary history. Id. at 17, 28.

Based on the EB Police Report filed on November 13, 2018, Officer Thomas Soulias (Soulias), EB Police, was dispatched to N.D.'s home to investigate "terroristic threats." (P-2.) Soulias spoke with N.D. and his stepmother. N.D. told Soulias that T.S. made the following comments:

> If I came into the school and shot it up how many people do you think I could kill?
>
> I'll shoot the cops.
>
> I've made a list before.
>
> I would do it with an AR-15.
>
> [(Id.)]

N.D. knew that a female friend of his had notified a guidance counselor regarding this discussion. He stated that he had known T.S. "since elementary school and that he had never heard him ever make statement like these before[.]" Id.

Detective Joseph Bauer, EB Police, conducted the search of the S. home and spoke with T.S. and his parents. Bauer reported that T.S. "admitted to making such comments, but that there was no serious intent and that they were made in a joking manner." Id. Bauer did not find any weapons in the S. home and contacted Vinella to report that no credible threat was found. Vinella asked the officer to direct P.S. and V.S. to accompany T.S. to school the next morning to meet with him before school hours. Although P.S. complained that her own physical condition made it difficult for her to do so, P.S. did accompany T.S. to EBHS to meet with Vinella, Pazinko, and Peggy Haas (Haas), Student Assistant Specialist.[3]

Vinella stated that he asked for the meeting to get greater clarification as to the incident in the cafeteria so he could decide "what school action needed to be taken according to [the EBHS Code of Conduct]." Tr. at 21.[4] During this meeting, T.S. stated that in the cafeteria the previous day, he, F.A. and N.D. talked about school shooting but made no direct threats. Vinella asked T.S. to meet with Haas and another counselor. Based on the counselors' recommendation, the police report, and the parents' statements, Vinella deemed that T.S. did not present a direct and immediate threat to the school and he was allowed to return to class. Id. at 25-26.

Vinella determined that based on the Handbook, the action of T.S. warranted discipline. Even though a suspension would normally be given, Vinella decided that a detention was the appropriate punishment under all the circumstances, including that T.S. has no other infractions on his record. Id. at 29. On November 16, 2018, Pazinko issued the notice of detention to T.S. (P-8.) On November 15 and 19, 2018, T.S. and V.S. respectively, submitted appeals to a number of EBHS officials, including Valeski and Vinella. (R-6; P-1.) Vinella stated that he met with T.S. to discuss his appeal and spoke by telephone with V.S. On December 11, 2018, Vinella sent written notice to P.S. and V.S. that the appeals were denied and that T.S. would serve a Saturday detention on January 12, 2019.[5] (R-7.) Vinella

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[3] Vinella further described Haas's position as a counselor. Tr. at 22.

[4] Detective Bauer reported that Vinella stated that T.S. could only return to school if accompanied by his parents. (P-2.) The District Regulations provide that a "parent may be required to attend a meeting with the Principal . . . to discuss the student's conduct and to ensure the parent and the student understand school rules and expectations." (R-3 at 5600.G.3.a.)

[5] T.S. served the detention on January 12, 2019. P.S. brought this action to challenge the decision to impose the detention and, if successful, to clear T.S.'s record.

and V.S. engaged in at least one additional conversation regarding the infraction code used in the incident report in T.S.'s school record; they agreed that the infraction should be described as "inappropriate language" rather than a "threat." (R-4; R-5.)

DISPUTED ISSUES

By their testimony and documentary evidence, P.S. and V.S. raised issues related to the process followed by the EBHS administration. They were both, at the least, surprised by the decisions to notify the EB Police and to issue a detention to T.S. as a result of this incident, describing them as "quick and hastily judged," and stated that EBHS should have looked into the matter further before sending the police to the S. home.[6]

P.S. stated that she was never fully informed as to the accusations against T.S. during the meeting of November 14, 2018. In particular, P.S. criticized the inconsistency of the responses to the incident between the EBHS counseling staff, who allegedly told her there was nothing to worry about and were willing to blame N.D., and the EBHS administration, who issued the discipline to T.S.

Both parents claim that T.S. never admitted to making the statements attributed to him and blame Pazinko for making it up and then calling P.S. a liar when she challenged him. See, Tr. at 101. V.S. filed a report with the EB Police alleging unfair treatment by the administration and slander by Pazinko. (P-9.) Petitioner introduced the transcript of a voice mail recording made by F.A., who appears to concede that he told respondent what he felt was necessary to be done with the matter. (P-7.)[7] On November 14, 2018, F.A., however, wrote and signed a statement regarding what he heard from T.S. which contradicts his voice mail statements. (P-4.)

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[6] Based on Vinella's testimony, he notified the SRO and this officer sent the EB Police to the S. home. Given, however, that most SROs are members of the local police force, Vinella effectively notified the EB Police.

[7] Although F.A. did not appear at hearing to corroborate this hearsay statement, both parties reviewed the tape prior to the hearing and respondent raised no objections to the introduction of the transcript and its consideration by the undersigned.

On more than one occasion, P.S. requested an apology from the EBHS administration. V.S. too stated that he only wants to clear T.S.'s name and get an apology for the S. family. Besides the black mark on T.S.'s permanent school record, his parents allege that respondents' actions put T.S. under stress and harmed his reputation among his peers.

P.S. and V.S. offered alternate bases for T.S.'s exoneration; first, that the discussion of school shootings was topical, is not specifically prohibited by the Handbook, and had this conversation taken place in a classroom, in the context of a lesson on current events, T.S. would not have been disciplined.

Second, petitioner claims that N.D. took advantage of a casual conversation to get back at T.S. for interpersonal problems the boys had been having for some time.[8] The "hit list" that T.S. allegedly told N.D. about was just a list of "weird names," interpreted by N.D. as a hit list. (See, P-6.) P.S. stated that Haas told her that N.D. was the problem and had caused significant problems for other students. Tr. at 82. They claim that it was N.D. who supplied the information to the student who sent the email to the guidance counselor (which then led to the investigation). V.S. stated that he tried to explain to respondent that T.S. and N.D. had prior issues, but no one would listen.

Finally, P.S. and V.S. contend that Vinella failed to consider T.S.'s entire record which is devoid of prior discipline, the findings of the EB Police of no threat, the findings of the guidance counselors of no threat, and the involvement of the other students. For his part, Vinella claimed he took all of the above into consideration, as well as the discretion afforded him by the Handbook and Board polices and regulations. Further, he stated that the other participants in the lunchroom conversation also received discipline.

It goes without saying that a visit from the local police is cause for concern, and it must have been especially disturbing for P.S. and V.S. to watch the EB Police search their home for weapons allegedly belonging to their fifteen-years old son. But, as discussed with the

[8] In her brief, P.S. stated that N.D. initiated the conversation, but T.S.'s written statement made clear that he was not simply responding to questions posed by N.D., but posed questions of his own to N.D. Br. of Pet'r, at 2; see, P-3.

parties, the decision of the EBHS administration to notify the EB Police and the subsequent actions of the police are not under review.

While the actions of N.D. and his female classmate may have been, as alleged by petitioner, an elaborate, and successful, plan to obtain retribution against T.S. for past slights, there is no credible evidence to support that claim.[9] Weighing strongest in petitioner's favor are the statements of T.S. that after a short back-and-forth about school shooting-related topics, he and the other boys went back to looking at their phones, an indication that none of them paid much attention to the conversation. (See, P-3; P-6.) None of the students, however, were called to testify; petitioner did not present affidavits from Haas or other EBHS personnel in which they describe N.D.'s history.

There is no evidence that Vinella or other members of the EBHS administration acted in a manner contrary to their responsibilities as outlined in the Handbook, Board policies and/or regulations. If the results of the EB Police investigation had been different, the same quick decision to involve the police would have been lauded, not criticized. Finally, and most significant, the preponderance of credible evidence supports the **FINDING** that on November 13, 2018, while in the EBHS cafeteria, T.S. voluntarily made statements to two other students, and later admitted to making statements to two other students, regarding school shootings, including asking what would happen if a shooter came into the school and asking if the police could disarm the shooter if the shooter was using an AR-15 (gun). (P-3; P-6.)

LEGAL ANALYSIS AND CONCLUSIONS

The issues for resolution are whether the above-described statements made by T.S. warrant discipline under the Handbook, District Policy and/or District Regulations and, if so, whether the EBHS administration acted appropriately in issuing to T.S. the penalty of a Saturday detention.

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[9] Petitioner introduced a copy of an unauthenticated text message allegedly written by N.D. to T.S., in which N.D. apologizes for what he has done. Even if this message were authenticated, which it was not, the sender does not state that he lied to the EBHS administration or to the EB Police and, therefore, it would be of little use in exonerating T.S. (P-11.)

As noted by respondent, the DOE requires local boards of education to adopt and implement codes of student conduct which establish "standards, policies and procedures" for student behavior on school grounds and to support and maintain a "civil, safe, secure, supportive and disciplined school environment conducive to learning." N.J.A.C. 6A:16-7.1. School boards are routinely granted broad discretion in the enforcement of student codes of conduct. See, L.B. o/b/o S.C. v. Hamilton Tsp. Bd. of Educ., OAL Docket No. EDS 08561-17 (June 22, 2017).

Actions within a school board's authority, including the adoption and implementation of disciplinary policies, are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that a decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Bd. of Educ. of the Twp. of Montgomery, 96 N.J.A.R.2d (EDU) 670, 676 [citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. North Bergen Twp. Bd. of Educ., 73 N.J. Super. 40 (App. Div. 1962)].

In matters involving the exercise of a board of education's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), affirmed, 131 N.J. Super. 37 (App Div. 1974). To satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

State law obligates and authorizes respondent to maintain order and ensure the safety of the students and staff of EBHS. The duly adopted District Policy and Regulations authorize

the EBHS administration to impose discipline, including detention, on a student when his or her behavior impedes the orderly operation of the school. Vinella testified credibly that he gave due consideration to a number of factors when imposing discipline on T.S., including the findings of no credible threat by the EB Police and the EBHS guidance department, the statements of all the students, and the fact that this was T.S.'s first violation of the Handbook. It is noteworthy that the District Policy and District Regulations authorized Vinella to impose a greater penalty on T.S., but he opted otherwise.

Petitioner and V.S. vigorously claim that their son is the victim of a well-orchestrated plan by disgruntled peers and/or of a pattern of bad faith on the part of an administration bent on creating a narrative to satisfy a preordained decision, but they failed to present competent and reliable evidence supporting either theory.

No code of conduct or policy can ever be as good at identifying and defusing potential threats to school safety as the real-time intelligence generated by students and teachers. Respondent should be credited for encouraging action when potential problems are identified—even when the alleged threat turns out to be baseless. To rule against respondent here would undermine the authority given to the administration by the Legislature and DOE. The statements to which T.S. admitted making on school property had the potential to impede the orderly operation of EBHS and/or to disrupt the learning climate. Petitioner has not shown that the Board was arbitrary, capricious, or unreasonable in its determinations that T.S. should serve a one-day Saturday detention and that his record should reflect this one-time violation of the Handbook. Therefore, I **CONCLUDE** that petitioner did not carry her burden in proving that the Board's action was unlawful, arbitrary, capricious or unreasonable.

ORDER

I **ORDER** that the decision of respondents Board of Education of the Township of East Brunswick, Dr. Michael Vinella, Principal of East Brunswick High School, and Glen Pazinko, Assistant Principal of East Brunswick High School, to impose the penalty of detention on petitioners' son T.S., is **AFFIRMED,** 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 forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

August 28, 2019
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: August 28, 2019

Date Mailed to Parties: August 28, 2019

nd

APPENDIX

WITNESSES

For Petitioner:

P.S.

V.S.

For Respondent:

Dr. Michael Vinella

EXHIBITS

For Petitioner:

P-1 Email from V.S. to pett321@yahoo.com, Regarding Appeal and Complaint Letter to East Brunswick High School Admin., dated March 6, 2019

P-2 East Brunswick Police Department, Investigation Report, Terroristic Threats 2C:12-3, dated November 13, 2018

P-3 Handwritten Letter by T.S., dated November 14, 2018

P-4 Redacted, Handwritten Letter by F.A., dated November 14 [2018]

P-5 Redacted, Handwritten Letter by N.D., dated November 14, 2018

P-6 Email from T.S. to M.H., dated November 15, 2018

P-7 Email from Frances Febres to P.S., Regarding Recording, dated May 29, 2019

For Respondent:

R-1 East Brunswick High School Student/Parent Handbook, 2018-2019

R-2 East Brunswick Board of Education, District Policy, 5600-Student Discipline/Code of Conduct (M), Date Created: July 2012, Date Edited: August 2018

R-3 East Brunswick Board of Education, District Regulation, 5600-Student Discipline/ Code of Conduct (M), Section: Students; Date Created: July 2012; Date Edited: August 2018

R-4 East Brunswick High School, Incident Summary Report-#1113201813, Disciplinarian: Glen Pazinko, Infraction Code: Inappropriate Language, dated November 16, 20189

R-5 East Brunswick High School-Report 50950, Infraction 1: Inappropriate Language on November 13, 2018, dated May 9, 2019

R-6 East Brunswick Public Schools, Student/Parent Appeal Form, Complete Reversal of the Decision of Detention, dated November 15, 2018

R-7 Letter from Michael W. Vinella, Ph.D., Principal, East Brunswick High School, to the Parents/Guardian of T.S., Denial of Appeal Regarding Saturday Detention, Scheduled Saturday Detention on January 12 2019, dated December 11, 2018

New Jersey Commissioner of Education

Final Decision

C.S. on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of the Township of Lacey, Ocean County,

Respondent.

Synopsis

Petitioner, now an adult, appealed the determination of the Lacey Township Board of Education that she committed an act of harassment, intimidation and bullying (HIB) in May 2014 when she reacted to a fellow student's vocal performance in music class by plugging her ears and allegedly saying "I'm going to need ear plugs to get through this part of the concert." The Board contended that it had properly conducted an HIB investigation and based its finding on two potential distinguishing characteristics when it determined that J.S. had committed an act of HIB against fellow student, C.H. Petitioner claimed that she had trouble with noise hypersensitivity, and that her actions had nothing to do with C.H. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact here, and the matter is ripe for summary decision; an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under New Jersey's Anti-Bullying Bill of Rights Act (Act), "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, the Board found that J.S.'s conduct while C.H. was singing – i.e., plugging or covering her ears, and allegedly making a derogatory comment – constituted an act of HIB; however, the alleged conduct did not satisfy the threshold requirement of being motivated by a distinguishing characteristic, and instead appeared to be motivated by a past relationship between J.S. and C.H. The ALJ concluded that J.S.'s alleged conduct did not constitute a HIB violation. Accordingly, the ALJ denied the Board's motion for summary decision and granted the petitioner's cross motion for summary decision. The Board's determination of HIB was reversed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision of the OAL as the final decision in this matter.

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 16, 2019

OAL Dkt. No. EDU 03693-15
Agency Dkt. No. 34-2/15

New Jersey Commissioner of Education

Final Decision

C.S., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of the Township of Lacey, Ocean County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto.

This matter stems from an incident that occurred on May 1, 2014, when J.S. allegedly plugged her ears, made gestures, and possibly made a comment about needing earplugs, while another student, C.H., was singing a solo in music class. J.S. and C.H. previously had a close personal relationship that had ended. Following an investigation, the Board found that J.S. had committed an act of harassment, intimidation and bullying (HIB), pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 et seq. Petitioner filed an appeal on behalf of J.S.,[1] challenging the Board's finding of a HIB violation.

The Administrative Law Judge (ALJ) reversed the Board's determination and concluded that the alleged conduct did not constitute a HIB violation. The ALJ found that the alleged conduct did not meet the threshold requirement of being motivated by a distinguishing characteristic. While the Board sets forth two potential distinguishing characteristics – C.H.'s perceived sexual orientation or that C.H. is a weaker and more vulnerable female – the ALJ found that it was unclear on which characteristic the Board was basing its finding, and that there was insufficient evidence presented in the record that C.H.

[1] The Commissioner notes that J.S. is no longer a minor and is now pursing this case on her own behalf.

is weaker or more emotionally vulnerable. Even if the Board had established a distinguishing characteristic, the ALJ found that there was no link between the distinguishing characteristic and the alleged conduct to establish that the conduct was motivated by the characteristic. The ALJ noted that, instead, the actions in this matter appear to have been motivated by the girls' past relationship, and that pursuant to *K.L. v. Evesham Township Board of Education*, 423 *N.J. Super.* 337, 351 (App. Div. 2011), *certif. denied*, 210 *N.J.* 108 (2012), "harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying."

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that the alleged conduct – plugging her ears and making gestures or a comment about needing earplugs – did not meet the statutory definition of HIB. The Commissioner further concurs that the alleged conduct appears to stem from the students' past relationship and was not motivated by an actual or perceived distinguishing characteristic of C.H. The Board's exceptions do not challenge the ALJ's conclusion that the finding of HIB against J.S. is reversed. Finally, the Commissioner notes that the Board argues that the Initial Decision should have addressed petitioner's claim for monetary relief. However, there is no legal authority for petitioner to recover damages in this forum.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, for the reasons thoroughly set forth in the Initial Decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/19
Date of Mailing: 10/17/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING CROSS MOTION
FOR SUMMARY DECISION
OAL DKT. NO. EDU 03693-15
AGENCY DKT. NO. 34-2/15

C.S., ON BEHALF OF MINOR CHILD, J.S.,
Petitioner,
v.
LACEY BOARD OF EDUCATION OF
THE TOWNSHIP OF LACEY, OCEAN COUNTY,
Respondent.

J.S., petitioner, pro se

Steven Tedeschi, Esq., for respondent (Stein and Supsie, attorneys)

Record Closed: August 1, 2019 Decided: September 5, 2019

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

STATEMENT OF THE CASE

Petitioner J.S., now an adult, appeals from respondent Lacey Township Board of Education's (Lacey) finding that she committed an act of HIB when, after another

student started singing in music class, she plugged her ears and allegedly said, "I'm going to need ear plugs to get through this part of the concert,".

PROCEDURAL HISTORY

By petition dated February 5, 2015, petitioner C.S., on behalf of his then minor daughter, J.S. filed this appeal of the determination by Lacey that J.S. had committed an act of HIB. The matter was transmitted to the Office of Administrative Law (OAL) on March 18, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties then engaged in extensive motion and discovery practice, and numerous status and prehearing conferences were conducted. On March 18, 2019, respondent filed a motion for Summary Decision and by letter of April 30, 2019, J.S. replied to the motion and requested that the matter be decided by summary decision. Oral argument was held, and the record closed on August 1, 2019.

STATEMENT OF FACTS

On May 1, 2014, in Stephanie Faille's (Faille) music class at Lacey Township High School, an incident occurred involving two eleventh grade students — J.S. and C.H., both female—who had once had a close personal relationship. For the first ten - fifteen minutes of class, all the students (about twenty) were gathered around the piano, singing together as Faille played. Then the class paused for C.H.'s solo vocal.

In a Discipline Report completed the next day, Faille recounted that: "[J.S.] was making harassing gestures while [C.H.] was singing her solo. She made the student feel so uncomfortable she moved to the back of the room." The "harassing gestures" was the act of placing her fingers in her ears.

In a HIB Report, also completed that day, Faille described the scene this way:

> [C.H.] was singing a solo with the group and while her solo was going on [J.S.] was mocking her and talking to those around her in a harassing way. [C.H.] saw what [J.S.] was doing and saying and moved to the back of the room to get

> away from the sneers and was noticeably upset by the interaction. I had spoken with [J.S.] before she went on homebound about not staring or glaring at [C.H.] during class because [C.H.] had expressed to me that it makes her feel really uncomfortable. [J.S.] got upset that I mentioned it to her and left my office.

The HIB Investigation

HIB Team Members Kevin Donahue and Paul O'Neill launched an investigation. They interviewed both girls and one unidentified witness, later memorializing those interviews in narrative summaries on statement forms. It appears they did not interview. Faille and instead relied on her statement in the HIB Report because it is reproduced in a statement form under her name without any new information.

Interview of J.S.

In her interview, "[J.S.] claimed that she had trouble with her ears and would often plug one of them so that she could hear herself sing." When asked about why she did this right after C.H. began singing, "[J.S.] stated that her actions had nothing to do with [C.H.]." This is the extent of the interview as reflected in the narrative summary.

J.S. later produced a document dated May 16, 2014, from Sean D. Houston, M.D., with whom she treated from January 2013 to April 2014.[1] He explained that her "sensitivity to noise and sound is documented by our office prior to this event." He concluded therefore that her reaction was "reasonable," and in his medical opinion, "related to her noise sensitivity and not due to a social/bullying issue."

Interview of C.H.

Her interview focused more broadly on her relationship with J.S., and there is no mention of the alleged incident in the narrative summary.

[1] In her letter dated April 30, 2019, J.S. says that she has treated with Dr. Houston since she was "a young girl." His report, however, identifies only the above-mentioned treatment period.

C.H. said that she dated J.S., who ended their relationship after five months. She believed that J.S. was "trying to turn her against her family and friends." For example, J.S. would limit who she could talk to, sometimes physically removing her from conversations, all of which made her feel "sad."

For a time after their breakup, the girls continued to hang out as "best friends." That ended, however, when C.H. realized that J.S. was "nutty." She started to distance herself, which J.S. had a hard time accepting. She would follow her around school and had at least once, lingered around her house and commented on her social media.

This school year, C.H. said that she and J.S. had lunch and music class together. On the day of the incident, which was also opening night for the concert, C.H. did not know that J.S. would be returning to school, making things awkward. During lunch, J.S. stared at her "like she always does," and when she moved, J.S. also moved to get back in her line of vision.

C.H. recounted two recent episodes at school events where both her sisters had confronted J.S. about her actions, including about allegedly taking pictures of C.H. She also recently received a candygram, which she suspected was from J.S. In the end, C.H. did not anticipate talking to J.S. in the future, but she thought that J.S. "may still want to be with her romantically."

Interview of Unidentified Witness

It is not clear whether this student was in Faille's class, but the student did know both girls. The student and C.H. had been getting closer, and J.S. would speak about this to the student. She would tell the student that C.H. told her that she still had feelings for her. She would also say that she thought C.H. "is pretending not to love her and using her parents as an excuse." The student said that J.S. had a hard time when C.H. would show affection toward others.

The HIB Investigation Report

The HIB Investigation Report was submitted by Principal James Handschuch to Superintendent Dr. Sandra Brower on May 16 and affirmed on May 27, 2014. The Report concluded that J.S. committed an act of HIB when she "made a gesture to [C.H.] that was done to harass and intimidate her. [J.S.] also continues to discuss [C.H.] after she has been instructed multiple times to end their relationship." The consequence imposed was a "schedule change."

On May 19, 2014, three days after the HIB Investigation Report was submitted, Donahue emailed Faille, asking if she remembered "any specifics that [J.S.] said when she put her fingers in her ears." He also asked if other people witnessed the incident. She responded in full: "[J.S.] put her fingers in her ears while [C.H.] was singing her solo and said I'm going to need earplugs to get through this song at the concert." This is the first documented mention of this comment.

This email exchange and Dr. Houston's report become a part of the HIB Investigation Report. Following the investigation, during a telephone conference call with several school officials, J.S. and her father, C.S., were told of the HIB finding. C.S. was also notified of the same by letter dated June 20, 2014. He timely requested a hearing before the Board of Education.

Board Meeting and Report

Through a Committee, the Board of Education held a hearing on this matter on September 3, 2014. The Committee later issued a written report in which it summarized the hearing and made certain findings of facts. The following information is drawn exclusively from that report.

Handschuch, Faille and O'Neill were present at the hearing to answer any questions. It is not clear to what extent any of them testified, but Faille and O'Neill likely did because there are details in the Committee Report that cannot be found in the HIB Investigation Report or C.S.'s testimony.

While J.S. did not attend the hearing or testify, her father did attend, and he testified but did not offer any other witnesses. C.S. said that the girls previously had a relationship, which he labeled an affair. He testified, however, that there were no problems between the girls—any problem was between the families. He offered as exhibits text messages exchanged between himself and C.H.'s parents in which there is no shortage of hostility.

His testimony focused mainly on explaining away his daughter's gesture and disputing the alleged comment. He opined that she plugged her ears because C.H. is a loud singer and she is sensitive to loud noises. For evidence of this, he cited the fact that J.S. wears headphones in the car to drown out noise from the tires. He also cited Dr. Houston's May 16, 2014 report, which confirmed her treatment for noise sensitivity. Regarding the alleged comment, C.S. testified that on the conference call following the investigation, he was told that J.S. had not made any comments.[2]

The Committee discounted Dr. Houston's report because it postdated the incident and J.S.'s treatment with him. It also found that the report amounted to a "net opinion" because it did not include facts about the incident. Neither did the Committee credit C.S.'s explanation—that J.S. plugged her ears to protect her hearing—because, when the entire class was singing together before C.H. started her solo, there was "no allegation or claim that [J.S.] made any movement to protect her hearing or her ears with her fingers or by any other means." More generally, the Committee noted that during concerts, sounds will reverberate toward the singers, and J.S. had "never expressed any concern about her hearing or the effect of that reverberating sound on her own hearing."

Regarding the alleged comment, the Committee found that "Mr. O'Neill, who was part of the conversation with [C.S.] upon the conclusion of the investigation . . . does not recall [C.S.] being informed that [J.S.] said nothing when she placed her fingers in her ears."

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[2] In her letter dated April 30, 2019, J.S. admits that she covered her ear because C.H. "has a beautiful, loud and distinctive tone that caused my ear to hurt." She emphasizes, however, that "I have never stuck my finger in my ear, nor did I say anything derogatory towards [C.H.] at the time of this incident."

In its report, the Committee found that the girls were standing around the piano, five feet from one another, and once C.H. started her solo, J.S. "placed her fingers in her ears and was heard to say, 'I'm going to need ear plugs to get through this part of the concert.'"[3] Relying on Faille's observations, the Committee also found that C.H. saw what J.S. was doing, and then "appeared to physically shrink in posture and removed herself from where the students were gathered around the piano and moved to the back of the class to be by herself" for the remainder of class.

Regarding her alleged motivation, the Committee found that "[J.S.] targeted [C.H.] who she viewed as a weaker and emotionally vulnerable female with [J.S.] having a perception of a characteristic of [C.H.] relating to sexual orientation." "It is unknown if the perception is accurate and for purposes of this investigation and the Committee's finding, such determination is not necessary as being motivated by a perceived characteristic that substantially disrupts or interferes with the right of another student is sufficient to justify a finding or harassment intimidation or bullying."

Based on these findings, the Committee recommended that the full Board vote to affirm the Superintendent's HIB finding, which it did at its September 15, 2014 meeting.

LEGAL DISCUSSION

Summary Decision Standard

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion "shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b).

Under this regulation, which is akin to the judiciary's motion for summary judgment, see R. 4:46-1, "the determination [of] whether there exists a genuine issue

[3] Note that this is slightly different than the comment Faille described in her email: "I'm going to need earplugs to get through this song at the concert."

with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, 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, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986). Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" Id. at 529.

Standard of Review

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. o/b/o K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014), adopted, Comm'r (April 10, 2014), http://njlaw.rutgers.edu/collections/oal/. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. o/b/o C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013), adopted, Comm'r (April 25, 2013), http://njlaw.rutgers.edu/collections/oal/.

HIB Regulations

Under the Anti-Bullying Bill of Rights Act, "harassment, intimidation or bullying" is broadly defined as:

any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14 (emphasis added).]

First, to satisfy the statutory definition of HIB, the conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." N.J.S.A. 18A:37-14. "The statute has not limited 'distinguishing characteristic' to those specifically enumerated, but it has consistently required such a perceived motivation." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). "The Legislature in the Anti-Bullying Act intentionally included a very open-ended phrase, 'any other distinguishing characteristic,' to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted

student." L.P. and H.P. o/b/o. L.P., EDU 04462-16, Initial Decision (June 10, 2016), adopted, Comm'r (July 25, 2016), http://njlaw.rutgers.edu/collections/oal/. However, the Appellate Division has made clear that "harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying." K.L., 423 N.J. Super. at 351.

Here, the Board found that J.S.'s conduct while C.H. was singing—a gesture (placing her fingers in her ears) and comment ("I'm going to need ear plugs to get through this part of the concert")—constituted an act of HIB. It is undisputed that J.S. obstructed at least one of her ears. The Committee found that she placed fingers in both of her ears. She maintains, however, that she covered (not plugged) only one ear. Either way, the effect was the same.

The comment, however, is disputed. In the Discipline Report and HIB Report, both completed the day after the incident, Faille did not mention this comment. Neither is there a reference to this comment in the HIB Investigation Report. It is documented for the first time in an e-mail three days after the HIB Investigation Report was completed and submitted to the Superintendent. Thus, the girls and the third-party witness were not asked about this comment in their interviews. Further, at the hearing before the Committee, J.S.'s father disputed that she made such a comment. And J.S. continues to maintain that she did not say anything derogatory about C.H.

In any event, even accepting the Board's finding as true, its ultimate HIB finding must nevertheless be overturned. To satisfy the "threshold requirement," J.S.'s conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic." C.K. and M.K. o/b/o M.K. v. Voorhees Twp. Bd. of Edu., EDU 20510-15, Comm'r (March 23, 2017), https://njlaw.rutgers.edu/collections/oal/. "Absence of this factor, alone, is sufficient to render a finding of no HIB." Ibid. In this matter the HIB Investigation Report did not identify a distinguishing characteristic that motivated J.S.'s conduct. In its report, however, the Committee found that J.S. had "a perception of a characteristic of [C.H.] relating to sexual orientation." While sexual orientation is an enumerated characteristic under N.J.S.A. 18A:37-14, the Board then went on to

discount it stating that it was "unknown if the perception is accurate and . . .such determination is not necessary". Simply put, the finding was unclear the characteristic upon which the Board was basing its HIB finding. While referencing sexual orientation, it appeared to base its finding on its characterization of C.H. as a weaker and vulnerable female. However, there was insufficient evidence presented in the record as set forth by Lacey to even determine whether the alleged characteristic of "a weaker and emotionally vulnerable female" applied to C.H.

Yet even granting that the Board based its HIB determination on either sexual orientation or C.H. being a weak and vulnerable female, there was no factual showing that either characteristic motivated J.S.' denigration of her singing. The fact that C.H. had a distinguishing characteristic is not, by itself, enough to support a finding that demeaning conduct directed at her was motivated by that characteristic. There must be something more linking the conduct to the characteristic, and that link is notably absent here. Nothing in J.S.' alleged conduct during the chorus class at issue raised the issue of sexual orientation or "a perception related to a sexual characteristic", nor were the alleged words or actions tied to C.H.'s purported status as a weaker and emotionally vulnerable female. Rather the conduct complained of here related to C.H.'s singing. While J.S.' alleged conduct may have been rude or inappropriate and may have warranted some form of censure or discipline, nothing in her alleged words or actions in that particular instance tied it to sexual orientation or status as a weaker female.

Rather, the conduct complained of here appears to have arisen out of the girls' past personal relationship. It is undisputed that they were close personal friends, with the Committee characterizing it as a "relationship of some kind with some form of undetailed intimate characteristics. The record was replete with the ups and downs of the girls' relationship which arguably was the real motivating factor in the conduct complained of in the HIB complaint. However, as noted by the Court in K.L., conduct arising out of a dispute over something such as a relationship, does not without more rise to the level of an HIB violation.

CONCLUSION

Based on the above, the Board's motion for summary decision is denied. petitioner's cross-motion for summary decision is granted.

ORDER

Petitioner's cross motion for summary decision is **GRANTED** and respondent's motion for summary decision is **DENIED**. It is hereby **ORDERED** that respondent's finding of HIB against petitioner J.S. is **REVERSED**.

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

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

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

9/5/19
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: September 5, 2019 (e-mailed)

Date Mailed to Parties: 9.6.19

/mel

271-19+

New Jersey Commissioner of Education

Amended Decision

Jamie Truncellito,

Petitioner,

v.

Board of Education of the Township of Lyndhurst, Bergen County,

Respondent.

Synopsis

Petitioner, formerly employed by the respondent Board, appealed the non-renewal of her employment and sought reinstatement to the position of guidance counselor. The Board contended that petitioner was a non-tenured employee at the time of her non-renewal due to budgetary constraints. Petitioner asserted that the non-renewal was politically motivated and was therefore arbitrary, capricious and unreasonable.

The ALJ found, *inter alia*, that: petitioner was employed by the Board as a school counselor from August 2018 through June 2018; she received a standard notice of non-renewal on April 25, 2018, stating that she would be non-renewed for the 2018-2019 school year; she was subsequently recommended for re-appointment by the Superintendent of Schools and received a written offer of employment, which she accepted via email on May 23, 2018; at a meeting on May 29, 2018, the Board voted not to renew the petitioner's employment; there was adequate funding available for petitioner's employment in the 2019-2019 district budget; petitioner was non-renewed at the May 2018 Board meeting because a faction of Board members wished to free the position she held so that it could be filled by a Lyndhurst resident; and *N.J.S.A.* 18A:27-4.1(b) stipulates that an employment contract shall renew only upon recommendation of the chief school administrator and by a recorded roll call majority vote of the full board, and that the board shall not withhold its approval for arbitrary and capricious reasons. The ALJ concluded that the Board's motivation to remove petitioner so that a Lyndhurst resident could fill the position was arbitrary and capricious. Accordingly, the ALJ determined that petitioner's non-renewal was improper, and ordered that her appeal be granted.

In a decision dated October 16, 2019, the Commissioner rejected the Initial Decision of the OAL and dismissed the petition. Subsequently, the Board filed a motion to re-open the case based upon the fact that the date of mailing on the respondent's copy of the Initial Decision differed from the date on the Commissioner's copy; as such, the Board contended that its exceptions were timely filed. Upon granting the motion to reopen, the Commissioner comprehensively reviewed the new filings and the record, and again rejected the ALJ's decision and dismissed the petition. In so doing, the Commissioner noted that a board of education has virtually unlimited discretion in renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. Where a non-tenured staff member challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. Petitioner herein has specifically stated that she is not arguing that her constitutional rights were violated, nor has she alleged a violation of any legislatively-conferred right. Accordingly, the petition was dismissed.

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

December 3, 2019

271-19+

OAL Dkt. No. EDU 10980-18
Agency Dkt. No. 150-6/18

New Jersey Commissioner of Education

Amended Final Decision

Jamie B. Truncellito,

Petitioner,

v.

Board of Education of the Township of Lyndhurst, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the respondent, Lyndhurst Board of Education (Board), and the reply thereto by petitioner, Jamie Truncellito.[1] This matter involves a decision by the Lyndhurst Board of Education (Board) to non-renew petitioner in her position as guidance counselor. The Administrative Law Judge (ALJ) found that the Board's motivation to non-renew petitioner was to allow a Lyndhurst resident to fill the position and, accordingly, that the decision was arbitrary and capricious. The ALJ reversed the Board's decision and ordered that petitioner be reinstated to her position.

In its exceptions, which recast the arguments made in its post-hearing brief, the Board argues that the ALJ did not consider the bona fide reasons presented by the Board

[1] The Commissioner issued a decision in this matter on October 16, 2019, which stated that exceptions filed by respondent were not timely pursuant to *N.J.A.C.* 1:1-18.4 and were therefore not considered by the Commissioner. After receipt of the decision, respondent filed a motion to re-open this case based upon the fact that the date of mailing on respondent's copy of the Initial Decision was different than the date on the Commissioner's copy. As such, respondent contended that its exceptions were timely filed. By order dated November 22, 2019, the Commissioner re-opened this matter to consider the exceptions filed by respondent.

regarding petitioner's non-renewal – the deficit experienced by the district and the appointment of a State Monitor. The Board contends that the testimony presented the alleged motivations of only one board member, solely through hearsay evidence with no residuum of competent evidence. Furthermore, according to the Board, no competent evidence supported imputing that Board member's motivation to the other four Board members who voted against petitioner's renewal.

In her reply, which includes arguments substantially similar to those made in her post-hearing briefs, petitioner argues that the ALJ carefully reviewed the testimony of all the witnesses, which supports petitioner's assertions of nepotism. Petitioner further contends that the Board refused to honor the recommendation of the superintendent, making its decision arbitrary, capricious, and unreasonable. Petitioner alleges that the Board's claim of economic crisis does not square with the facts because her employment had already been accounted for in the budget and the business administrator, who co-authored the budget, testified that he had no knowledge of why petitioner was not renewed. Respondent filed a reply to petitioner's reply. However, *N.J.A.C.* 1:1-18.4 does not permit the filing of a reply to a reply to exceptions; as such, respondent's submission was not considered.

Upon review, the Commissioner finds that the ALJ erroneously reversed the Board's decision. A board of education has virtually unlimited discretion in hiring or renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982). As such, where a non-tenured staff member challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation

of constitutional or legislatively-conferred rights. *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986). In this case, petitioner has specifically stated that she is not arguing that her constitutional rights were violated. Furthermore, she has not alleged a violation of any legislatively-conferred right.

Accordingly, the Initial Decision of the OAL is rejected and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/19
Date of Mailing: 12/03/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10980-18
AGENCY DKT. NO. 150-6/18

JAMIE B. TRUNCELLITO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,
Respondent.

Alfred Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Dennis McKeever, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: August 14, 2019 Decided: September 9, 2019

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Jamie Truncellito (petitioner or Truncellito), a former guidance counselor employed by the Board of Education of the Township of Lyndhurst (Board) appeals the Board's decision of non-renewal and seeks reinstatement to her former position as a guidance counselor. The Board argues Truncellito was a non-tenured

employee at the time of non-renewal and claims her contract was non-renewed due to budget constraints. Truncellito asserts that the non-renewal was politically motivated and thus arbitrary, capricious, and unreasonable.

ISSUE

Was the non-renewal of Truncellito's contract by the Board a result of a reduction in force due to budget shortfalls or was she non-renewed for political reasons, specifically so that a Lyndhurst Township native could take her position.

PROCEDURAL HISTORY

Petitioner filed the instant petition with the New Jersey Commissioner of Education, on June 20, 2018, where it was received on June 21, 2018, by the Department of Controversies and Disputes.

The matter was transmitted as a contested case on July 30, 2018, to the Office of Administrative Law (OAL) where it was received on July 30, 2018.

The matter was set down for a hearing on May 2, 2019, and May 20, 2019. Final submissions were received on July 10, 2019, and response briefs on August 14, 2019, at which point the record was closed.

STATEMENT OF FACTS

The I **FIND** that the following facts are undisputed, and I therefore **FIND** them to be the **FACTS** of the case:

1. Petitioner was employed as a School Counselor under a Student Services Certificate from August 26, 2016, through June 30, 2018.
2. On April 25, 2018, Truncellito received a standard Notice of Non-Renewal stating that she would be non-renewed for the 2018-2019 school year.

3. Truncellito was recommended for re-appointment by Jamie Stevens, Director of Special Services (her immediate supervisor), the High School Principal Laura Vouno, and the Superintendent of Schools Shauna DeMarco.
4. On May 22, 2018, Truncellito was given a written offer of employment by Superintendent Shauna DeMarco in advance of the May 29, 2018, Pubic Board Meeting.
5. Truncellito accepted the offer of employment in writing through an email communication with the Superintendent on May 23, 2018.
6. At the May 29, 2018, Lyndhurst Board of Education Meeting, the Board voted five to four not to renew Truncellito's employment.
7. During the fall and winter months of the 2017-2018 school year, a budget deficit was discovered by the Superintendent of Schools and the Business Administrator.
8. The initial deficit was projected at approximately $1.8 million dollars and subsequently determined to be approximately $3.8 million dollars.
9. The Business Administrator advised the Acting Bergen County Superintendent of Schools of the deficit in writing on March 31, 2018, identifying the amount of the deficit and the District's plan to address the same.
10. The Business Administrator, with the assistance of the Superintendent of Schools Demarco, prepared a budget for the 2018-2019 school year and submitted the same to the County Superintendent.
11. The budget presented to and approved by the Country Superintendent reflected cuts taken to address the deficit that was reported to him.
12. The 2018-2019 budget contained numerous cuts in non-tenured personnel, reductions in tenured staff, and other operational cuts in spending.
13. The approved 2018-2019 budget was adopted by the Board included the salary for Truncellito's employment.
14. Petitioner's salary for the 2017-2018 school year was $83,910.
15. Petitioner's salary, unadjusted for collective bargaining for the 2018-2019 school year would have been $88,080.
16. A fiscal monitor, Thomas Egan (Egan), was appointed to manage the District's finances in August 2018.

17. The monitor possesses the powers as set forth under New Jersey State Law and the New Jersey Administrative code, including the power to amend the 2018-2019 budget and corresponding personnel decisions.
18. The monitor chose not to amend the approved 2018-2019 budget and corresponding personnel decisions.
19. When Egan took control of the District's finances, he did not non-renew any of the non-tenured employees approved in the 2018-2019 budget.
20. Shauna DeMarco resigned as Superintendent in February of 2018, effective June 30, 2018.
21. Shauna DeMarco was replaced by Anthony Grieco as Superintendent in July of 2018.
22. When Truncellito's renewal was defeated by the Board, neither Superintendent DeMarco nor her successor recommended any individual to fill the position.

Shauna Demarco

Shauna DeMarco (DeMarco) has been employed by the Lyndhurst School District since 2006, first as a substitute, then a full-time teacher, and then the Superintendent. As the Superintendent, she was fully involved with the budgetary process and made recommendations to the Board that considered these budget constraints.

DeMarco testified that at the end of the 2017-2018 school year, all non-tenured staff, including petitioner, were sent notice of non-renewal. She would then decide who of these were essential to re-hire. In analyzing who to re-hire, DeMarco took recommendations from the principals, vice principals, and supervisors within the district.

When conferring with the guidance department regarding who to re-hire, everyone agreed that Jamie Truncellito was essential to the department. She testified that she felt that Truncellito could handle a crisis if need be, as Truncellito regularly dealt with very sensitive issues and her expertise was very valuable to the district. There were three counselors who had been non-renewed (Truncellito, Samantha Foti,

and Laura Tunnell) but the decision was made that Truncellito's would be the only re-hire. While the other counselors were excellent, they were new and less experienced than Truncellito.

The serious financial situation in the district was carefully examined while making all of these determinations. Jamie Truncellito was making over $83,000 and the other two were making $59,000. These facts were taken into careful consideration when recommending to re-hire Jamie Truncellito. Her salary was included in the budget that was sent to the Board and to the County for approval.

DeMarco then testified that there came a time when certain Board members tried to influence personnel decisions by persuading other members to vote to non-renew certain non-tenured employees, such as Truncellito, so that these certain Board members could offer the position to people they knew.

With respect to the Guidance Counselor position, the principal and others began receiving signals from a certain Board member that an individual named Laura Tunnell should get the position occupied by Truncellito. Notwithstanding these influences, DeMarco explained to her staff that the best candidates should be put forward regardless of political bias and that she alone would make the final recommendation.

DeMarco testified that in January of 2018, she was advised by the Director of Curriculum that a certain Board member inquired about who would be recommended for the guidance counselor position (occupied by Truncellito). DeMarco was surprised that the Board was interfering with personnel recommendations and she therefore reached out to the Board member for a conversation. This Board member advised DeMarco that the only candidate the Board would support would be Laura Tunnell because she was a "good kid" from Lyndhurst. There was never a discussion about money or budget.

DeMarco explained to the Board member that it was improper for the Board and its members to influence personnel decisions in this manner. DeMarco then had a conversation with the Board president and vice president because she was concerned about what she considered the non-ethical behavior of certain members of the Board.

DeMarco resigned from the District February 2, 2018, even though she had a five-year contract. She testified that she resigned because she felt that she was not able to accomplish what she wanted to in this district.

With respect to the Jamie Truncellito recommendation, DeMarco testified that she was in contact with the business administrator and her recommendation in favor of Truncellito was clear. When she made the recommendation for Truncellito, she was acutely aware of the financial problems and that there was sufficient money in the budget for Truncellito. She was also aware that there would be lay-offs of the two other counselors whose salaries totaled $120,000 plus benefits. This recommendation was made because DeMarco believed it was essential that the District retain Jamie Truncellito and the funds were available to do so.

DeMarco then testified with regard to executive session that occurred before the Board vote at the May 29, 2018, Board of Education Meeting. At this meeting, there were two names given to be voted upon separate and apart from the list of people being recommended for re-hire. DeMarco asked why these individuals were being separated from the larger list of pre-approved, recommended candidates. DeMarco was advised that the Board wanted Truncellito to be voted on separately. DeMarco then testified that in response to this conversation, Board member Jim Donovan got up and said "are you kidding me?" He was upset with Susan Alcuri and with the Board. He said "this isn't about money. It's about Susan wanting to put in a position for Laura Tunnell."

The Board decided to remove Jamie Truncellito's name for the larger block of names being approved and vote on her re-employment by a separate line item. Once Truncellito's name was removed, the larger block of names was ultimately voted on and approved by the Board. The vote on Truncellito alone was 5-4 against re-hiring Truncellito. This vote created a vacancy for Truncellito's position.

DeMarco was asked by the Board to make another recommendation for the position, but she refused. DeMarco added that she was shocked by the vote of the Board. Laura Tunnell has multiple family members in the Lyndhurst school system.

DeMarco opined that the Board was attempting to create a vacancy so that they could hire Laura Tunnell.

Lisa Klein

Lisa Klein (Klein) is a staff developer in the Lyndhurst School district. She has been an administrator there for twenty years. Klein had a role in the development of the budget. She had monthly meetings with Scott Bisig and Shauna DeMarco and she was aware of the budget constraints.

Klein made recommendations on how many positions were needed and she knew certain personnel cuts would have to be made. Klein testified that a determination was made to keep Jamie Truncellito and cut the other two counselors. This decision was made because Truncellito provided classroom experience, she ran many programs, she helped students in crisis, she partook in confidential meetings, and she went out of her way for students. One example was with an English student who was having problems and she would work every day to help him complete a project. Klein felt the retention of Truncellito was essential.

Klein testified that at the May 29, 2018, Lyndhurst Board of Education meeting related to budget and staffing, motions were made to appoint a large list of non-tenured staff. Jamie Truncellito was the only non-tenured staff member who was singled out and taken off the list.

Laura Vuono

Laura Vuono (Vuono) is employed as the Lyndhurst High School principal. She is very familiar with the school board budget process and the budgetary problems facing the Lyndhurst school district. Vuono recommended re-hiring Jamie Truncellito for the position of guidance counselor. Vuono testified that Truncellito did excellent work with the students, was the liaison for the Gay Straight Alliance, she had the ability to deal with students in crisis and sensitive issues and the skills to handle large caseloads. Vuono's recommendation was based on Truncellito's performance and work ethic and took the

budgetary constraints of the District into account when making the decision.

Jamie Stevens

Jamie Stevens (Stevens) is the Supervisor of the Special Education and Guidance in Lyndhurst and she supervised Jamie Truncellito. Stevens was aware of the budget problems facing the district at the time. She recommended Truncellito and was advised there were adequate funds in the budget for her position. Stevens made a conscious choice to let two other counselors go and keep Truncellito as a priority re-hire. She felt petitioner was the best qualified and made this decision keeping in mind the best interests of the students. If Stevens had been advised there was a financial issue with Truncellito's re-hire, she would have moved some line items in our budget to allow her to remain. She felt Truncellito was essential to the district.

James Vuono

James Vuono (Vuono) is a member of the Board. He was indirectly part of the budget process and was present at Board meetings, committee meetings, and caucuses where the budget was discussed. He is aware of the budget deficit issue that the previous business administrator left behind.

Vuono testified that at the May 29, 2018, Board meeting, there was a block of names of personnel recommended to be voted on. He recalls that Jamie Truncellito was on the recommended list and that there was money in place in the budget to fund her position.

Vuono recalls Board conversations regarding a motion for her re-appointment. He received a phone call from Board member Susan Alcuri asking him if he would support Laura Tunnell instead of Jamie Truncellito. He said no.

Vuono then testified that at the May 29 Board Meeting, Truncellito's name was taken off a long list of names of people who were recommended for hiring and her name was made a separate line item. The motion passed to move her name and then the vote

was 5-4 against re-hiring her.

The person who called for Jamie Truncellito's name to be separate also voted against hiring her was Board member Susan Alcuri. James Vuono believes that he was excluded from some of the private conversations among other Board members regarding Truncellito's re-hire because he had already made it known that he would be voting in favor of Truncellito. The context of these private discussions was to remove Truncellito because she was not from Lyndhurst and to then fill her position with someone who was from Lyndhurst. There was no discussion of District finances regarding the decision to remove Truncellito. James Vuono opines that Jamie Truncellito lost 5-4 as she was not a "Lyndhurst person."

James Donovan

James Donovan (Donovan) is a Lyndhurst Board of Education Trustee, elected in 2016. He was present for the budget crisis and served on several committees. The town did not raise taxes to pay for this.

Donovan was present at the May 29, 2018, Board of Education meeting and he voted in favor of the Superintendent's recommendations. The money for Jamie Truncellito's salary was included in the budget and he voted in favor of her re-hire. As a Board member, he does not tell the Superintendent who to hire. He bases his vote on her recommendation and he testified that the Board is not able to hire anyone who is not recommended.

Prior to this May 29 Board meeting, there were discussions between himself and other Board members regarding who should remain employed by the District and who should not. Donovan testified that someone on the Board was attempting to influence him and that he was being pressured. He testified that certain members of the Board did not want Jamie Truncellito hired because she was from Rutherford and not from Lyndhurst.

Donovan testified that there were two other non-tenured guidance counselors non-renewed but Truncellito was the only one recommended by the Superintendent. Laura

Tunnell was offered a job by the District in August of 2018 which she accepted. He testified that she was not recommended by the Superintendent.

Erin Keefe (by telephone conference)

Erin Keefe (Keefe) was sworn onto the Board of Education in January of 2018, and she serves as the current president. She was made aware of the financial crisis within a month of taking office. She was not on the finance committee, but she did participate in meetings and discussions regarding the deficit, which was substantial.

The new budget for 2018-2019 was prepared by Shauna Demarco and Scott Bisig. The purpose of the March 28, 2018, letter from Scott Bisig to the County Superintendent was to alert the County of the deficit and the corrective actions being taken. The budget was submitted and approved. The budget included personnel decisions, policy decisions, budget cuts, and it was mindful of the deficit. It also included Jamie Truncellito's salary.

Keefe was present at the executive session held before the May 29, 2018, Board of Education meeting. There was discussions of staffing and cuts. The guidance counselor positions were discussed. The decision was made for Lisa Klein and Jamie Truncellito to be voted on separately. Truncellito was the only non-tenured staff member listed for re-appointment who was taken off the list. She had been recommended by the Superintendent.

Board member Susan Alcuri discussed that two counselors cut were from Lyndhurst and Truncellito was not. She stated that Lyndhurst people should be hired first. She also stated that they made less money than Truncellito. Susan Alcuri voted "no" for Truncellito. The vote was 5-4 against her re-hire.

Keefe testified that the Superintendent's recommendations on cuts and retention were made in the best interests of the District. She felt that Truncellito was essential and voted "yes" for Truncellito. Keefe believes that residency was made a factor by Ms. Alcuri and was a factor in the vote not to re-hire Truncellito.

Jamie Truncellito

Truncellito was hired by the Lyndhurst School District in August 2016, and she worked from October 2016 until June 30, 2018, as a guidance counselor. She was responsible for administering SAT, AP, and other testing. She oversaw the anxiety group and the Gay Straight Alliance, ran the lunch and learn program, totally revamped the INRS process, and provided academic, college, and crisis counseling.

Truncellito testified that In January of 2018, she learned of serious budget issues in the district and noted that all of the non-tenured staff were worried. Truncellto testified that there were two other non-tenured guidance counselors at the school; Samantha Foti, who was hired in 2017, and Laura Tunnell, who had just been hired January of 2018. In light of the budget issues and her non-tenured status, Truncellito began sending out resumes. Truncellito's supervisor, Jamie Stevens, heard that she was looking for another job and told Truncellito not to send out any more resumes as there were no plans to let her go. Truncellito testified that she was also advised by her principal, Laura Vuono, that her job would be safe.

On April 25, 2018, Truncellito received a letter of non-renewal along with all of the other non-tenured staff. On May 22, 2018, she was given a letter by Laura Vuono indicating that the Superintendent was recommending her for the position of guidance counselor. She accepted this position by email on May 23, 2019. She was told that her job would be approved at the May 29, 2018, Board of Education meeting. On May 30, Truncellito learned that she was not re-hired and that her name had been singled out and voted on separately. She testified that the vote was 5-4 against her. She was distraught by the news and inconsolable at the time.

Truncellito then testified that later, at a school award ceremony, she saw Board member Erin Keefe and thanked her for her "yes" vote. Keefe apologized to Truncellito and said that she could give Truncellito no reason as to why she had lost her job. Keefe stated she was still trying to figure out the various relationships among Board members and that her leaving would be a loss to the District. She never mentioned finances.

Truncellito is currently working in Tenafly in a temporary job making $76,000. It is a maternity leave position with no pension credits. Truncellito holds six certifications K-5 elementary, 5-8 with language arts, teacher of the handicapped, reading specialist, teacher of reading, and school counseling. In her last year working at Lyndhurst, she was making $83,910. If was working there today, her salary, pursuant to the guide, would be $88,080.

When Truncellito was employed at Lyndhurst there were nine counselors and she believes there are now six. Laura Tunnell was hired in August 2018, and then resigned in September 2018. Truncellito does not know if her former job description was ever posted and she has been advised that ultimately, the Board did not re-hire anyone for this position.

Scott Bisig

Scott Bisig (Bisig) testified on behalf of the Board. His testimony was offered to show how Truncellito's non-renewal was directly related to a reduction in force due to budgetary shortfalls. He was hired by the Lyndhurst School District as the business administrator in 2017. Prior to this, he was employed in Oradell as the business secretary and prior to that, he was employed as a teacher in Bergenfield. He was made aware of glaring accounting discrepancies in November 2017. He contacted Shauna DeMarco and told her of a 1.2 million dollar deficit.

An audit was conducted and a second audit completed in January. After the audits, he was informed that the deficit could be as high as 4.5 million dollars.

On April 16, 2018, the District sent non-renewal notices to all non-tenured staff. Jamie Truncellito received a notice. When the 2018-2019 budget was prepared it include Truncellito's salary.

There were two other non-tenured counselors being cut. To date, the Board has not rehired this guidance counselor position. There was a maternity leave position offered to Laura Tunnell, but she did not accept it. That money has since been used to pay other

expenses.

Bisig testified that he had no knowledge as to why Truncellito was not hired.

CREDIBILITY DETERMINATION

I **FIND** each and every witness in this case to be entirely credible.

FINDINGS OF FACT

In light of the above testimony, and having assessed the credibility of each witness, I **FIND** the following **FACTS**:

The moneys necessary to fund Truncellito's employment for the 2018-2019 school year were available and accounted for in the 2018-2019 District Budget. Truncellito was non-renewed at the May 29, 2018, Board meeting because a faction of Board members, including Member Alcuri, wished to free the position held by Truncellito so that it may be filled by a Lyndhurst resident. The decision by these Board members was not motivated by concerns regarding any budget shortfalls but instead the decision was purely motivated by in interest to employ Lyndhurst residents over non-Lyndhurst residents.

Legal Discussion

In the Case at bar, Truncellito was recommended for re-hire by the Superintendent, received a written offer of employment, and accepted same. Truncellito was ultimately not re-hired by the Board because a faction of the Board members wished to free-up her position as counselor so that a Lyndhurst resident may be hired to fill it.

N.J.S.A. 18A:27-4.1 b states:

> A Board of Education shall renew the employment contract of a certified or non-certified 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.

In light of the above, I **FIND** the Board's motivation to remove Truncellito so that a Lyndhurst resident may fill it to be arbitrary and capricious and I **CONCLUDE** the Board's non-renewal of Truncellito was improper and should be reversed.

ORDER

It is hereby **ORDERED** that petitioner Jamie Truncellito's petition be **GRANTED** and that she be reinstated to her position of school counselor on the appropriate salary guide step for the 2019-2020 school year. It is further **ORDERED** that Truncellito be awarded the difference between what her earnings and benefits for the 2018-2019 school year would have been had she not been wrongfully removed from her position and what she actually received.

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

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

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

September 9, 2019
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 9/9/19

Date Mailed to Parties:

id

271-19

New Jersey Commissioner of Education

Decision

Jamie Truncellito,

Petitioner,

v.

Board of Education of the Township of Lyndhurst, Bergen County,

Respondent.

Synopsis

Petitioner, formerly employed by the respondent Board, appealed the non-renewal of her employment and sought reinstatement to the position of guidance counselor. The Board contended that petitioner was a non-tenured employee at the time of her non-renewal due to budgetary constraints. Petitioner asserted that the non-renewal was politically motivated and was therefore arbitrary, capricious and unreasonable.

The ALJ found, *inter alia*, that: petitioner was employed by the Board as a school counselor from August 2018 through June 2018; she received a standard notice of non-renewal on April 25, 2018, stating that she would be non-renewed for the 2018-2019 school year; she was subsequently recommended for re-appointment by the Superintendent of Schools and received a written offer of employment, which she accepted via email on May 23, 2018; at a meeting on May 29, 2018, the Board voted not to renew the petitioner's employment; there was adequate funding available for petitioner's employment in the 2019-2019 district budget; petitioner was non-renewed at the May 2018 Board meeting because a faction of Board members wished to free the position she held so that it could be filled by a Lyndhurst resident; and *N.J.S.A.* 18A:27-4.1(b) stipulates that an employment contract shall renew only upon recommendation of the chief school administrator and by a recorded roll call majority vote of the full board, and that the board shall not withhold its approval for arbitrary and capricious reasons. The ALJ concluded that the Board's motivation to remove petitioner so that a Lyndhurst resident could fill the position was arbitrary and capricious. Accordingly, the ALJ determined that petitioner's non-renewal was improper, and ordered that her appeal be granted.

Upon review, the Commissioner rejected the Initial Decision of the OAL and dismissed the petition. In so doing, the Commissioner noted that a board of education has virtually unlimited discretion in hiring or renewing non-tenured staff members absent constitutional constraints or legislatively-conferred rights. As such, where a non-tenured staff member challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. Petitioner herein has specifically stated that she is not arguing that her constitutional rights were violated, nor has she alleged a violation of any legislatively-conferred right. Accordingly, the petition was dismissed.

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

October 16, 2019

OAL Dkt. No. EDU 10980-18
Agency Dkt. No. 150-6/18

New Jersey Commissioner of Education

Final Decision

Jamie B. Truncellito,

Petitioner,

v.

Board of Education of the Township of Lyndhurst, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] This matter involves a decision by the Lyndhurst Board of Education (Board) to non-renew petitioner in her position as guidance counselor. The Administrative Law Judge (ALJ) found that the Board's motivation to non-renew petitioner was to allow a Lyndhurst resident to fill the position and, accordingly, that the decision was arbitrary and capricious. The ALJ reversed the Board's decision and ordered that petitioner be reinstated to her position.

Upon review, the Commissioner finds that the ALJ erroneously reversed the Board's decision. A board of education has virtually unlimited discretion in hiring or renewing

[1] Exceptions filed by respondent were not timely pursuant to *N.J.A.C.* 1:1-18.4 and were therefore not considered by the Commissioner. Petitioner timely filed a reply, which includes arguments substantially similar to those made in her post-hearing briefs. Petitioner's reply argues that the ALJ carefully reviewed the testimony of all the witnesses, which supports petitioner's assertions of nepotism. Petitioner further contends that the Board refused to honor the recommendation of the superintendent, making its decision arbitrary, capricious, and unreasonable. Petitioner alleges that the Board's claim of economic crisis does not square with the facts because her employment had already been accounted for in the budget and the business administrator, who co-authored the budget, testified that he had no knowledge of why petitioner was not renewed. Respondent filed a reply to petitioner's reply. However, *N.J.A.C.* 1:1-18.4 does not permit the filing of a reply to a reply to exceptions; as such, respondent's submission was not considered.

non-tenured staff members absent constitutional constraints or legislatively-conferred rights. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447, 456 (App. Div. 1982). As such, where a non-tenured staff member challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Guerriero v. Bd. of Ed. of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd* Docket #A-3316-85T6 (App. Div. 1986). In this case, petitioner has specifically stated that she is not arguing that her constitutional rights were violated. Furthermore, she has not alleged a violation of any legislatively-conferred right.

Accordingly, the Initial Decision of the OAL is rejected and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/19
Date of Mailing: 10/17/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10980-18
AGENCY DKT. NO. 150-6/18

JAMIE B. TRUNCELLITO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,
Respondent.

Alfred Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Dennis McKeever, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: August 14, 2019 Decided: September 9, 2019

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Jamie Truncellito (petitioner or Truncellito), a former guidance counselor employed by the Board of Education of the Township of Lyndhurst (Board) appeals the Board's decision of non-renewal and seeks reinstatement to her former position as a guidance counselor. The Board argues Truncellito was a non-tenured

employee at the time of non-renewal and claims her contract was non-renewed due to budget constraints. Truncellito asserts that the non-renewal was politically motivated and thus arbitrary, capricious, and unreasonable.

ISSUE

Was the non-renewal of Truncellito's contract by the Board a result of a reduction in force due to budget shortfalls, or was she non-renewed for political reasons, specifically so that a Lyndhurst Township native could take her position.

PROCEDURAL HISTORY

Petitioner filed the instant petition with the New Jersey Commissioner of Education, on June 20, 2018, where it was received on June 21, 2018, by the Department of Controversies and Disputes.

The matter was transmitted as a contested case on July 30, 2018, to the Office of Administrative Law (OAL) where it was received on July 30, 2018.

The matter was set down for a hearing on May 2, 2019, and May 20, 2019. Final submissions were received on July 10, 2019, and response briefs on August 14, 2019, at which point the record was closed.

STATEMENT OF FACTS

The I **FIND** that the following facts are undisputed, and I therefore **FIND** them to be the **FACTS** of the case:

1. Petitioner was employed as a School Counselor under a Student Services Certificate from August 26, 2016, through June 30, 2018.
2. On April 25, 2018, Truncellito received a standard Notice of Non-Renewal stating that she would be non-renewed for the 2018-2019 school year.

3. Truncellito was recommended for re-appointment by Jamie Stevens, Director of Special Services (her immediate supervisor), the High School Principal Laura Vouno, and the Superintendent of Schools Shauna DeMarco.
4. On May 22, 2018, Truncellito was given a written offer of employment by Superintendent Shauna DeMarco in advance of the May 29, 2018, Pubic Board Meeting.
5. Truncellito accepted the offer of employment in writing through an email communication with the Superintendent on May 23, 2018.
6. At the May 29, 2018, Lyndhurst Board of Education Meeting, the Board voted five to four not to renew Truncellito's employment.
7. During the fall and winter months of the 2017-2018 school year, a budget deficit was discovered by the Superintendent of Schools and the Business Administrator.
8. The initial deficit was projected at approximately $1.8 million dollars and subsequently determined to be approximately $3.8 million dollars.
9. The Business Administrator advised the Acting Bergen County Superintendent of Schools of the deficit in writing on March 31, 2018, identifying the amount of the deficit and the District's plan to address the same.
10. The Business Administrator, with the assistance of the Superintendent of Schools Demarco, prepared a budget for the 2018-2019 school year and submitted the same to the County Superintendent.
11. The budget presented to and approved by the Country Superintendent reflected cuts taken to address the deficit that was reported to him.
12. The 2018-2019 budget contained numerous cuts in non-tenured personnel, reductions in tenured staff, and other operational cuts in spending.
13. The approved 2018-2019 budget was adopted by the Board included the salary for Truncellito's employment.
14. Petitioner's salary for the 2017-2018 school year was $83,910.
15. Petitioner's salary, unadjusted for collective bargaining for the 2018-2019 school year would have been $88,080.
16. A fiscal monitor, Thomas Egan (Egan), was appointed to manage the District's finances in August 2018.

17. The monitor possesses the powers as set forth under New Jersey State Law and the New Jersey Administrative code, including the power to amend the 2018-2019 budget and corresponding personnel decisions.
18. The monitor chose not to amend the approved 2018-2019 budget and corresponding personnel decisions.
19. When Egan took control of the District's finances, he did not non-renew any of the non-tenured employees approved in the 2018-2019 budget.
20. Shauna DeMarco resigned as Superintendent in February of 2018, effective June 30, 2018.
21. Shauna DeMarco was replaced by Anthony Grieco as Superintendent in July of 2018.
22. When Truncellito's renewal was defeated by the Board, neither Superintendent DeMarco nor her successor recommended any individual to fill the position.

Shauna Demarco

Shauna DeMarco (DeMarco) has been employed by the Lyndhurst School District since 2006, first as a substitute, then a full-time teacher, and then the Superintendent. As the Superintendent, she was fully involved with the budgetary process and made recommendations to the Board that considered these budget constraints.

DeMarco testified that at the end of the 2017-2018 school year, all non-tenured staff, including petitioner, were sent notice of non-renewal. She would then decide who of these were essential to re-hire. In analyzing who to re-hire, DeMarco took recommendations from the principals, vice principals, and supervisors within the district.

When conferring with the guidance department regarding who to re-hire, everyone agreed that Jamie Truncellito was essential to the department. She testified that she felt that Truncellito could handle a crisis if need be, as Truncellito regularly dealt with very sensitive issues and her expertise was very valuable to the district. There were three counselors who had been non-renewed (Truncellito, Samantha Foti,

and Laura Tunnell) but the decision was made that Truncellito's would be the only re-hire. While the other counselors were excellent, they were new and less experienced than Truncellito.

The serious financial situation in the district was carefully examined while making all of these determinations. Jamie Truncellito was making over $83,000 and the other two were making $59,000. These facts were taken into careful consideration when recommending to re-hire Jamie Truncellito. Her salary was included in the budget that was sent to the Board and to the County for approval.

DeMarco then testified that there came a time when certain Board members tried to influence personnel decisions by persuading other members to vote to non-renew certain non-tenured employees, such as Truncellito, so that these certain Board members could offer the position to people they knew.

With respect to the Guidance Counselor position, the principal and others began receiving signals from a certain Board member that an individual named Laura Tunnell should get the position occupied by Truncellito. Notwithstanding these influences, DeMarco explained to her staff that the best candidates should be put forward regardless of political bias and that she alone would make the final recommendation.

DeMarco testified that in January of 2018, she was advised by the Director of Curriculum that a certain Board member inquired about who would be recommended for the guidance counselor position (occupied by Truncellito). DeMarco was surprised that the Board was interfering with personnel recommendations and she therefore reached out to the Board member for a conversation. This Board member advised DeMarco that the only candidate the Board would support would be Laura Tunnell because she was a "good kid" from Lyndhurst. There was never a discussion about money or budget.

DeMarco explained to the Board member that it was improper for the Board and its members to influence personnel decisions in this manner. DeMarco then had a conversation with the Board president and vice president because she was concerned about what she considered the non-ethical behavior of certain members of the Board.

DeMarco resigned from the District February 2, 2018, even though she had a five-year contract. She testified that she resigned because she felt that she was not able to accomplish what she wanted to in this district.

With respect to the Jamie Truncellito recommendation, DeMarco testified that she was in contact with the business administrator and her recommendation in favor of Truncellito was clear. When she made the recommendation for Truncellito, she was acutely aware of the financial problems and that there was sufficient money in the budget for Truncellito. She was also aware that there would be lay-offs of the two other counselors whose salaries totaled $120,000 plus benefits. This recommendation was made because DeMarco believed it was essential that the District retain Jamie Truncellito and the funds were available to do so.

DeMarco then testified with regard to executive session that occurred before the Board vote at the May 29, 2018, Board of Education Meeting. At this meeting, there were two names given to be voted upon separate and apart from the list of people being recommended for re-hire. DeMarco asked why these individuals were being separated from the larger list of pre-approved, recommended candidates. DeMarco was advised that the Board wanted Truncellito to be voted on separately. DeMarco then testified that in response to this conversation, Board member Jim Donovan got up and said "are you kidding me?" He was upset with Susan Alcuri and with the Board. He said "this isn't about money. It's about Susan wanting to put in a position for Laura Tunnell."

The Board decided to remove Jamie Truncellito's name for the larger block of names being approved and vote on her re-employment by a separate line item. Once Truncellito's name was removed, the larger block of names was ultimately voted on and approved by the Board. The vote on Truncellito alone was 5-4 against re-hiring Truncellito. This vote created a vacancy for Truncellito's position.

DeMarco was asked by the Board to make another recommendation for the position, but she refused. DeMarco added that she was shocked by the vote of the Board. Laura Tunnell has multiple family members in the Lyndhurst school system.

DeMarco opined that the Board was attempting to create a vacancy so that they could hire Laura Tunnell.

Lisa Klein

Lisa Klein (Klein) is a staff developer in the Lyndhurst School district. She has been an administrator there for twenty years. Klein had a role in the development of the budget. She had monthly meetings with Scott Bisig and Shauna DeMarco and she was aware of the budget constraints.

Klein made recommendations on how many positions were needed and she knew certain personnel cuts would have to be made. Klein testified that a determination was made to keep Jamie Truncellito and cut the other two counselors. This decision was made because Truncellito provided classroom experience, she ran many programs, she helped students in crisis, she partook in confidential meetings, and she went out of her way for students. One example was with an English student who was having problems and she would work every day to help him complete a project. Klein felt the retention of Truncellito was essential.

Klein testified that at the May 29, 2018, Lyndhurst Board of Education meeting related to budget and staffing, motions were made to appoint a large list of non-tenured staff. Jamie Truncellito was the only non-tenured staff member who was singled out and taken off the list.

Laura Vuono

Laura Vuono (Vuono) is employed as the Lyndhurst High School principal. She is very familiar with the school board budget process and the budgetary problems facing the Lyndhurst school district. Vuono recommended re-hiring Jamie Truncellito for the position of guidance counselor. Vuono testified that Truncellito did excellent work with the students, was the liaison for the Gay Straight Alliance, she had the ability to deal with students in crisis and sensitive issues and the skills to handle large caseloads. Vuono's recommendation was based on Truncellito's performance and work ethic and took the

budgetary constraints of the District into account when making the decision.

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Jamie Stevens (Stevens) is the Supervisor of the Special Education and Guidance in Lyndhurst and she supervised Jamie Truncellito. Stevens was aware of the budget problems facing the district at the time. She recommended Truncellito and was advised there were adequate funds in the budget for her position. Stevens made a conscious choice to let two other counselors go and keep Truncellito as a priority re-hire. She felt petitioner was the best qualified and made this decision keeping in mind the best interests of the students. If Stevens had been advised there was a financial issue with Truncellito's re-hire, she would have moved some line items in our budget to allow her to remain. She felt Truncellito was essential to the district.

James Vuono

James Vuono (Vuono) is a member of the Board. He was indirectly part of the budget process and was present at Board meetings, committee meetings, and caucuses where the budget was discussed. He is aware of the budget deficit issue that the previous business administrator left behind.

Vuono testified that at the May 29, 2018, Board meeting, there was a block of names of personnel recommended to be voted on. He recalls that Jamie Truncellito was on the recommended list and that there was money in place in the budget to fund her position.

Vuono recalls Board conversations regarding a motion for her re-appointment. He received a phone call from Board member Susan Alcuri asking him if he would support Laura Tunnell instead of Jamie Truncellito. He said no.

Vuono then testified that at the May 29 Board Meeting, Truncellito's name was taken off a long list of names of people who were recommended for hiring and her name was made a separate line item. The motion passed to move her name and then the vote

was 5-4 against re-hiring her.

The person who called for Jamie Truncellito's name to be separate also voted against hiring her was Board member Susan Alcuri. James Vuono believes that he was excluded from some of the private conversations among other Board members regarding Truncellito's re-hire because he had already made it known that he would be voting in favor of Truncellito. The context of these private discussions was to remove Truncellito because she was not from Lyndhurst and to then fill her position with someone who was from Lyndhurst. There was no discussion of District finances regarding the decision to remove Truncellito. James Vuono opines that Jamie Truncellito lost 5-4 as she was not a "Lyndhurst person."

James Donovan

James Donovan (Donovan) is a Lyndhurst Board of Education Trustee, elected in 2016. He was present for the budget crisis and served on several committees. The town did not raise taxes to pay for this.

Donovan was present at the May 29, 2018, Board of Education meeting and he voted in favor of the Superintendent's recommendations. The money for Jamie Truncellito's salary was included in the budget and he voted in favor of her re-hire. As a Board member, he does not tell the Superintendent who to hire. He bases his vote on her recommendation and he testified that the Board is not able to hire anyone who is not recommended.

Prior to this May 29 Board meeting, there were discussions between himself and other Board members regarding who should remain employed by the District and who should not. Donovan testified that someone on the Board was attempting to influence him and that he was being pressured. He testified that certain members of the Board did not want Jamie Truncellito hired because she was from Rutherford and not from Lyndhurst.

Donovan testified that there were two other non-tenured guidance counselors non-renewed but Truncellito was the only one recommended by the Superintendent. Laura

Tunnell was offered a job by the District in August of 2018 which she accepted. He testified that she was not recommended by the Superintendent.

Erin Keefe (by telephone conference)

Erin Keefe (Keefe) was sworn onto the Board of Education in January of 2018, and she serves as the current president. She was made aware of the financial crisis within a month of taking office. She was not on the finance committee, but she did participate in meetings and discussions regarding the deficit, which was substantial.

The new budget for 2018-2019 was prepared by Shauna Demarco and Scott Bisig. The purpose of the March 28, 2018, letter from Scott Bisig to the County Superintendent was to alert the County of the deficit and the corrective actions being taken. The budget was submitted and approved. The budget included personnel decisions, policy decisions, budget cuts, and it was mindful of the deficit. It also included Jamie Truncellito's salary.

Keefe was present at the executive session held before the May 29, 2018, Board of Education meeting. There was discussions of staffing and cuts. The guidance counselor positions were discussed. The decision was made for Lisa Klein and Jamie Truncellito to be voted on separately. Truncellito was the only non-tenured staff member listed for re-appointment who was taken off the list. She had been recommended by the Superintendent.

Board member Susan Alcuri discussed that two counselors cut were from Lyndhurst and Truncellito was not. She stated that Lyndhurst people should be hired first. She also stated that they made less money than Truncellito. Susan Alcuri voted "no" for Truncellito. The vote was 5-4 against her re-hire.

Keefe testified that the Superintendent's recommendations on cuts and retention were made in the best interests of the District. She felt that Truncellito was essential and voted "yes" for Truncellito. Keefe believes that residency was made a factor by Ms. Alcuri and was a factor in the vote not to re-hire Truncellito.

Jamie Truncellito

Truncellito was hired by the Lyndhurst School District in August 2016, and she worked from October 2016 until June 30, 2018, as a guidance counselor. She was responsible for administering SAT, AP, and other testing. She oversaw the anxiety group and the Gay Straight Alliance, ran the lunch and learn program, totally revamped the INRS process, and provided academic, college, and crisis counseling.

Truncellito testified that In January of 2018, she learned of serious budget issues in the district and noted that all of the non-tenured staff were worried. Truncellto testified that there were two other non-tenured guidance counselors at the school; Samantha Foti, who was hired in 2017, and Laura Tunnell, who had just been hired January of 2018. In light of the budget issues and her non-tenured status, Truncellito began sending out resumes. Truncellito's supervisor, Jamie Stevens, heard that she was looking for another job and told Truncellito not to send out any more resumes as there were no plans to let her go. Truncellito testified that she was also advised by her principal, Laura Vuono, that her job would be safe.

On April 25, 2018, Truncellito received a letter of non-renewal along with all of the other non-tenured staff. On May 22, 2018, she was given a letter by Laura Vuono indicating that the Superintendent was recommending her for the position of guidance counselor. She accepted this position by email on May 23, 2019. She was told that her job would be approved at the May 29, 2018, Board of Education meeting. On May 30, Truncellito learned that she was not re-hired and that her name had been singled out and voted on separately. She testified that the vote was 5-4 against her. She was distraught by the news and inconsolable at the time.

Truncellito then testified that later, at a school award ceremony, she saw Board member Erin Keefe and thanked her for her "yes" vote. Keefe apologized to Truncellito and said that she could give Truncellito no reason as to why she had lost her job. Keefe stated she was still trying to figure out the various relationships among Board members and that her leaving would be a loss to the District. She never mentioned finances.

Truncellito is currently working in Tenafly in a temporary job making $76,000. It is a maternity leave position with no pension credits. Truncellito holds six certifications K-5 elementary, 5-8 with language arts, teacher of the handicapped, reading specialist, teacher of reading, and school counseling. In her last year working at Lyndhurst, she was making $83,910. If was working there today, her salary, pursuant to the guide, would be $88,080.

When Truncellito was employed at Lyndhurst there were nine counselors and she believes there are now six. Laura Tunnell was hired in August 2018, and then resigned in September 2018. Truncellito does not know if her former job description was ever posted and she has been advised that ultimately, the Board did not re-hire anyone for this position.

Scott Bisig

Scott Bisig (Bisig) testified on behalf of the Board. His testimony was offered to show how Truncellito's non-renewal was directly related to a reduction in force due to budgetary shortfalls. He was hired by the Lyndhurst School District as the business administrator in 2017. Prior to this, he was employed in Oradell as the business secretary and prior to that, he was employed as a teacher in Bergenfield. He was made aware of glaring accounting discrepancies in November 2017. He contacted Shauna DeMarco and told her of a 1.2 million dollar deficit.

An audit was conducted and a second audit completed in January. After the audits, he was informed that the deficit could be as high as 4.5 million dollars.

On April 16, 2018, the District sent non-renewal notices to all non-tenured staff. Jamie Truncellito received a notice. When the 2018-2019 budget was prepared it include Truncellito's salary.

There were two other non-tenured counselors being cut. To date, the Board has not rehired this guidance counselor position. There was a maternity leave position offered to Laura Tunnell, but she did not accept it. That money has since been used to pay other

expenses.

Bisig testified that he had no knowledge as to why Truncellito was not hired.

CREDIBILITY DETERMINATION

I **FIND** each and every witness in this case to be entirely credible.

FINDINGS OF FACT

In light of the above testimony, and having assessed the credibility of each witness, I **FIND** the following **FACTS**:

The moneys necessary to fund Truncellito's employment for the 2018-2019 school year were available and accounted for in the 2018-2019 District Budget. Truncellito was non-renewed at the May 29, 2018, Board meeting because a faction of Board members, including Member Alcuri, wished to free the position held by Truncellito so that it may be filled by a Lyndhurst resident. The decision by these Board members was not motivated by concerns regarding any budget shortfalls but instead the decision was purely motivated by in interest to employ Lyndhurst residents over non-Lyndhurst residents.

Legal Discussion

In the Case at bar, Truncellito was recommended for re-hire by the Superintendent, received a written offer of employment, and accepted same. Truncellito was ultimately not re-hired by the Board because a faction of the Board members wished to free-up her position as counselor so that a Lyndhurst resident may be hired to fill it.

N.J.S.A. 18A:27-4.1 b states:

> A Board of Education shall renew the employment contract of a certified or non-certified 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.

In light of the above, I **FIND** the Board's motivation to remove Truncellito so that a Lyndhurst resident may fill it to be arbitrary and capricious and I **CONCLUDE** the Board's non-renewal of Truncellito was improper and should be reversed.

ORDER

It is hereby **ORDERED** that petitioner Jamie Truncellito's petition be **GRANTED** and that she be reinstated to her position of school counselor on the appropriate salary guide step for the 2019-2020 school year. It is further **ORDERED** that Truncellito be awarded the difference between what her earnings and benefits for the 2018-2019 school year would have been had she not been wrongfully removed from her position and what she actually received.

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

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

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

September 9, 2019
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 9/9/19

Date Mailed to Parties:

id

272-19E

OAL Dkt. No. EDU 12642-19
Agency Dkt. No. 235-9/19

New Jersey Commissioner of Education

Order on Emergent Relief

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

Petitioner,

v.

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

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/19
Date of Mailing: 10/17/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 12642-19
AGENCY DKT. NO. 235-9/19

J.M. ON BEHALF OF J.M.,
Petitioner,
BOARD OF EUCATION OF
THE TOWNSHIP OF MOORESTOWN,
BURLINGTON COUNTY.
Respondents.

J.M., parent, pro se

John Comegno, Esq., for respondent (Comegno Law Group, P.C., attorneys)

BEFORE **CARL V. BUCK III,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner[1] appealed the action of respondent Moorestown Board of Education (Board) denying him promotion from the seventh grade to the eighth grade at the William Allen Middle School for the 2019-2010 academic year. Notice of the possibility to retain student was given as early as January 2019. Direct notice of intent of the School's principal to retain student was given to petitioner on June 17, 2019. Petitioner

[1] As the petitioner and his son have the same initials, in the body of this Order the father shall be referred to as "Petitioner" or "Father" and the student shall be referred to as "Student" or "Son".

requested an appeal to the Superintendent of the Board, who upheld the principal's decision on or about July 15, 2019. Petitioner requested an appeal to the Board which upheld the decision made by the principal and the superintendent.

The State of New Jersey, Department of Education, Bureau of Controversies received a petition for emergency relief on or about September 12, 2019. The matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case on September 13, 2019, on petitioner's application for emergency relief. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5.

Oral argument on the matter was scheduled for September 18, 2019. Subsequent to oral argument on that date, both parties requested time to make an additional submission and agreed to the extension of this order so that information could be considered in the Order. Respondent was given until 10:00 am on Friday, September 20, 2019 and made a submission. Petitioner was given until 10:00 am on Monday, September 23, 2019 and did not make a submission. Nothing from petitioner was received by the close of business on Tuesday, September 24, 2019.

For the reasons discussed below, the relief sought by the petitioner is **DENIED.**

FACTUAL FINDINGS

For the purposes of deciding the application for emergent relief, the following facts are determined to be undisputed:

Respondent Board's policy 5410 deals with retention of students within the Moorestown Township School District. This policy deals with promotion to a subsequent grade and states:

> A pupil in the elementary grades will be promoted to the next succeeding grade level when he/she has completed the course requirements at the presently assigned grade; has achieved the instructional objectives set for the present grade; has demonstrated

> the proficiency is required for movement into the educational program of the next grade; and his demonstrated the degree of social, emotional, and physical maturation necessary for a successful learning experience in the next grade.

Beginning with PAARC testing results of May 2018, student's scores indicated that he was below proficient levels in language arts and math. In August 2018 the student was placed in remedial classes for general education students for the subjects of math and language arts. The student was also recommended to the PASS class - that being a class to improve executive functioning for general education students. The petitioner initially refused to consent to these placements.

In September and October 2018, the student's teachers requested that he stay after school for extra assistance due to his low grades. Petitioner did not consent to allow the student to stay after school to accept assistance. On September 25, 2018, the teachers requested a meeting with petitioner. In October 2018 the student was referred to the intervention and referral services team; however, petitioner refused to allow the student access to this assistance. In September and October 2018, the school nurse contacted the petitioner regarding a concern with the student's need for eyeglasses. The student was not provided with eyeglasses for several months.

In November 2018 the principal met with the student to discuss the student's responsibilities to complete his work for the first marking period. Petitioner was notified of that meeting and objected to the meeting. In November 2018 the student was offered a mentor and the school nurse notified petitioner of concerns regarding the student's weight. Petitioner indicated he would not allow a mentor to assist the student nor use the nurse's advice.

In December 2018 the possibility the student joining the wrestling team was discussed with petitioner; however, petitioner failed to follow up.

In January 2019 the child study team (CST) offered to evaluate the student again and the student was recommended for the PASS class. Petitioner refused to consent to either a review or evaluation by the CST or for the student to participate in the PASS

class. In January 2019 the principal notified petitioner that the student could be retained or changed to different classes, specifically, the BSI math and the PASS class, if his grades did not improve. Petitioner refused to consent to the PASS class but consented to the BSI math class. In March 2019 petitioner was notified for the second time that the student was in jeopardy of retention if his grades did not improve. In March 2019 the principal met again with petitioner to discuss the possibility that student could be retained. This was the third time petitioner had been made aware of the possibility of his son being retained in seventh grade. Petitioner then agreed to receive weekly updates of student's progress and assignments. The student was again offered extra assistance after school, but petitioner refused to allow the student to receive such assistance.

From March 2019 through June 2019, the student's teachers communicated with petitioner regarding student's failure to complete assignments via the student's agenda book. Petitioner did note that the book was misplaced at least on one occasion. The school asserted that petitioner did not respond to the notations regarding the student's failure to complete assignments.

In March 2019 petitioner agreed he would email the student's teachers every Wednesday and would respond with updates. The teachers forwarded emails to the petitioner with updates regarding the student's progress. In June 2019 the petitioner was requested to schedule a final meeting regarding the student's retention. The petitioner requested a telephone conference for June 17, 2019. However, petitioner did not call at the scheduled time. On June 21, 2019, the principal met with the petitioner and petitioner's mother to discuss the student's retention. This was the fourth time student's retention was mentioned to petitioner.

TESTIMONY

J.M.

J.M. is the father of the student. He requests emergent relief so that his son may be advanced to eighth grade. His position is that he was told during several discussions

with the principal that if the student evidenced satisfactory effort that he would be advanced. Petitioner states that the student has tried to advance; therefore, he should be advanced to the eighth grade. Petitioner further states that the harm in retaining the student is far greater than the harm in holding him back for another year. He provided citations to many articles which petitioner stated evidence that position, but petitioner could not provide a succinct analysis of how those articles correlate to the matter at hand. It was his goal to have the student advance, as he will be responsible for the child for another year. As a single parent, he has made efforts to keep the student involved in school but was unable to do so. Petitioner argued that the burden of retaining the student will be placed on himself and the student only, and that it hurts nobody to put the student in the eighth grade.

R.K.

R.K. is the mother of the petitioner (and grandmother of the student). She represented that she possesses a master's degree in higher education and a master's degree in experimental psychology. She testified not as a professional, but simply as a family member with knowledge and involvement in this case. She has done tremendous research and found that it is harmful to not promote a student. There are mental-health ramifications for high school dropouts, and she is concerned that her grandson would ultimately become a high school dropout due to this event. She requested a CST evaluation be done and stated, what harm would it be to have him in the eighth grade while this evaluation is being done. She stated that she does not feel that it would be harmful to promote the student to the eighth grade.

Board

The Board attorney, John Comegno, Esq., reiterated the terms of Board Policy 5410 detailed above. Specifically, he detailed that when and how a promotion occurs is not based on attendance, intentions, etc. but strictly on academic results and emotional readiness to advance. The retention decision was not punitive and was based on the evidence as detailed as well as the student's final report card (R-1). The decision was initially made by the Principal, Matthew Keith. Petitioner requested an appeal to

Superintendent Scott McCartney who upheld the principal's decision. Petitioner then requested a further appeal to the entire Board of Education. The Board then upheld the decisions below made by the principal and the superintendent. In their argument, the Board relied on two decisions from the Hon. Joseph Martone ALJ dealing with similar circumstances - but not exact fact patterns. The Board then detailed the four criteria of Crowe v. DeGioia stating that the criteria were not met, and that the contention of the petitioner must ultimately fail.

A secondary issue, regarding standing (in that petitioner withdrew the student from the school system on September 9, 2019) was not heard by the Court. This issue was raised during a telephone conversation before the court date and the court's position was that that issue would not be dealt with but that the appeal would continue as filed.

LEGAL DISCUSSION AND CONCLUSION

Pursuant to N.J.A.C. 6A:3-1.6(b), an application for emergent relief shall not be granted unless it satisfies the following four standards:

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.

[See Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982).]

The petitioner must meet all four criteria to prevail on his request. See Crowe, 90 N.J. 126; DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester Cnty. Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric,

Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Accordingly, each prong of the test must be analyzed:

1. Whether petitioner will suffer irreparable harm if the student is not advanced to the eighth grade for the 2019-2020 school year.

The first principle for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioner. Crowe, 90 N.J. at 132–33. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

Here, petitioner claims that no one will be hurt by the student's elevation to eighth grade. Petitioner further states that there will be ongoing harm and trauma to the student should the student not be promoted. Petitioner's mother also states that it is harmful to retain a student.

In opposition, the Board maintains that it is following its adopted Board Policy 5410. In support of its position, the Board avers that the student's grades throughout the year were deficient; with the ultimate result being that the student failed four of the core curriculum courses needed for promotion to the next grade level. (R-1). The

student failed language arts for three of the four quarters; math for three of the four quarters, science for all four quarters, cultural geography for three of the four quarters and math support for two quarters. The student's final grades reflect an A- in chorus, a B+ in art, a B in physical education, a C- in health, a P in math support. The student received an A+ and a C for two quarters of Spanish. The Board demonstrated that assistance was offered to the student throughout the course of the year but was, for the most part, rejected by the parent.

Petitioner is seeking to have the student promoted to eighth grade while a CST evaluation occurs. A CST evaluation was recommended by the school last year but was refused by the father at that time. Conducting such evaluation at a time the student in the untenable position of expecting (or hoping) that he will provide satisfactory results in a grade for which he is ill-prepared and unready is not a sound plan and doing so, in the Court's opinion, would be setting up the student for failure.

Accordingly, I **FIND** that petitioner has not shown neither irreparable harm nor the risk of harm to the student based on the Board's action. The issue of damages remains speculative and therefore does not satisfy the first prong of the four-prong test under N.J.A.C. 6A:3-1.6(b).

2. Whether the legal right underlying petitioner's claim is well settled.

Petitioner claims that the legal right underlying his claim is well settled because the principal, the superintendent, and the Board of Education have made such determination and by his citation to numerous articles citing the harm in retaining students.

Respondent claims that the Board's action is in compliance with Board Policy 5410 and does not violate any legal right of petitioner.

Pursuant to N.J.S.A. 18A:35-4.9(a), Boards of Education are empowered to develop retention and promotion policies. The policies the Board of Education produce pursuant to this delegated power have the force and effect of law. See P.D.M. o.b.o.

K.M. v Bd. Of Educ. of Somerville, EDU 6706-98, (Aug. 27, 1998); J.Y. and C.Y. o.b.o. M.Y. v. Bridgewater-Raritan Reg. Sch. Dist., EDS 6876-98 (September 17, 1998). It is well settled that decisions of local boards of education are entitled to a presumption of correctness unless they are shown to be "patently arbitrary, without rational basis or induced by improper motives." J. M., by His Guardian, D. M. v. Hunterdon Central Regional High School District, Hunterdon County, 96 N.J.A.R.2d (EDU) 415, 419; R. A. M. and C. A. M. v. Board of Educ. of the OAL DKT. NO. EDU 04389-18 8 Township of Tabernacle, 94 N.J.A.R.2d (EDU) 573, 576 (citing, Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960)). Petitioner bears the burden of proving, by a preponderance of the evidence, that the respondent's action was "arbitrary, capricious or unreasonable." J.M., 96 N.J.A.R.2d at 419.

Respondent claims that the Board's action is in compliance with Board Policy 5410 and does not violate any legal right of petitioner.

The claim before me is unique with sparse reference to caselaw. But, the statute and the Board Policy are plain on their face, and the petitioner has not shown (nor has my review revealed) that the actions here were either "arbitrary" or "capricious". Accordingly, I **FIND** that the legal issue here is settled as a matter of law.

3. Whether petitioner is likely to be successful on the merits of its claim.

Petitioner's appeal does not assert an argument that supports the contention he will prevail on the merits.

4. Whether petitioner will suffer greater harm than respondent if emergent relief is not granted.

Petitioner claims that the student will suffer greater harm than respondent if the requested relief is not granted. Petitioner has not shown that student will suffer greater hardship than respondent and it is the position of the tribunal that if the student is not provided with appropriate assistance in an appropriate classroom setting, that he will, through lack of an appropriate educational foundation, suffer harm here.

While I agree that ensuring the welfare of the student is paramount, I do not **FIND** that such a correction can be made by way of allowing the student to progress to the eighth grade when he does not have the appropriate educational background to do so.

CONCLUSION

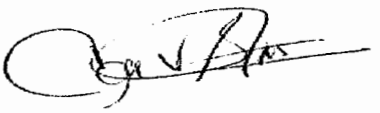
Petitioner has not satisfied the four prongs required to obtain emergent relief. Petitioner has not shown imminent and irreparable harm. He has not shown that that the legal right to petitioner's claim is well settled. He has not shown that he has a likelihood of prevailing on the merits. He has not shown any harm to the student or that the student will be negatively impacted by retention in the seventh grade.

This matter was filed as an Emergent matter only. No filing for a Due Process hearing was made by petitioner. Therefore, this office will retain this file until the final decision by the Commissioner.

ORDER

The application for emergent relief is **DENIED**.

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



September 25, 2019
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

lam

WITNESSES

For Petitioner:

J.M., petitioner
R.K., mother of petitioner

For Respondent:

Matthew Keith, Principal

APPENDIX

For Petitioner:

P-1 Email September 17, 2019 8:13 pm
P-2 Email September 17, 2019 7:50 pm
P-3 Email September 17, 2019 7:03 pm
P-4 Email September 17, 2019 5:40 pm
P-5 Email September 17, 2019 6:15 pm
P-6 Email September 17, 2019 6:04 pm

For Respondent:

R-1 Report card printed 09/18/2019
R-2 September 17, 2019, Letter and response to petition
R-3 September 20, 2019, Letter and supplemental submission

SEC Dkt Nos. C17-12, C18-12, and C21-12 (CONSOLIDATED)
OAL Dkt. Nos. EEC 13642-12, EEC 13643-12, and EEC 13644-12
Agency Dkt. No. 4-5/19A

New Jersey Commissioner of Education

Final Decision

In the Matter of Israel Varela and Kenneth Puccio, Perth Amboy Board of Education, Middlesex County.

This matter involves an appeal of the School Ethics Commission's (Commission) May 2, 2019 decision that appellant Kenneth Puccio, a member of the Perth Amboy Board of Education, violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code) in connection with his attendance at a meeting of the local American Federal of Teachers (AFT), which is the teachers' union.[1] The Commission found probable cause that the appellant violated *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) in connection with his behavior at a Board personnel meeting held on February 22, 2012, and *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in connection with his attendance at an AFT meeting on May 9, 2012.[2] Following a hearing at the Office of Administrative Law, the Administrative Law Judge (ALJ) dismissed the charges regarding the Board personnel meeting, concluded that appellant violated *N.J.S.A.*

[1] Complaint C21-12 was filed with the Commission against appellant on May 24, 2012. Complaints C17-12 and C18-12 involved Israel Varela, whose matters were consolidated with Mr. Puccio's due to the similarity of the legal issues and evidence. The Commission's May 2, 2019 decision involved findings against both Mr. Varela and Mr. Puccio. Mr. Varela did not appeal the Commission's decision. The Commissioner's Final Decision regarding Mr. Varela was issued on June 18, 2019 under Agency Docket No. 106-5/19.

[2] The Commission's May 2, 2019 decision indicates that it also found probable cause that appellant violated *N.J.S.A.* 18A:12-24.1(i). However, the September 26, 2012, Probable Cause Notice indicates that the Commission found no probable cause to credit the allegation that appellant violated *N.J.S.A.* 18A:12-24.1(i), and the ALJ's decision does not address this provision of the Code. Accordingly, this citation appears to have been included in the May 2, 2019 decision in error.

18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in relation to the AFT meeting, and recommended a penalty of a sixty-day suspension.[3] In its May 2, 2019, decision, the Commission adopted the ALJ's factual and legal determinations, but modified the recommended penalty to a one-year suspension.

In his appeal to the Commissioner, the appellant argues that the conclusion that he violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) is not supported by the record. Appellant contends that there is no evidence that he made a direct order or became directly involved in day to day activities of the school, as required by *N.J.A.C.* 6A:28-6.4(a) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(d), or that he made a personal promise beyond the scope of his duties, as required by *N.J.A.C.* 6A:28-6.4(a)(5) to demonstrate a violation of *N.J.S.A.* 18A:12-24.1(e). Appellant claims that the ALJ and Commission decisions were based on speculative hearsay evidence by the district's superintendent, Dr. Janine Caffrey, who did not attend the AFT meeting and who instead testified based on information she had been told by an unnamed source. Appellant argues that the superintendent's testimony should be discounted because it was not supported by any residuum evidence. The only other witnesses to testify regarding the meeting were appellant and the then-president of the AFT, neither of whom corroborated the superintendent's testimony. Finally, the appellant questions the credibility of the superintendent's testimony in light of the dispute between Dr. Caffrey and the Board, and alleges that her motivation in filing the ethics complaint was to conflict appellant from voting on her continued employment.

[3] The ALJ further recommended that, in lieu of a suspension, appellant be replaced as Board president by another member chosen by the county superintendent. The Commission rejected this recommendation because its authority is limited to the reprimand, censure, suspension, or removal of a board member. The Commissioner concurs with the Commission's decision to reject the ALJ's recommendation of a demotion as such an action is not contemplated by *N.J.S.A.* 18A:12-29(c).

Appellant further claims that the Commission erred in finding a violation of *N.J.S.A.* 18A:24.1(e) because he attended the AFT meeting in his capacity as Vice President of the Board, at the request of the Board President. He testified, and argues, that he believed the majority of the board wanted both him and the President to attend the meeting. Furthermore, appellant contends that he was not required to obtain formal Board approval to attend the meeting and notes that neither the ALJ nor the Commission relied upon any decision or advisory opinion requiring formal approval in these circumstances.

With respect to the penalty, appellant argues that a penalty of a one-year suspension is excessive, inconsistent with prior Commission decisions, and unwarranted given appellant's service to the Board in the seven years since the initial allegations. Appellant first notes that he was chosen as the Board President by the Middlesex County Superintendent, who was aware of the allegations of ethical violations against appellant,[4] following a contest between two board members for the position. Additionally, the current superintendent of the district testified that appellant was a "significant asset" to the district.

Appellant distinguishes *In the Matter of Gartland and Picardo, West Essex Board of Education, Essex County*, SEC Dkt. No. C-44-05, March 28, 2006, *affirmed* Commissioner Decision No. 210-06, decided June 12, 2006, which was relied upon by the Commission, because the respondent board members in *Gartland, supra,* had been asked not to attend the union meeting by at least one other board member, while the appellant herein understood that the majority of his fellow board members wanted him to attend the AFT meeting. Furthermore, in *Gartland, supra,* the board members could have contacted the superintendent about the union meeting, but the appellant claims he could not have done so in the instant matter because

[4] The Commissioner notes that this information was provided by David Roman, current superintendent of the Perth Amboy school district, who testified, "I believe that they were" aware of the ethics complaints. Tr8, 42:19-22.

Dr. Caffrey was not acting in the position of superintendent at the time of the meeting. Appellant also argues that the recommended penalty of a one-year suspension is not consistent with prior decisions, citing cases in which board members who engaged in similar conduct received only a reprimand or a censure, while a board member in another case who engaged in multiple instances of ethics violations received only a sixty-day suspension. Appellant contends that a penalty of suspension requires something more extreme than "just" taking action beyond the scope of one's authority.

In reply, the Commission argues that its decision that appellant violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) was reasonable and supported by the record. The Commission notes that the appellant attended the AFT meeting without the Board's approval and with the admitted specific purpose of removing the superintendent from her position. The Commission contends that appellant's attempts to cure what it alleges are prior admissions about the meeting should be rejected.

The Commission compares this matter to *Gartland*, *supra*, in which two board members met with the local union to discuss concerns that the union had brought to their attention, without the approval or knowledge of the superintendent. In *Gartland*, *supra*, the Commission found that the board members had violated several provisions of the Code, including *N.J.S.A.* 18A:12-24.1(d), because the board members had usurped the authority of the superintendent by meeting with the union. According to the Commission, the appellant here similarly interfered with the superintendent's relationship with the teacher's union and undermined her ability to manage the district's teachers. The Commission argues that its position is further supported by the testimony of the district's current superintendent that actions such as appellant's would have the effect of undermining his authority as the superintendent.

The Commission submits that appellant violated *N.J.S.A.* 18A:12-24.1(e) because he acted privately by attending the meeting without Board approval. The Commission argues that board members do not have implied authorization to act on the board's behalf in all matters, but rather are generally prohibited from acting without board authorization by the basic restriction inherent in *N.J.S.A.* 18A:12-24.1(e). Additionally, the Commission disagrees with appellant's argument that he did not make any personal promises, pointing to appellant's 2013 testimony and discovery responses in a related matter, in which appellant stated that he told the membership that the Board supported the teachers and that the Board was exploring all possible options for removing the superintendent, and contending that the Commission reasonably interpreted this statement as a promise. The Commission further points out that the more than six years of litigation that followed the meeting demonstrates that appellant's actions clearly had the potential to compromise the Board.

The Commission argues that the sixty-day suspension recommended by the ALJ is insufficient, relying on *Gartland, supra*, in which the Commission recommended, and the Commissioner concurred with, penalties of a one-month suspension and censure for two Board members who met with the local union to discuss enhancing educational opportunities in the school district. The Commission contends that appellant's conduct warrants a more significant penalty than in *Gartland, supra,* because his explicit intent was to undermine the superintendent, while the board members in *Gartland, supra,* intended only to open a channel of communication with the union.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission that the appellant violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) is supported by sufficient credible evidence, and appellant has not established

that the Commission's decision is arbitrary, capricious, or contrary to law.[5] The record is clear that appellant was well aware of the significant issues between the district's teachers and the superintendent when he attended the meeting. He nonetheless inserted himself into the middle of the relationship, and he did so at a time when, according to his own admission, his intent was to have the superintendent removed from her position.[6] At least one member of the union, local president Donna Chiera, believed that appellant was empathizing with the union members and wanted to make sure that the teachers felt supported in their dealings with the superintendent. Furthermore, the appellant attended the AFT meeting without any formal board approval, or any proof of informal consent.

The superintendent had been reinstated prior to the AFT and thus was the person responsible for the day-to-day operation of the schools, including interacting with the union members and their leadership. Appellant took this responsibility upon himself when he attended the AFT meeting, thus violating *N.J.S.A.* 18A:12-24.1(d). Appellant's actions had the potential to undermine the authority of the superintendent and her ability to manage the day-to-day operations of the schools and interactions with AFT members. While the appellant argues that he made no personal promise about Dr. Caffrey's employment, such is not required by *N.J.A.C.* 6A:28-6.4(a)(5), which provides that evidence of a violation of *N.J.S.A.* 18A:12-24.1(e) may include that "respondent made personal promises or took action beyond the scope of his or her duties" (emphasis added); *see also Persi v. Woska*, 2017 N.J. Super. Unpub. LEXIS 625, *7 (App. Div. Mar. 10, 2017) (finding that action taken by a board member that is beyond the scope

[5] The Commissioner is also in accord with the Commission's determination that appellant did not violate *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) in connection with the February 22, 2012 Board personnel meeting.

[6] Although appellant attempted to explain this admission, which occurred in his 2013 testimony in a related matter, when he testified in the current matter, the ALJ credited the earlier testimony, and the Commissioner accepts the ALJ's credibility determination.

of his authority and duties as a board member meets the definition of "private action" and is sufficient to demonstrate a violation). Attending a meeting of the teacher's union to discuss the employment of the superintendent, at time when her employment was in question and when appellant clearly understood that there was friction in her relationship with the district's teachers, without approval by the board, went beyond the scope of his duties and had the potential to compromise the board.

With respect to the appropriate penalty, the Commissioner concurs with the ALJ and finds that a penalty of a sixty-day suspension is appropriate in this matter. The one-year penalty recommended by the Commission is not consistent with other cases involving similar offenses. For example, in *Persi*, *supra*, a board member who wanted to terminate the interim superintendent's employment unilaterally directed the issuance of a *Rice* notice, met with incoming board members-elect about terminating the interim superintendent and identified a potential replacement, and met with the potential replacement. He was found to have violated *N.J.S.A.* 18A:12-24.1(e) and received only a reprimand. *See also Schwartz v. Gallagher*, Commissioner Decision No. 228-19SEC (Sept. 5, 2019) (reprimanding a board member for approaching an employee to inquire whether she would be interested in assuming the position of Chief School Administrator, even though that position was not vacant). In *Gartland*, *supra*, two board members met with union representatives to discuss concerns that the union had brought to their attention without the knowledge of the rest of the board or the superintendent. The Commission found, and the Commissioner affirmed, that the board members had violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(d), with a penalty of a one-month suspension for the board member with one year of experience and censure for the newly-elected board member.

The Commissioner agrees with the Commission that appellant's actions are more egregious than those of the board members in *Gartland*, *supra*, as appellant was well aware that the matter of the superintendent's employment was in flux. Appellant was also more experienced than the board members in *Gartland*, *supra*, having served three years on the board at the time of the AFT meeting. As such, an increase from the reprimand, censure, and thirty-day penalties assessed in those cases is warranted. However, a one-year suspension is excessive in comparison to the similar cases.

Accordingly, respondent is hereby suspended for sixty days as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 10/16/19
Date of Mailing: 10/17/19

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

275-19
OAL Dkt. No. EDU 9957-19
Agency Dkt. No. 123-5/19

New Jersey Commissioner of Education

Final Decision

M.A., on behalf of minor child, L.G.A.,

Petitioner,

v.

Board of Education of the Eastern Camden County Regional High School District, Camden County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled September 11, 2019 OAL hearing, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/19
Date of Mailing: 10/18/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 9957-19
AGENCY NO. 123-5/19

M.A. on behalf of minor child, L.G.A.
Petitioner,
v.
BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY.
Respondent.

No appearance by M.A., petitioner, pro se

Anthony Padovani, Esq., for respondent (Sahli & Padovani, attorneys)

Record Closed: September 12, 2019 Decided: September 18, 2019

BEFORE **EDWARD J. DELANOY, JR.**, ALAJ:

Petitioner, M.A., challenges the Eastern Camden County Regional Board of Education's (Board) residency determination. The matter was transmitted to the Office of Administrative Law (OAL) on July 19, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for September 11, 2019, at the OAL and notices for the hearing were mailed to the parties on August 9, 2019. On the date of the hearing, petitioner did not appear. Counsel for the Board appeared and advised that the Board is waiving the tuition in the amount of $9,648. No counterclaim was filed by the Board in this matter.

Accordingly, I **CONCLUDE** that petitioner failed to appear for the September 11, 2019, hearing and the matter is hereby **DISMISSED.**

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

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

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

September 18, 2019
DATE

EDWARD J. DELANOY, JR., ALAJ

Date Received at Agency: 9-18-19

Date Mailed to Parties: 9-19-19

mph

SEC Dkt No. D04-19
Agency Dkt. No. 247-9/19

New Jersey Commissioner of Education

Final Decision

In the Matter of William Santomauro,
The Ethical Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file his Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent failed to file his Disclosure Statements despite the issuance of its July 23, 2019 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has he instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby removed – effective on the date of this decision – as a school official found to have violated the School Ethics Act for failure to file his Disclosure Statements.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/19
Date of Mailing: 10/18/19

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

Before the School Ethics Commission
Docket No.: D04-19
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O William Santomauro,
The Ethical Community Charter School Board of Trustees, Hudson County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on July 23, 2019, and mailed on July 24, 2019, through regular and electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that he had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its special meeting on August 30, 2019.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Respondent is a returning school official and, therefore, was required to file his Disclosure Statements by April 30, 2019. Respondent failed to file his Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 1, 2019, from the Hudson County Office of Education, Respondent was reminded that his Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if he failed to file his Disclosure Statements by

July 10, 2019, the Commission had the authority to issue an OTSC, find him in violation of the Act, and recommend a penalty up to and including removal for his non-compliance.

When the correspondence from the Hudson County Office of Education failed to cause Respondent to file his Disclosure Statements, the Commission sent him another letter dated July 11, 2019, and informed Respondent that failure to file his Disclosure Statements by July 19, 2019, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file his Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by July 19, 2019, and despite receiving multiple reminders and opportunities to file his Disclosure Statements, an OTSC was issued by the Commission at its meeting on July 23, 2019. After having been served with the OTSC, Respondent still failed to file his completed Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files his Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the

decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2019

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D04-19

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Ethical Community Charter School; and

Whereas, as a returning school official, Respondent was required to file his Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2019; and

Whereas, Respondent failed to file his Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 23, 2019, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file his Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file his Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to otherwise file a response to the OTSC; and

Whereas, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file his Disclosure Statements; and

Whereas, at its special meeting on August 30, 2019, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files his Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2019, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at its special meeting on August 30, 2019.

Kathryn A. Whalen, Director

SEC Dkt No. D03-19
Agency Dkt. No. 245-9/19

New Jersey Commissioner of Education

Final Decision

In the Matter of Zandile Nkabinde,
Jersey City Community Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent did not file her Disclosure Statements until after the issuance of its July 23, 2019 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Because respondent has previously received a thirty-day suspension for failure to complete ethics training in 2017, a suspension of sixty days for this second violation of the School Ethics Act is appropriate. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended for sixty (60) days – effective from the date of this decision – as a school official found to have violated the School Ethics Act for failure to file her Disclosure Statements.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/19
Date of Mailing: 10/18/19

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

Before the School Ethics Commission
Docket No.: D03-19
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Zandile Nkabinde,
Jersey City Community Charter School Board of Trustees, Hudson County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on July 23, 2019, and mailed on July 24, 2019, through regular and electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its special meeting on August 30, 2019.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2019. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 1, 2019, from the Hudson County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her Disclosure Statements by

July 10, 2019, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Hudson County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated July 11, 2019, and informed Respondent that failure to file her Disclosure Statements by July 19, 2019, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by July 19, 2019, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on July 23, 2019. After being served with the OTSC, Respondent filed her Disclosure Statements on August 15, 2019. However, Respondent has not disputed that her Disclosure Statements were not timely filed, or otherwise submitted anything, in writing, explaining why a penalty should not be imposed.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for sixty (60) days**, with such suspension to become effective immediately upon adoption by the Commissioner of Education. The Commission's recommended sanction is predicated on the fact that, not only is Respondent's filing nearly four (4) months late, Respondent was also sanctioned in 2017 (suspension for thirty (30) days) for failing to comply with the statutory requirement to complete ethics training. Respondent's repeated failure to abide by, and comply with, her statutory obligations as a trustee, must be met with an appropriate sanction.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2019

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D03-19

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Jersey City Community Charter School; and

Whereas, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2019; and

Whereas, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 23, 2019, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent filed her Disclosure Statements on August 15, 2019, although they were required to be filed no later than April 30, 2019; and

Whereas, Respondent did not dispute that her Disclosure Statements were not timely filed; and

Whereas, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file her Disclosure Statements; and

Whereas, at its special meeting on August 30, 2019, the Commission recommended that the Commissioner of Education impose a penalty of suspension for sixty (60) days, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2019, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at its special meeting on August 30, 2019.

Kathryn A. Whalen, Director

SEC Dkt No. D06-19
Agency Dkt. No. 248-9/19

New Jersey Commissioner of Education

Final Decision

In the Matter of Gabriela Lopez,
Red Bank Charter School,
Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent did not file her Disclosure Statements until after the issuance of the SEC's August 30, 2019 decision. Respondent has neither filed exceptions to the recommended penalty, nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended for thirty (30) days – effective from the date of this decision – as a school official found to have violated the School Ethics Act for failure to file her Disclosure Statements.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/18/19
Date of Mailing: 10/18/19

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

Before the School Ethics Commission
Docket No.: D06-19
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Gabriela Lopez,
Red Bank Charter School Board of Trustees, Monmouth County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on July 23, 2019, and mailed on July 24, 2019, through regular and electronic mail, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute. The Commission discussed this matter at its special meeting on August 30, 2019.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in *N.J.S.A.* 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. *N.J.A.C.* 6A:28-3.1(a). In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

Although Respondent was appointed to the Board on or about September 18, 2018, she was not added to the Red Bank Charter School's electronic list of school officials until January 31, 2019. As a newly appointed member of a board of trustees, Respondent was required to file Disclosure Statements within thirty (30) days of her appointment, which was on September 18, 2018. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

By correspondence dated July 1, 2019, from the Monmouth County Office of Education, Respondent was reminded that her Disclosure Statements had not yet been filed with the Commission. This correspondence further advised Respondent that if she failed to file her Disclosure Statements by July 10, 2019, the Commission had the authority to issue an OTSC, find her in violation of the Act, and recommend a penalty up to and including removal for her non-compliance.

When the correspondence from the Monmouth County Office of Education failed to cause Respondent to file her Disclosure Statements, the Commission sent her another letter dated July 11, 2019, and informed Respondent that failure to file her Disclosure Statements by July 19, 2019, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC was issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by July 19, 2019, and despite receiving multiple reminders and opportunities to file her Disclosure Statements, an OTSC was issued by the Commission at its meeting on July 23, 2019. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: August 30, 2019

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D06-19

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at the Red Bank Charter School; and

Whereas, as a newly appointed school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days of her appointment, which was on or about September 18, 2018; and

Whereas, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on July 23, 2019, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to otherwise file a response to the OTSC; and

Whereas, at its special meeting on August 30, 2019, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file her Disclosure Statements; and

Whereas, at its special meeting on August 30, 2019, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files her Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on August 30, 2019, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at its special meeting on August 30, 2019.

Kathryn A. Whalen, Director

280-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

October 23, 2019

Morgan Owens, *pro se*
206 Lenox Avenue
Paterson, New Jersey 07502

Karen Murray, Esq.
Robert E. Murray, LLC
621 Shrewsbury Avenue, Suite 111
Shrewsbury, New Jersey 07702

Re: *M.O., on behalf of minor child, A.M. v. Board of Education of the City of Paterson, Passaic County, OAL Dkt. No. 06018-19, Agency Dkt. No. 81-4/19.*

Dear Parties:

I have reviewed the papers filed in connection with respondent's request for interlocutory review of Administrative Law Judge Julio C. Morejon's order issued October 7, 2019, denying respondent's motion for summary decision. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, respondent's request for interlocutory review is hereby denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

LOR/JKH/BCM

cc: Julio C. Morejon, Administrative Law Judge
Clerk, Office of Administrative Law

VIA E-MAIL ONLY

OAL Dkt. No. EDU 15868-16
Agency Dkt. No. 261-9/16

New Jersey Commissioner of Education

Final Decision

Noelle Jacquelin,

Petitioner,

v.

Board of Education of the Township of Dennis, Cape May County; Renee Pettit and Mark Miller,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petitioner has voluntarily agreed to dismiss the petition of appeal. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19
Date of Mailing: 10/30/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL

OAL DKT. NO. EDU 15868-16
AGENCY DKT. NO. 261-9/16

NOELLE JACQUELIN,
Petitioner,
v.
TOWNSHIP OF DENNIS BOARD OF EDUCATION, CAPE MAY COUNTY, RENEE PETTIT AND MARK MILLER,
Respondents.

David R. Castellani, Esq., for petitioner (Castellani Law Firm, LLC, attorneys)

Patrick J. Madden, Esq., for respondents (Madden & Madden, P.A., attorneys)

Record Closed: September 19, 2019 Decided: September 19, 2019

BEFORE **JEFFREY R. WILSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 18, 2016, 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 dismissal with prejudice and without costs.

I have reviewed the Stipulation of Dismissal annexed hereto as J-1 and I **FIND**:

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

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

I **CONCLUDE** that the Stipulation of Dismissal to the Complaint meets the requirements of N.J.A.C. 1:1-19.1 and that the dismissal should be approved. I approve the Stipulation of Dismissal herein and therefore **ORDER** that these proceedings be concluded.

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

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

September 19, 2019
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: 9-24-19

Date Mailed to Parties: 9-24-19

JRW/tat

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Stipulation of Dismissal received by the Office of Administrative Law on September 19, 2019

Exhibit: J-1
Date: 9-19-19
I:
E:

SEP 19 2019

TIMOTHY R. BIEG, ESQUIRE – ID 024112005
MADDEN & MADDEN, P.A.
108 KINGS HIGHWAY EAST - SUITE 200
POST OFFICE BOX 210
HADDONFIELD, NEW JERSEY 08033
TEL: (856) 428-9520
Attorney for Respondents

NOELLE JACQUELIN Petitioner, v. DENNIS TOWNSHIP BOARD OF EDUCATION; RENEE PETTIT, PRESIDENT OF THE DENNIS TOWNSHIP BOARD OF EDUCATION; MARK MILLER, SUPERINTENDENT OF SCHOOLS; DENNIS TOWNSHIP SCHOOL DISTRICT Respondents.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DOCKET # 261-9/16 OAL Docket No. EDU-15868-2016 S **STIPULATION OF DISMISSAL**

This matter is hereby dismissed with prejudice and without costs.

MADDEN & MADDEN, P.A.
Counsel for Respondents

Timothy R. Bieg, Esquire

CASTELLANI LAW FIRM, LLC
Counsel for Petitioner

David R. Castellani, Esquire

OAL Dkt. No. EDU 12406-19
Agency Dkt. No. 233-9/19

New Jersey Commissioner of Education

Final Decision

W.A., on behalf of minor child,

Petitioner,

v.

Board of Education of the Borough of Butler, Morris County,

Respondent.

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

The Consent Order provides, on page two, that the Office of Administrative Law and/or the Commissioner shall retain jurisdiction of the matter to enforce the Order. However, pursuant to the New Jersey Court Rules, R. 4:67-6, parties seeking enforcement of judgments are generally required to bring an action in New Jersey Superior Court, not with the Commissioner. As such, the Commissioner rejects this provision of the Consent Order.

With the exception of the provision regarding retaining jurisdiction, the Commissioner approves the remainder of the terms of the Consent Order and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement as modified herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19
Date of Mailing: 10/30/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDU 12406-19
AGENCY DKT. NO. 233-9/19

W.A. ON BEHALF OF MINOR CHILD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Respondent.

Joseph M. Rasa, Esq., for petitioner

Jeffrey R. Merlino, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: September 19, 2019 Decided: September 25, 2019

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On September 9, 2019, the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On September 16, 2019, the parties settled this case, which they memorialzed in a consent order, dated September 19, 2019. A copy of the consent order is attached to this decision. Having reviewed the terms of the consent order, I **FIND** that the parties have entered into their settllement voluntarily as evidenced by the signatures of their representatives.

In addition, I **CONCLUDE** that the consent order is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

9/25/19
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 9/25/19

Date Mailed to Parties: 9/25/19

/bem

9/18/19
3243-001
Order1.docx

Joseph M. Rasa, Esq.
Filing Atty ID # 016511998
THE LAW OFFICES OF
JOSEPH M. RASA, L.L.C.
565 Newark Pompton Turnpike
Pompton Plains, New Jersey 07444
(973) 831-8800

Attorneys for Petitioner,
Wendy Arias

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

WENDY ARIAS,	
Petitioner,	**Petition No:**
vs.	
BUTLER PUBLIC SCHOOLS,	**CONSENT ORDER**
Respondent.	

THIS MATTER being opened to the Commissioner of Education of New Jersey by The Law Offices of Joseph M. Rasa, L.L.C., attorneys for Petitioner, Wendy Arias, upon notice by way of Motion for Emergent Relief or Stay;; and the matter having been referred to the Office of Administrative Law for disposition; and it appearing that a copy of all of the papers were duly served upon Respondent, Butler Public Schools, directly and through their respective attorneys; and this Order being consented to by The Law Offices of Joseph M. Rasa, L.L.C., Joseph M. Rasa, Esq. appearing, attorneys for Petitioner, Wendy Arias, and Sciarrillo Cornell Merlino

McKeever & Osborne LLC, Jeffrey Merlino, Esq. appearing, attorneys for Respondent, Butler Public Schools, as evidenced by his signature affixed hereto; and the Judge, Office of Administrative Law, having read and reviewed the papers submitted in connection with the said Motion for Emergent Relief or Stay and this Order; and for good cause shown;

It is on this _____ day of September, 2019,

ORDERED that the Student, Cadence Huber, be and hereby is permitted to enroll and attend, immediately and permanently, classes as a full-time student at Butler High School; and it is further

ORDERED that the within action be and hereby is dismissed, except that the Office of Administrative Law and/or Commission of Education of New Jersey, shall retain jurisdiction of this matter to enforce this Order; and it is further

ORDERED that a true copy of this Order shall be served upon all counsel of record within seven (7) days from the date hereof.

HON. BARRY E. MOSCOWITZ. J.O.A.L.

The undersigned hereby consent to the form and the entry of this Order:

Dated: September 19, 2019

JOSEPH M. RASA, ESQ.
THE LAW OFFICES OF
JOSEPH M. RASA, L.L.C.
Attorneys for Petitioner,
Wendy Arias

Dated: September 19, 2019

JEFFREY MERLINO, ESQ.
SCIARRILLO CORNELL MERLINO
MCKEEVER & OSBORNE, LLC
Attorneys for Respondent,
Butler Public Schools

OAL Dkt. No. EDU 13031-18
Agency Dkt. No. 196-8/18

New Jersey Commissioner of Education

Final Decision

W.Y. and K.Y., on behalf of minor child, C.Y.,

Petitioners,

v.

Board of Education of the Township of Roxbury, Morris County,

Respondent.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19
Date of Mailing: 10/30/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13031-18

AGENCY DKT. NO. 196-8/18

K.Y. AND W.Y. ON BEHALF OF C.Y,

Petitioner,

v.

ROXBURY TOWNSHIP BOARD OF EDUCATION,

Respondents.

Julie Warshaw, Esq., for petitioner Butler BOE (Warshaw Law Group, attorneys)

Nathanya G. Simon, Esq., for respondent Roxbury Township BOE (Scarinci Hollenbeck, attorneys)

Record Closed: September 19, 2019 Decided: September 20, 2019

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on August 30, 2018 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and Release setting forth the terms of their agreement, which is attached and fully incorporated herein.

Having reviewed the record and the Settlement Agreement and Release setting forth the terms of the parties' agreement, I **FIND**:

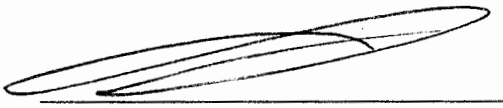
I have reviewed the record and terms of the settlement and **FIND**:

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.



September 20, 2019
DATE

ANDEW M. BARON, ALJ

Date Received at Agency: 9/20/19

Date Mailed to Parties: 9/24/19

mm

Nathanya G. Simon, Esq.
SCARINCI & HOLLENBECK, LLC
ATTORNEYS AT LAW
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071-0790
T: (201) 896-4100
F: (201) 896-8660
Attorneys for Respondent, Roxbury Township Board of Education
Our File No.: 13923.1003

K.Y. and W.Y. o/b/o C.Y. Petitioners, vs. Roxbury Township Board of Education Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW **SETTLEMENT AGREEMENT AND RELEASE** **OAL DOCKET NO.: EDU 13031-2018** **AGENCY REF. NO.: 196-8/18**

WHEREAS, Respondent, the Roxbury Township Board of Education (hereinafter "Respondent" or "Board") is a body politic and corporate, organized and existing by virtue of the law of the State of New Jersey, pursuant to N.J.S.A. 18A:11-1, and which is invested with the authority for maintain and operating the Roxbury Township Public School District ("District"), the local educational authority with responsibility for providing a free appropriate public education ("FAPE") to C.Y.; and

WHEREAS, K.Y. and W.Y. ("Petitioners" or "Parents") are the parents of C.Y., a minor child currently seven (7) years of age with a date of birth of March 6, 2012, and a student residing within the District; and

WHEREAS, a dispute arose between these parties regarding an incident involving C.Y. and a District staff member in which Petitioners claimed that the District staff member committed an act of Harassment, Intimidation, or Bullying ("HIB") of C.Y. under the New Jersey Anti-Bullying Bill of Rights ("ABR"), codified in N.J.S.A. 18A:37-13, *et seq.*; and

WHEREAS, the District conducted a thorough investigation of the incident and determined that the actions of the District staff member, while unacceptable, did not constitute a HIB; and

WHEREAS, upon Petitioners' request, the Board held a hearing on June 18, 2018 on the matter in which Petitioners were offered an opportunity to present their objections to the District's determination and at which the Board affirmed the finding that the incident was not a HIB; and

WHEREAS, Petitioners disagreed with the Board's decision and filed a Petition of Appeal ("Appeal") on August 7, 2018 with the Commissioner of Education; and

WHEREAS, Petitioners also filed a Notice of Tort Claim and Superior Court Complaint in the Law Division, Morris County, alleging some of these same allegations and seeking monetary damages, which claim has been settled and approved by the Court; and

WHEREAS, the parties in good faith have negotiated concerning the issues which are in dispute and have a desire to settle this matter in an amicable way, without admitting any deficiencies in the HIB investigation performed by the District or in the actions of the Board, but in order to reach a compromise of this dispute.

NOW, THEREFORE, the parties hereby agree as follows:

1. The Petitioners agree that by signing this Settlement Agreement and Release ("Agreement"), the Petitioners consent to an immediate dismissal, with prejudice, of their Appeal without a finding on the merits.

2. The Petitioners acknowledge that the Board will incur no financial responsibility or monetary compensation under this Agreement. Any and all damages which could be claimed are barred by the Settlement reached in the Superior Court action. See Exhibit A.

3. Any and all costs and expenses incurred of whatsoever nature associated with this matter which are not specifically agreed upon herein, are and shall remain the sole responsibility of the Petitioners.

4. The foregoing shall constitute full and complete settlement regarding any and all issues and claims of whatsoever nature the Petitioners and/or the student have or may have had against the Respondent through to the date of execution of this Agreement including but not limited to medical care, counseling services, related services fees, expert fees and costs, legal fees and any other fees and costs incurred. As a material part of this Agreement, the Petitioners, individually and on behalf of C.Y., specifically releases and waives all rights and claims of whatsoever nature relating to the HIB incident from the date of the execution of this Agreement until the end of time.

5. This Agreement is made without any admissions or findings of liability or responsibility by the Board with respect to any aspect of the handling of this matter and shall not be construed as an admission by the Board that the programs and placements previously provided and recommended were not in all respects appropriate as a matter of fact and law.

6. It is agreed that this Agreement and all its terms are and will remain confidential to the maximum extent permitted by law.

7. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein including, but not limited to, any legal fees, costs, claims for expert fees or reimbursement of any kind. This Agreement shall be filed with the Administrative Law Judge assigned to this matter

and shall be approved and incorporated into an initial decision by the Administrative Law Judge once fully signed and approved by both parties, which shall then be filed with the Commissioner of Education for final approval.

8. This Agreement represents the entire agreement between the parties and will not be modified in whole or in part. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of each parties' choosing and option. The Petitioners have been represented by Julie M. Warshaw, Esq. and are satisfied with her competent representation in this matter. The Board has been represented by Nathanya G. Simon, Esq., and is satisfied with her competent representation in this matter. Both parties acknowledge that they have reviewed this Agreement in its entirety, that they fully understand its provisions, requirements and limitations, and fully understand all of its contents. It is further agreed that neither party is considered a "prevailing party" for any purposes. Additionally, all parties are bound by this Agreement and each of its provisions and anyone who succeeds to the rights and responsibilities of the parties are also bound.

[INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties have signed this Agreement or caused their representative to sign this Agreement on the dates set forth below.

Kimberly Reed Gamache

K.Y., individually and on behalf of C.Y.

Dated: 8/26/19

William Young Jr

W.Y., individually and on behalf of C.Y.

Dated: 8/26/19

Roxbury Township Board of Education

By:

Dated: 9/16/2019

IN WITNESS WHEREOF, the parties have signed this Agreement or caused their representative to sign this Agreement on the dates set forth below.

K.Y. individually and on behalf of C.Y.

Dated: _____

_____
[illegible] individually and on behalf of C.Y.

Dated: _____

Roxbury Township Board of Education

_____

By: _____

Dated: _____

STATE OF NEW JERSEY)

SS:

COUNTY OF Morris)

I CERTIFY that on August 28, 2019, K.Y., individually and o/b/o C.Y., and W.Y., individually and o/b/o C.Y., personally came before me and acknowledged under oath, to my satisfaction, that these persons:

(a) are named in and personally signed this document; and

(b) signed, sealed, and delivered this document as his/her act and deed.

Attorney or Notary Public

Jr. Hall Kirshaw Esq.
Attorney at Law
State of New Jersey

STATE OF NEW JERSEY)

SS:

COUNTY OF Morris)

I CERTIFY that on August 26, 2019, W.Y., individually and o/b/o C.Y., personally came before me and acknowledged under oath, to my satisfaction, that these persons:

(a) are named in and personally signed this document; and

(b) signed, sealed, and delivered this document as his/her act and deed.

Attorney or Notary Public

Blake Weinstein, Esq.
Attorney at Law
State of New Jersey

SETTLEMENT AGREEMENT AND RELEASE

Plaintiffs, KIMBERLY YAMASHITA and WILLIAM YAMASHITA, individually and as the parents and natural guardians of COLTON YAMASHITA, minor child ("Plaintiffs") and Defendants ROXBURY PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION, LORETTA RADULIC, CHARLES SEIPP, ERIC RENFORS, GINA LACAPRA, MARYANN GIBBS, BRIANA DAVIS, SARA COX and MICHELE LAKI, (collectively hereinafter referred to as "Defendants") hereby agree upon this Settlement Agreement and Release ("Agreement") as a settlement of all issues involved herein as follows:

WHEREAS, Plaintiffs filed a Complaint and have pending against Defendants an action in the Superior Court of the State of New Jersey, Morris County, bearing Docket Number _____ (hereinafter, the "Action") alleging violations of the 42 U.S.C. § 1983 as well as other laws, contract claims and common law claims;

WHEREAS, Defendants have filed an Answer with the Court, denying all allegations in the Complaint, denying Plaintiffs' entitlement to any relief whatsoever against Defendants, and asserting a number of affirmative defenses;

WHEREAS, Plaintiffs and Defendants (collectively hereinafter referred to as the "Parties") desire to fully and finally resolve and settle in full all claims that Plaintiffs have, had, or may have against Defendants, by way of this Settlement Agreement and Release ("Agreement"); and

WHEREAS, Plaintiff's counsel of record in the Action and Defendants' counsel have negotiated in good faith to reach a settlement that is acceptable to the Parties and that constitutes a reasonable compromise of Plaintiff's claims, Defendants' defenses, and the *bona fide* dispute between the Parties.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the receipt and sufficiency of which is hereby acknowledged, and incorporating the above "Whereas" clauses in this Agreement, Plaintiffs, on behalf of themselves and all of their heirs, executors, administrators and assigns, and Defendants agree as follows:

1. **Dismissal of Action.**

For and in consideration of the promises of Defendants set forth in this Agreement, the Parties agree to dismiss, or cause to be dismissed, the Action with prejudice. To that end, together with the execution of this Agreement, the Parties shall execute and file with the Superior Court, Morris County the Stipulation of Voluntary Dismissal with Prejudice annexed hereto as Exhibit A.

2. **Payment/Consideration.**

In consideration of the execution of this Agreement and promises and covenants contained herein, and in full, final, and complete settlement, the Parties acknowledge and agree that this Action is settled and resolved for the following consideration:

Defendants shall pay, or cause to be paid to Plaintiffs the gross total monetary amount of **One Hundred Thousand Dollars and no cents ($100,000.00)**, inclusive of attorneys' fees, costs, and expenses (the "Settlement Sum"), under the following terms and conditions.

i. The Settlement Sum shall be paid within twenty-one (21) days of Plaintiffs' execution of this Agreement or within twenty-one (21) days of the issuance of a judgment approving the settlement on behalf of the minor Plaintiff following the friendly hearing, whichever is later;

ii. The check shall be made payable to "Warshaw Law Firm, LLC, as attorney" or in accordance with the directions contained within the judgment approving the settlement on behalf of the minor plaintiff, if they differ from the provisions of this agreement;

iii. All settlement checks shall be delivered to the Warshaw Law Firm, LLC, 266 King George Road, Suite I, Warren, NJ 07059, to the attention of Julie Warshaw, Esq;

iv. Julie Warshaw shall provide Defendants with Warshaw Law Firm, LLC 's W9 tax form before the settlement check can be issued; and

v. The Settlement Sum shall be reported on IRS Form 1099s per IRS regulations.

3. **Release.**

Effective on the date of their execution of this Agreement Plaintiffs, on behalf of themselves and their assigns, agents, predecessors, and successors, hereby forever irrevocably and unconditionally release, remise and discharge Defendants and their employees, Board Members, contractors, agents, predecessors and successors, as well as Glatfelter Claims Management, Inc. and American Alternative Insurance Corporation (the "Releasees"), from any and all actions, causes of action, administrative charges, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, forfeitures, claims and demands whatsoever, of whatever nature, kind or description, in law, admiralty or equity, whether fixed or contingent, known or unknown, matured or unmatured, foreseen or unforeseen, and whether or not yet accrued or asserted, arising out of or relating to the allegations in Plaintiffs' Complaint, which Plaintiffs had, or now have against the Releasees arising or occurring from the beginning of the world through the date of Plaintiffs' execution of this Settlement Agreement. This provision does not waive or release future claims, claims which may not be released under applicable law, or claims to enforce the provisions of this Agreement.

4. **Confidentiality**

(a) Except as otherwise provided in Paragraph 2 Subpart (v) of this Agreement, the Parties and their attorneys shall keep the terms of this Agreement strictly confidential and shall not disclose any information contained in this Agreement to anyone. Notwithstanding the foregoing, the Parties may disclose such information their attorneys, financial advisors, tax advisors, and/or as required by law in connection with a legal proceeding and/or governmental investigation. In

addition, Plaintiffs may disclose such information to members of their immediate family. If either Plaintiff tells members of his immediate family, lawyers, and/or tax or financial advisors about the terms of this Agreement or its contents, that Plaintiff must immediately instruct the person to whom the disclosure is made that the information disclosed must be kept strictly confidential.

(b) Notwithstanding the above, this Paragraph shall not be violated by the Parties responding to a direct inquiry with the statement that "the matter has been resolved." Similarly, nothing in this Agreement shall prohibit or restrict the Parties from responding to any inquiry, or providing testimony, about this Agreement or its underlying facts and circumstances by or before any federal or state administrative or regulatory agency or authority, pursuant to legal process, court order, subpoena or other law, rule, or regulation.

5. **Non-Disparagement.**

(a) Plaintiffs expressly agree to refrain from disparaging, defaming, or criticizing the Defendants and their Releasees, including, without limitation, making any untrue statement, oral or written, which portrays the Defendants, their affiliates, officers, agents, representatives, and Commissioners in an unfavorable light or subjects any thereof to scorn, obloquy or ridicule.

(b) Nothing in this paragraph shall be interpreted as prohibiting Plaintiffs from making truthful statements, including any truthful statements pursuant to a lawfully issued subpoena or testimony under oath in a legal, administrative or regulatory proceeding.

6. **Plaintiffs Responsibility for Taxes.**

Plaintiffs assume full responsibility for the payment of any and all federal, state and local taxes or contributions which may hereafter be imposed or required to be paid by Plaintiffs under any federal, state or local laws of any kind, with respect to the monies paid by Defendants to Plaintiffs pursuant to this Agreement. Plaintiffs expressly acknowledge and warrant that they are, and shall be, responsible for all federal, state, and local tax liabilities which are attributable to them that may result from the payments under this Agreement, and Plaintiffs hereby warrant that Defendants shall bear no responsibility for any such tax liabilities. Plaintiffs acknowledge that neither the Defendants nor their Releasees have provided any tax advice with respect to this Agreement or the Settlement Sum, and that Plaintiffs have not relied on any such tax advice. Plaintiffs further agree to indemnify and hold Defendants harmless to the full extent of any such liabilities, payments or costs, including taxes, interest, penalties, and attorneys' fees (except such liabilities, payments or costs relating to the employers' payroll tax contributions) which may be assessed against or incurred by Defendants in connection with any payment made to or on behalf of Plaintiff hereunder. Plaintiffs agree that should any tax liability arise or accrue to Plaintiff under local, state, or federal tax law as a result of any payments made under this Agreement, Plaintiff will pay any and all such finally determined obligations without seeking indemnity or reimbursement from Defendants.

7. **Non-Admission.**

This Agreement does not constitute an admission that Defendants have violated any law, committed any tort, breached any agreement, or committed any wrongdoing whatsoever, and Plaintiffs expressly acknowledge that Defendants have denied and continue to deny any wrongdoing arising out of the events alleged in the Complaint, as well as any liability to Plaintiffs

or to anyone else. Neither this Agreement nor any of its terms shall be admissible in any proceeding other than in a proceeding to enforce the terms of this Agreement.

8. **Attorneys' Fees.**

Except as otherwise specifically set forth herein, Plaintiffs and Defendants expressly agree to bear their own attorneys' fees, costs and disbursements incurred in this litigation, including the fees, costs and disbursements incurred in negotiating and preparing this Agreement and obtaining the dismissal of the Action without prejudice. No party shall be responsible or liable for the payment of any attorneys' fees for the other party except as set forth herein.

9. **Important Acknowledgments.**

Plaintiffs acknowledge that they were represented by counsel of their choosing throughout the negotiation and the execution of the Agreement. Plaintiffs further represent that they had sufficient opportunity to consider this Agreement, have reviewed the terms of this Agreement, had the opportunity to confer with their legal counsel, **Warshaw Law Firm, LLC**, in order to obtain advice with respect to the terms of this Agreement, had the opportunity to consider their legal counsel's advice with respect to the Agreement, fully understand the terms of the Agreement, are entering into this Agreement of their own free will and accord after consultation with their legal counsel, and are signing the Agreement knowingly and voluntarily.

It is understood and agreed that the Settlement Sum and the other good and valuable consideration provided for herein are not a mere recital but are the consideration for this Agreement and all terms herein, including the full and final release effected thereby. The Parties represent and warrant that this Agreement, including the monies received by Plaintiffs and referenced herein, is a fair and reasonable resolution of a *bona fide* dispute. The Parties represent and warrant that the Settlement Sum is fair and reasonable.

10. **Important Acknowledgments Regarding Medicare.**

Plaintiffs confirm that they have not received any health care treatment as a result of the events alleged in their Complaint or their claimed injuries in the Complaint and Medicare has made no conditional payments for any claimed medical injuries. Plaintiffs warrant and affirm that they are not Medicare recipients with respect to the alleged injuries by Defendants alleged in the Complaint and will not become Medicare beneficiaries within thirty (30) days.

Plaintiffs represent that they will agree to save and hold harmless the defendants, their respective attorneys, their respective law firms and their respective liability indemnity carriers for any lien or subrogation action, either known or unknown, arising out of this lawsuit.

Plaintiffs and plaintiffs' attorney represent that they are unaware of any lien, claims, etc. that may be applicable to this settlement.

11. **Oral Modifications Prohibited.**

This Agreement represents the entire agreement between Plaintiffs and Defendants with respect to the Action. This Agreement cannot be amended, supplemented, or modified nor may

any provision be waived, except by a written instrument executed by or on behalf of the party against whom enforcement of any such amendment, supplement, modification or waiver is sought.

12. **Choice of Law.**

This Agreement shall be governed by the law of the State of New Jersey, without regard to the choice-of-law or conflicts-of-law principles of any jurisdiction.

13. **Headings.**

The headings used herein are for reference only and shall not in any way affect the meaning or interpretation of this Agreement.

14. **Counterparts.**

This Agreement may be executed on multiple counterparts, each of which shall be considered an original but all of which shall constitute one (1) Agreement.

15. **Facsimile, Electronic, and Email Signatures.**

Any party may execute this Agreement by signing on the designated signature block below and transmitting or causing to be transmitted that signature page via facsimile or email to counsel for the other party. Any signature made and transmitted by facsimile or email for the purpose of executing this Agreement shall be deemed an original signature for purposes of this Agreement and shall be binding upon the party whose counsel transmits the signature page by facsimile or email.

16. **Severability.**

The invalidity or unenforceability of any provision(s) of this Agreement (other than Paragraph 2) shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect.

17. **Status of Settlement if Case Is Not Ultimately Dismissed.**

In the event that the Court fails to dismiss the Action with prejudice as contemplated by this Agreement, this Agreement shall be null and void *ab initio*. In such case, the Parties shall be returned to their respective statuses as of the date immediately prior to the Effective Date of this Agreement, and the Parties shall proceed in all respects as if the Agreement had not been executed.

18. **No Other Representations or Agreements; Entire Agreement.**

Each party acknowledges that, except as expressly set forth herein, no representations of any kind or character have been made by any other party or parties, agents, representatives, or attorneys to induce the execution of this Agreement. This Agreement constitutes a single integrated contract expressing the entire agreement of the Parties hereto. There is no other agreement or understanding, written or oral, expressed or implied, among the Parties hereto concerning the subject matter hereof, except the agreements set forth in this Agreement. This Agreement constitutes and contains the entire agreement among the Parties and supersedes and replaces all prior negotiations and agreements, proposed or otherwise, written or oral, concerning the subject matter hereof. This Agreement is an integrated document.

IN WITNESS WHEREOF, the Parties hereto have executed, or caused their duly authorized officers to execute, this Agreement as of the dates set forth below.

Signed and sealed this 20 day of April, 2019.
(CAUTION - READ BEFORE SIGNING)

Signature:

Kimberly Yamashita (SEAL)
Kimberly Yamashita, individually
and as the parent and natural guardian
of COLTON YAMASHITA, minor child

Witness

William Yamashita (SEAL)
William Yamashita, individually
and as the parent and natural guardian
of COLTON YAMASHITA, minor child

Caitlin Tidgood (SEAL)
Witness

STATE OF NEW JERSEY)
) SS
COUNTY OF Morris)

On this 20 day of April, 2019, before me personally appeared, William + Kimberly Yamashita to me known to be the person who executed the foregoing instrument, and acknowledged that Kimberly + William Yamashita executed the same as his/her/their free act and deed.

Notary Public
My commission expires_____

NICOLE L. HADE NOTARY PUBLIC NEW JERSEY

Nicole L. Hade
Notary Public of New Jersey
My Commission Expires March 29, 2021

ROXBURY TOWNSHIP PUBLIC SCHOOLS
BOARD OF EDUCATION BUSINESS OFFICE
42 NORTH HILLSIDE AVENUE, SUCCASUNNA, NJ 07876

Phone (973) 584-6099 www.roxbury.org Fax (973) 584-0426

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY COUNTY OF MORRIS, STATE OF NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Roxbury Township Board of Education of the Township of Roxbury, County of Morris, State of New Jersey, convened in Public Session on Monday, September 16, 2019 at 6:32 p.m. in the Media Center at Lincoln/Roosevelt School, 34 North Hillside Avenue, Succasunna, New Jersey.

The following members of the Roxbury Township Board of Education were present:

Mr. Richard Alexander	Mr. Joseph Bocchino	Mrs. Rachel Byrne
Mrs. Heather Champagne	Mr. Leo J. Coakley	Mrs. Anne Colucci
Mr. Dan Masi	Mrs. Danielle McCabe	Mrs. Kathy Purcell
Ms. Carol Scheneck		

The following members of the Roxbury Township Board of Education were absent: None

MOTION:	Ms. Scheneck
SECOND:	Mrs. Champagne
AYES:	Mr. Alexander, Mr. Bocchino, Mrs. Byrne, Mr. Coakley, Mrs. Colucci, Mr. Masi, Mrs. McCabe, Mrs. Purcell, Ms. Scheneck*
NAYS:	None
ABSTAIN:	Mrs. Champagne

TITLE AND TEXT OF RESOLUTION

SETTLEMENT AGREEMENTS

12. IT IS RESOLVED, upon the recommendation of the Superintendent of Schools and Board Attorney, that the Settlement Agreements and Releases in the following matters be approved and the Board President is authorized to sign same on behalf of the Board:

OAL Docket No. EDS 12822-2018
OAL Docket No. EDU 13031-2018
Docket No. MRS L -1166-19

I, Joseph Mondanaro, Business Administrator/Board Secretary of the Board of Education of the Township of Roxbury, County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on Monday, September 16, 2019 is a true complete copy of the original minutes as recorded in the minute book of said Roxbury Township Board of Education so far as the same relate to the subject matter referred to in said extract.

In witness, I have hereto set my hand and affixed the corporate seal of the said Board of Education on this 18th day of September, 2019.

Mr. Joseph Mondanaro
Business Administrator/Board Secretary

OAL Dkt. No. EDU 06935-17
Agency Dkt. No. 57-3/17

New Jersey Commissioner of Education

Final Decision

Oakwood School, Monmouth County,

Petitioner,

v.

New Jersey Department of Education,

Respondent.

The record of this matter and the Settlement Agreement transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Settlement Agreement is deemed to be the final decision in this case.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19

Date of Mailing: 10/30/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06935-17
AGENCY DKT. NO. 57-3/17

OAKWOOD SCHOOL, MONMOUTH COUNTY,

Petitioner,

v.

NEW JERSEY DEPARYMENT OF EDUCATION,

Respondent.

Jerry Dougherty, Executive Director/Principal, for petitioner

Caroline Jones, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 16, 2019 Decided: September 20, 2019

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 16, 2017, 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.

This matter is settled and the parties have filed a fully executed Settlement Agreement, which is attached hereto.

I have reviewed the dismissal and I **FIND**:

1. The parties have voluntarily agreed to dismiss the complaint 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.

I **CONCLUDE** that the Consent to Dismiss the Complaint meets the requirements of N.J.A.C. 1:1-19.1 and that the dismissal should be approved. I approve the dismissal of the complaint herein and therefore **ORDER** that these proceedings be concluded.

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

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

September 20, 2019
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 9-30-19

Date Mailed to Parties: 9-25-19

/lam

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625

GURBIR S. GREWAL
Attorney General

MICHELLE L. MILLER
Director

RECEIVED
2019 SEP 16 A 11:20
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

September 11, 2019

Approved
Placed
ID sett
Dic 9/17/19

Via Facsimile (609) 689-4100 and Regular Mail
The Honorable Dorothy Incarvito-Garrabrant, ALJ
State of New Jersey
Office of Administrative Law
P.O. Box 049
Trenton, New Jersey 08625

Re: Oakwood School, Monmouth Co. v. New Jersey Department of Education, Office of Fiscal Accountability and Compliance
Docket No. EDU 06935-2017 S

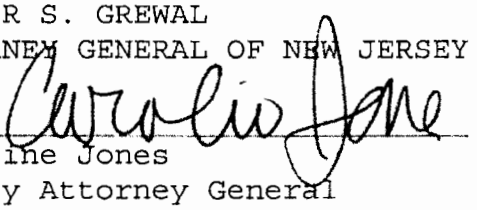
Dear Judge Incarvito-Garrabrant:

As Your Honor is aware, this office represents the New Jersey Department of Education, Office of Fiscal Accountability and Compliance. Enclosed please find an executed settlement agreement on behalf of the parties. Because this settlement does not fall under the circumstances contemplated by N.J.A.C. 1:1-19.1(c) (settlements where the agency head has approved the terms of the settlement), an initial decision should be issued regarding the matter.

If there are any questions or concerns regarding the parties' settlement please do not hesitate to contact my office and I would be happy to arrange a conference call.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: 
Caroline Jones
Deputy Attorney General

cc: Jerry Dougherty (Oakwood School, via email)

RECEIVED
2019 SEP 11 A 11:20
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAKWOOD SCHOOL, MONMOUTH CO.	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
v.	:	AGENCY REF. NO.: 57-3/17 OAL DKT. NO.: 06935-2017 s
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE	:	**SETTLEMENT AGREEMENT**

WHEREAS, the Oakwood School ("Oakwood") and the New Jersey Department of Education, Office of Fiscal Accountability and Compliance, ("OFAC") have mutually agreed to settle the above-captioned matter, with Gurbir S. Grewal, Attorney General of New Jersey, by Caroline Jones, Deputy Attorney General, appearing on behalf of OFAC, and Jerry Dougherty, Executive Director/Principal of Oakwood appearing on behalf of Oakwood; and

WHEREAS, this matter arose from the April 20, 2015, OFAC Fiscal Monitoring Report, Oakwood School Fiscal Monitoring, OFAC Case #SG-0045-12 ("the audit"). The audit made six findings regarding non-allowable costs and ordered corrective action; and

WHEREAS, on June 14, 2015, Oakwood appealed findings #1, #3, and #4 to OFAC. By letter dated November 9, 2016, OFAC resolved to hold Oakwood's appeal of finding #1 in abeyance but denied Oakwood's appeal of findings #3 and #4; and

WHEREAS, on or about May 15, 2017, Oakwood filed a Petition of Appeal with the Commissioner of Education appealing findings #3 (key man insurance) and #4(disability insurance) of the audit. Finding #1 is not subject of the Petition of Appeal. The matter was transmitted to the OAL as a contested case; and

WHEREAS, during the course of litigation Oakwood furnished additional records regarding finding #4. And based on a review of these records, on March 29, 2018, OFAC rescinded finding #4 of the audit; and

WHEREAS, only finding #3 remains as subject to the Petition of Appeal; and

WHEREAS, the audit remains in force because finding #1 is held in abeyance; 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. Oakwood will withdraw, with prejudice its Petition of Appeal.

2. Oakwood will issue a refund to all schools for the total costs as set forth in finding #3 of the audit. The total cost being $6,647. To achieve this, a prior period adjustment will be recorded in the school's audited

financial statements. And the school will include a note disclosure describing the reason for the adjustment.

3. The total refund will be staggered over three years, i.e. approximately $2,216 each year.

4. OFAC will prepare the calculations to determine what proportion of that total for each year is to be returned to each sending district based on the district's enrollment. The calculations will be provided by OFAC to Oakwood by letter after this matter is settled. The letter will be incorporated as fully part of this agreement. Oakwood agrees to and will not contest OFAC's calculations regarding the amount due to each sending district.

5. OFAC does not admit or concede that finding #3 in the report was not correct nor does Oakwood admit or concede the finding #3 is correct, and both parties have entered into this agreement for the purpose of settlement only.

6. The parties agree that this agreement resolves the Petition of Appeal, but that the audit remains open. This agreement does not fully resolve the audit.

7. Oakwood asserts and agrees that Jerry Dougherty has the authority to settle this matter under these terms and withdraw the Petition of Appeal on behalf Oakwood. Oakwood asserts and agrees that it had the option to consult with legal counsel and to be represented by legal counsel in

this litigation and for purposes of this settlement agreement but it has knowingly and on its own elected not to consult or seek representation by legal counsel.

8. The parties agree that this agreement fully resolves all issues between them arising from the Petition of Appeal.

Jerry Dougherty
Oakwood Center I

Date: 8-12-19

Caroline Jones
Deputy Attorney General

Date: 9/11/19

OAL Dkt. No. EDU 10717-19
Agency Dkt. No. 154-6/19

New Jersey Commissioner of Education

Final Decision

C.W., on behalf of minor child, T.W.,

Petitioner,

v.

Board of Education of the Township of Montclair, Essex County,

Respondent.

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

Upon review, the Commissioner observes that the Interim Superintendent of the Montclair Board of Education signed the agreement on behalf of the Board. Despite the language in paragraph 9 of the proposed stipulation of settlement – which incorrectly states that settlements involving short-term discipline are not subject to Board approval – *N.J.A.C.* 6A:3-1.13 clearly requires that when a district board of education is a party to a contested matter, a proposed settlement agreement must either include a copy of the Board resolution approving the settlement or the signature of the Board's attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Interim Superintendent to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19
Date of Mailing: 10/30/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10717-19

AGENCY DKT. NO. 154-6/19

C.W. ON BEHALF OF T.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY.

Respondent.

C.W.. for petitioner, T.W., pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: September 24, 2019 Decided: September 25, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 5, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by 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 settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

September 25, 2019
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: September 30, 2019

Date Mailed to Parties: September 27, 2019

lr
Attachment

MACHADO LAW GROUP
1 Cleveland Place
Springfield, New Jersey 07081
Tel: 732-540-8276
Fax: 732-540-8296
Attorneys for Respondent,
Montclair Board of Education

C.W. o/b/o T.W.	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
	:	DOCKET NOS.: EDU 10717-2019
Petitioner,	:	AGENCY REF. NOS.: 154-6/19
	:	
vs.	:	
	:	
MONTCLAIR BOARD OF EDUCATION	:	
Respondent.	:	

STIPULATION OF SETTLEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT (the "Agreement") made by and between the Montclair Board of education, with its principal office located in Montclair, New Jersey (hereinafter referred to as the "Board" or "District" and Chriss Williams ("Parent"), on behalf of Truman Foster Williams (hereinafter "T.W." or "student").

WHEREAS, the Montclair Board of Education is the local educational authority with the responsibility of educating T.W.; and

WHEREAS, on May 1, 2019, Truman was accused of engaging in a fight with another District student on school-grounds;

WHEREAS, as a result of the allegations, T.W. received a one (1) day suspension; and

WHEREAS, on June 24, 2019, Parent filed a Petition of Appeal with the New Jersey Department of Education, Office of Controversies and Disputes, challenging the accuracy of the allegations made against T.W. and requesting that the matter be expunged from his student records; and

WHEREAS, the parties having a desire to settle the above matters in an amicable way so as to avoid a hearing and any further legal proceedings.

NOW THEREFORE, in consideration of the mutual promises the parties hereto agree as follows:

1. Effective with the execution of this Agreement, references to the May 1, 2019 incident, as well as the associated one (1) day suspension, shall be expunged from T.W.'s student records.

2. It is understood and agreed that each Party shall be responsible for their own attorney's fees and that there is no "prevailing party". Petitioner further waives any and all other costs associated with this matter, whether alleged or not, up to the date of the execution of this Agreement.

3. Petitioner shall release the District from any and all claims, rights and liability, including but not limited to any claims or costs for attorney's fees, civil liability, or any other equitable or legal relief at all relevant times, whether known or unknown as of the date of this Agreement.

4. This Agreement contains the entire agreement between the parties hereto and is intended to resolve all disputes and issues between them as of the date of execution of this Agreement.

5. This Agreement shall remain confidential and neither party shall disclose its form or contents to third parties, except as required by law and as necessary for enforcement purposes.

6. This Agreement shall be governed by the laws of the State of New Jersey.

7. 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.

8. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

9. Because short-term discipline is within the discretion of the administration, this agreement is not subject to Board approval, unless otherwise required by the Court.

Date: 9/20/2019

Chriss Williams

Date: 9/20/2019

Witness:

Date: 9-23-19

By:

Dr. Nathan Parker
Interim Superintendent
Montclair Board of Education

OAL Dkt. No. EDU 07219-19
Agency Dkt. No. 79-4/19

New Jersey Commissioner of Education

Final Decision

Christina DiCosmo,

Petitioner,

v.

Board of Education of the Town of Hackettstown, Warren County,
Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19
Date of Mailing: 10/30/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07219-19
AGENCY DOCKET NO. 79-4/19

CHRISTINA DiCOSMO,

Petitioners,

v.

BOARD OF EDUCATION OF TOWN OF HACKETTSTOWN, WARREN COUNTY.

Respondents.

Randi Doner April, Esq. appearing on behalf of petitioner (Oxfeld Cohen, P.C.)

Jeffrey R. Merlino, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC)

Record Closed: September 24, 2019 Decided: September 24, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 28, 2019, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on June 17, 2019 wherein a conference call was scheduled for July 26, 2019. During the pendency of the telephone conference the parties agreed the a motion for summary decision would be filed on September 16, 2019 and a response to motion would be filed on September 27,

2019. Prior said dates, petitioner's counsel advised that the matter is settled and requested that the briefing schedule be suspended. On September 24, 2019, OAL received a copy of the fully executed Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

9-24-19

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: September 26, 2019

Date Mailed to Parties: September 26, 2019

ljb

LAW OFFICES

OXFELD COHEN, P.C.

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RANDI DONER APRIL *
WILLIAM P. HANNAN **
BENJAMIN A. SPIVACK (1950-2012)

SAMUEL B. WENOCUR **
JESSE M. HUMPHRIES ***
BARRY FRANK **
OF COUNSEL

* MEMBER OF NJ BAR
** MEMBER OF NJ & NY BAR
*** MEMBER OF NJ & PA BAR
**** MEMBER OF NJ & DC BAR

September 23, 2019

Honorable Kimberly Moss, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, New Jersey 07102

Re: Christina DiCosmo v. Twp. of Hackettstown BOE
Docket No: EDU 07219-2010-N

RECEIVED
2019 SEP 24 A 11:22
OFFICE OF ADMINISTRATIVE LAW

Dear Judge Moss:

Enclosed please find the Settlement Agreement in the above matter.

Thank you for Your Honor's courtesies.

Respectfully yours,
OXFELD COHEN, PC

Randi Doner April, Esq.

cc: Jeffrey R. Merlino, Esq. (via email)

2019 SEP 24 A 11:22

CHRISTINA DICOSMO,	)	
	)	**BEFORE THE COMMISSIONER OF**
Petitioner,	)	**EDUCATION OF THE STATE OF NEW**
	)	**JERSEY**
vs	)	
	)	
HACKETTSTOWN PUBLIC SCHOOLS,		**OAL DKT NO: EDU-07219-19**
Respondent.		
		STIPULATION OF SETTLEMENT

Whereas, the parties have amicably resolved their differences and wish to memorialize their agreement herein,

Now, Therefore Be It Agreed, that upon satisfaction of the conditions set forth below, the Action will be dismissed, with prejudice, on the following terms:

1. Petitioner began her employment with Respondent on December 14, 2011 in the position of Interpreter and paid on the MA 7 column of the negotiated salary guide.
2. Petitioner served in the capacity of Interpreter for the 2012-2013 school year and was paid on the MA 8 salary guide. She was non-renewed and then ultimately re-hired after the school year.
3. Petitioner resigned her position as Interpreter in or around August 2013 but worked during her sixty (60) day notice period.
4. On October 1, 2013 she remained as an Interpreter at an off-guide salary of $50,000 for the remainder of the 2013-2014 school year.

5. Petitioner began the 2014-2015 school year as an Interpreter, resigned on December 17, 2014 and was then was re-hired as a TOD, at a salary on the MA guide, from January to June 2015.

6. On August 20, 2015, Petitioner was again appointed as an Interpreter for the 2015-2016 school year. Her employment contract referenced her salary placement on the BA salary guide.

7. Petitioner served as an Interpreter for the 2016-2017 school year on the BA 3 salary guide.

8. Petitioner served as an Interpreter for the 2017-2018 school year on the BA 4 salary guide.

9. Petitioner served as an Interpreter for the 2018-2019 school year on the BA 5 salary guide.

10. Petitioner is under contract as an Interpreter for the 2019-2020 school year on the guide as a BA6 guide with a commensurate salary.

11. Petitioner has attained tenure as an Interpreter.

12. Petitioner contends she has been incorrectly paid for her time as Interpreter, and filed the within Action asserting that she should be paid pursuant to the MA salary guide.

13. Respondent agrees to move Petitioner to the MA salary guide from the BA column prospectively effective with the 2019-20 school year. Accordingly, Petitioner's 2019-20 salary shall be MA6 with a salary of $69,730.00.

14. Petitioner agrees that this Settlement Agreement fully resolves all administrative, civil or other claims that were or could have been asserted against the District, its Board of Education, its Board of Education members, employees, agents and representatives, based on any facts or events preceding execution of this Settlement Agreement, including but not limited to any claims for money damages, counsel fees, or other relief, and release the

opportunity to consult with her legal counsel concerning the meaning and consequences of entering into this Settlement Agreement, that she fully understands its terms, and that she has full legal authority to resolve this dispute.

17. Petitioner represents that she has entered into this Settlement Agreement voluntarily, and without duress or coercion.

18. This Settlement Agreement is subject to approval by the Hackettstown Board of Education and Administrative Law Judge Kimberly Moss.

19. This Settlement Agreement may be signed in counterparts, and PDF signature pages shall be acceptable in lieu of original signature copies.

Christina DiCosmo 9/20/2019
Christina DiCosmo

Michael Herbst, Hackettstown Board of Education

Witness
Dated: 9/20/19

Timothy Havlusch, Board Secretary
Dated: 9/19/19

Agency Dkt. No. 2-3/19A
SEC Dkt. No. C34-18

New Jersey Commissioner of Education

Final Decision

Walter Fields,

Complainant,

v.

Stephanie Lawson-Muhammad, South Orange-Maplewood Board of Education, Essex County,

Respondent/Appellant.

This matter involves an appeal of the School Ethics Commission's (SEC) March 26, 2019 determination that appellant Stephanie Lawson-Muhammad – a member of the South Orange-Maplewood Board of Education (Board) – violated *N.J.S.A.* 18A:12-24.1(e)[1] and (f)[2] of the School Ethics Act (Act) based on her conduct during an April 27, 2018 traffic stop. The SEC recommended a penalty of a six-month suspension for the violations. The appellant filed a Notice of Appeal appealing the SEC's finding of a violation pursuant to *N.J.A.C.* 6A:4-1.3(c).

In her appeal to the Commissioner, the appellant maintains that the SEC erred in finding that she violated *N.J.S.A.* 18A:12-24.1(e) and (f) of the Act.[3] The appellant argues that her

[1] *N.J.S.A.* 18A:12-24.1(e), states "I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board."

[2] *N.J.S.A.* 18A:12-24.1(f), states "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."

[3] This decision provides a summary of the arguments advanced by the appellant on appeal. Many of the arguments reiterate the substance of the submissions below that were fully outlined in the SEC's March 26, 2018 decision and will not be repeated herein.

speech during the traffic stop was clearly "beyond the scope of [her] authority and duties as a board member" and thus was private action. While some of her speech during the stop was undeniably lamentable, it did not have the potential to compromise the Board. The appellant cites to the Advisory Opinion of the School Ethics Commission, No. A03-07, decided April 2, 2007, for the proposition that "board members do not surrender the rights that they have as a private citizen, such as First Amendment rights, when they become a board member." Indeed, the SEC must balance "a board member's rights as a private citizen with the interests of the Legislature in ensuring that a board ... avoids conduct that would violate the public trust or create a justifiable impression among the public that trust is being violated."

The appellant stresses that at no point during the stop did she engage with a member of the public; rather she had a personal interaction with Officer Horst, a public official, that was fully unrelated to the Board. When a board member's work or duties are not implicated, there must be evidence of an explicit request for preferential treatment or a nexus between the invocation of the member's position and the benefit sought, which did not occur during the stop. Appellant argues that during her initial introduction to Officer Horst, she did not "create ... the impression that she was representing the interests of the Board" when she mentioned her board membership. Further, at no point during the stop did the appellant link her position on the Board to her relationship with South Orange Village President, Sheena Collum. The complainant did not present any evidence that the two mentions of Ms. Collum's name invoked "special or elevated standing" sufficient to constitute an abuse of public trust. The appellant also emphasizes that but for an anonymous government actor taking steps to release the video into the public domain, the public would not have had knowledge of the traffic stop, as the stop had nothing to do with Board business.

In addition, the appellant argues that there was no evidence presented showing that she used the schools to acquire some benefit for personal gain as required to establish a violation of *N.J.S.A.* 18A:12-24.1(f). Moreover, the SEC's assertion that the failure to accrue a benefit is "of no moment, as [appellant's] outspoken threat to do so is sufficient" is legally and factually incorrect. First, actual proof of the accrued benefit is required by the statute to substantiate a violation. *See N.J.A.C.* 6A:28-6.4(6) ("Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(f) shall include evidence that the respondent(s) ... used the schools in order to acquire some benefit for the respondent(s) ..."). Here, the appellant received no benefit in mentioning Ms. Cullom's name as she later appeared in court and paid a fine for the summons issued by Officer Horst. Secondly, appellant contends that name dropping is not a threat nor is it inappropriate. The SEC completely leaves out of its factual summary and subsequent analysis the detail that the appellant called her husband during the stop, who informed her and Officer Horst that he was in possession of the couple's current insurance card. Both invocations of Ms. Cullom's name were made in reaction to what appellant perceived as unfair statements by Officer Horst and a direct reaction to the fact that she did not believe she did anything wrong. Her reference to "Sheena" and calling Chief Kroll a "skinhead" is in direct response to what the appellant believes to be an injustice and her desire to remedy same. Therefore, the SEC's findings must be found to be arbitrary and contrary to law.

Additionally, the appellant asserts that the SEC's analysis of the aggravating factors that allegedly justify the unduly harsh recommended penalty is without merit. Naming her speech "offensive and inappropriate," the SEC ridicules appellant's statement to Officer Horst that "you guys hurt black people." The SEC failed to consider the appellant's words within a broader cultural context or to understand appellant's desire to immediately dispel any concern

Officer Horst may have entertained as to whether, as a black woman, she might pose a threat to him. Given the contemporaneous racially motivated events occurring around the country involving police officers, appellant's fears – while not entirely rational – were justified.[4] The complainant's assertion that the appellant's fear was not only unreasonable but also offensive, without any collaborating evidence, further underscores the arbitrary nature of the SEC's finding that the appellant's speech was offensive. Moreover, the appellant mentioned being on the Board and being a member of the community within seconds of the stop to provide her credentials so that the officer knew that she was not a "dangerous black woman." The appellant also points out that punishing an individual in their personal capacity for not being adequately deferential is dubious on its face and implicates the First Amendment. While the SEC may not have liked the tenor of the appellant's language, the SEC's displeasure cannot and does not support a violation of the Act. The appellant also disagrees with the SEC's characterization of "skinhead" as a racial slur, arguing that it may qualify as an epithet, but it is not a racial one.

In analyzing her conduct in conjunction with past cases, the appellant notes that the SEC cites to the cases collectively referred to as *Pleasantville*. *See Hyman, et al. v. Davenport*, SEC Dkt. Nos.: C31-13, C28-13, C45-13, C41-13, C42-13, C43-13, C44-13, *affirmed*, Commissioner Decision No. 113-18SEC, decided April 13, 2018. In that case, the board member respondent, Lawrence Davenport, accosted a pregnant principal in the elevator about a comment the principal's mother made, resulting in the principal having to call law enforcement. The same board member later called a school district employee a "stupid n****er" in an exchange regarding school business that occurred on school property. In that case, the SEC recommended a sixty-day

[4] Appellant cites to various sources and documented incidents that have occurred throughout the country to provide context as to why she was fearful during the stop.

suspension. Using *Pleasantville* to justify the severity of the appellant's penalty, the SEC finds that unlike the *Pleasantville* matter, the appellant was not "involved in a mutual verbal exchange," and that the respondent in *Pleasantville* "denied" his racist behavior; finally, and most outrageously, the respondent's action in *Pleasantville* "did not impact anyone other than him ...." The appellant claims that these justifications are as shocking as they are inapposite. Unlike in *Pleasantville*, no nexus exists between the appellant's interaction with Officer Horst and the Board or a school employee. The appellant did not take any action, either with Officer Horst or Ms. Collum, under the auspices of Board authority. Thus, the alleged "aggravating factors" used here as the basis for the SEC's severe penalty recommendation are arbitrary and without basis in fact or law.

Finally, the appellant cites to various cases where the SEC has recommended a penalty of a reprimand or a censure. By contrast, the appellant stated that suspension was only proposed as a sanction in the most egregious breaches of trust, including confrontations between a board member and members of the public involving threats of or actual physical violence and/or harassment, or soliciting financial donations which could have been perceived as under the auspices of the board. *See, In the Matter of Jan Rubino*, SEC Dkt. No. C16-08, decided September 28, 2010. Therefore, the appellant maintains that the SEC's recommended six-month suspension should be rejected, and the Commissioner should determine that the SEC failed to provide credible and corroborating evidence to support its finding of a violation of *N.J.S.A.* 18A:12-24.1(e) and (f) of the Act.

In his response brief, the complainant maintains that the SEC acted appropriately and within the scope of its authority in finding that the appellant violated the Act. *N.J.S.A.* 18A:12-24.1(e) and (f) represent a minimal expectation of a school board member as these provisions speak

to a basic level of behavior and decency.[5] In her appeal of the SEC's findings, the appellant demonstrates an inability to surrender her self-interest for the welfare of the South Orange-Maplewood School District. The complainant stressed that the SEC provided the appellant with ample opportunity to make her case and properly deliberated on the testimony and the evidence provided at the hearing in reaching its decision. The standard of review of the SEC's decision is whether the decision is arbitrary and capricious, which is a significantly high burden for the appellant.

The complainant also contends that the appellant offers a misconstrued interpretation of the Act, as the appellant suggests that since there was no direct action between a board member and the public that involved actual business of the Board, her speech did not violate the Act. This is a misrepresentation of the spirit and intent of the Act and further, *N.J.S.A.* 18A:12-24.1(e) does not reference "direct action." The integrity of the Board is called into question when a member: presents herself as a Board member during a traffic stop; attempts to qualify her public standing to evade being issued a traffic summons when she is guilty of violating a municipal statute; uses her political connections to try to intimidate the officer; and then insults a public employee and denigrates the employee's superior by calling him a racist epitaph. Moreover, there is no question that the appellant sought to use her public position in a private action for personal gain, and by doing so violated the Act. The appellant's claim that the term "skinhead" is not a racial epithet is disingenuous and inconsistent with the fact that the word is universally associated with extremist views held by white males whose appearance includes shaved heads and tattoos.

[5] This decision also provides a summary of the arguments advanced by the complainant on appeal. Many of the arguments reiterate the substance of the submissions below that were fully outlined in the SEC's March 26, 2018 decision and will not be repeated herein.

Additionally, the complainant argues that the appellant wrongfully seeks to have the Commissioner believe that she had reason to fear the officer due to the current social climate. Yet at no time did Officer Horst make a threat: he spoke respectfully and in an even tone, and went so far as to let the appellant's daughter exit the car and walk to school. The appellant is clearly seeking to take advantage of current tensions in the relationship between the African American community and law enforcement. However, the appellant's behavior was irresponsible, unattached to the substantive issues African Americans have faced with local law enforcement, and is abusive of real efforts to resolve long-standing issues. Finally, in its March 26, 2019 decision, the SEC made clear that it had taken into consideration all "mitigating factors" and levied a penalty that could have been more severe. The appellant's behavior cannot be condoned as acceptable: her service is a privilege and not an entitlement. As a result, the complainant contends that the SEC's decision should be adopted by the Commissioner.

Upon a comprehensive review of the record – which includes a video of the April 27, 2018 traffic stop, as well as the sound recording of the hearing before the SEC on November 27, 2018 – the Commissioner finds that the appellant has not established that the SEC's decision, finding violations of the Act, is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). The facts in this case are not in dispute as the video of the traffic stop clearly depicts the appellant's behavior and her interaction with Officer Horst. There is no evidence in the record to suggest that the SEC was unreasonable in determining that the appellant violated *N.J.S.A.* 18A:12-24.1(e) and (f) in referencing her membership on the Board and her relationship with the South Orange Village president. Regardless of the appellant's motivation for identifying herself as a Board member, the fact that she did so at the very least gave the appearance of impropriety, and it was not unreasonable for the SEC to find that it linked her Board membership to the traffic stop.

Likewise, based on the video of the traffic stop, it was not unreasonable for the SEC to determine that the appellant used the schools for personal gain when she stated her position as a Board member and referenced her relationship with the South Orange Village president. The Commissioner is mindful of the appellant's contention that, but for an anonymous source providing the video to the complainant, the circumstances surrounding the traffic stop would have remained a personal issue. However, the video did ultimately become public and the impact that it has had on the Board and the community cannot be ignored.

Turning to the appropriate penalty, and while in no way minimizing the appellant's conduct, the Commissioner finds that the SEC's recommended penalty of a six-month suspension is not supported by the evidence in the record and is inconsistent with penalties recommended by the SEC in other cases. In recommending the extreme penalty of a six-month suspension, the SEC assessed the appellant's conduct during the traffic stop and her testimony before the Commission in an unduly harsh manner. Moreover, the weight afforded to the aggravating factors by the SEC was disproportionate to that afforded to the mitigating circumstances in light of the nature of the offense.

Specifically, the Commissioner disagrees with the SEC's conclusion that "seemingly without any reasonable basis" the appellant stated "[a]nd I am scared of cops because you guys hurt black people." The SEC did not give due consideration to the fact that the appellant testified that she was afraid and, more importantly, the SEC appeared to minimize the anxiety the appellant experienced during the traffic stop. Whether the SEC believes that the appellant should or should not feel a certain way is immaterial here; rather, in evaluating an appropriate penalty, the motivation behind appellant's behavior must be fully considered.[6] Although the appellant's use

[6] In the March 26, 2019 decision, the SEC did state that in recommending the penalty of a six-month suspension, it "gave due consideration to [appellant's] testimony as to how she felt during the traffic stop, and her stated mindset on

of inappropriate language was not necessary, it was also not unreasonable for the appellant to feel insulted when Officer Horst offered to call an ambulance given her mindset that morning. The appellant's testimony at the hearing about why she felt the way she did (*i.e.*, her concern for her personal safety as a black woman during a traffic stop; her stress about getting her kids to school; her irrational response to her interaction with Officer Horst) was overall very compelling in light of the circumstances.

Further, a review of the hearing testimony reveals that the appellant was contrite, recognizing that she was anxious and overreacted during the traffic stop, and she unequivocally conceded that she was rude to Officer Horst. *Audio of the November 27, 2018 Code Hearing* (*Audio*) 1:17, 1:19, 1:30. Appellant also emotionally testified about the impact that this situation has had on the community, the police chief, Officer Horst and herself, stressing that she "had a very bad day" and that she is not proud of her behavior nor is she trying to justify her conduct. *Audio* 1:45-47. [7] As such, the Commissioner does not agree with the SEC's finding that an aggravating factor was the appellant's failure to recognize that her words could negatively impact the public's perception of the Board. Clearly, the appellant has also been personally impacted by the public release of the video. As she emphasized during the hearing, "[m]y worst moment was caught on film and I have had to pay for it." *Audio* 1:47.

The Commissioner also finds that the recommended penalty is inconsistent with the penalty recommended by the SEC in other cases. Most notably, in *Hyman*, *supra*, board member

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actual and observed interactions with police officers." This statement, however, is not consistent with the SEC's ultimate characterization of the appellant's conduct and the unduly harsh penalty recommendation.

[7] The appellant also apologized to the police chief and issued a formal statement of apology at a board meeting. With respect to the fact that the appellant did not issue an apology to Officer Horst, the record reveals that there are clearly some unresolved feelings between the appellant and Officer Horst. It was undoubtably a bad interaction with Officer Horst, but it was a stretch for the SEC to conclude that the appellant "attempted to escalate the situation."

Lawrence Davenport was found to have violated *N.J.S.A.* 18A:12-24.1(e), (g) and (i) when he: approached and questioned a pregnant principal in the elevator of the middle school about a personal matter, causing the principal to visit her doctor and call law enforcement; had an exchange with a district employee on school premises that resulted in Mr. Davenport giving the employee the middle finger and calling him a "stupid n***er"; and blatantly disregarding the board's policies regarding the use of facilities. The totality of Mr. Davenport's conduct, which involved three separate incidents on school grounds over the course of several months, was far more egregious and offensive than the conduct displayed by the appellant in this case. Yet, in *Hyman*, *supra*, the SEC recommended a sixty-day suspension for Mr. Davenport's "completely inappropriate conduct" and "wholly unacceptable decision making," while recommending a six-month suspension in this case.[8]

Moreover, the appellant's interaction with Officer Horst was an isolated incident that did not occur in a school setting or at a board meeting, as the only link to the Board was the appellant's statement that she was a board member. This stands in contrast to the facts in *In the Matter of John Talty and Sharon Kight, Brick Township Board of Education, Ocean County*, SEC Dkt. No. C18-05 and C19-05, *affirmed*, Commissioner Decision No. 84-06SEC, decided March 1, 2006, where the board member received a sixty-day suspension for verbally and physical confronting a member of the public that actually took place at a board meeting. Similarly, the six-month suspension imposed on the board member in *In the Matter of Jan Rubio, Matawan-*

[8] In its March 26, 2019 decision, the SEC appeared to suggest that the conduct in this case necessitated a more severe penalty than Mr. Davenport received because the appellant and Officer Horst were not involved in a mutual verbal exchange; Mr. Davenport denied giving the employee the middle finger and using the racial epithet; and Mr. Davenport's actions did not impact anyone other than him. The Commissioner disagrees with the SEC's comparison of the circumstances in *Hyman, supra*, with the appellant's conduct in this case. The fact that Mr. Davenport had the benefit of no video evidence of his inappropriate conduct does not negate its existence and degree of egregiousness. Further, the Administrative Law Judge who had the opportunity to observe the demeanor of the witnesses at the hearing and assess their credibility found that Mr. Davenport did in fact give the employee the middle finger and call him a "stupid n***er"

Aberdeen Regional School District Board of Education, Monmouth County, SEC Dkt. No. C16-08, *affirmed*, Commissioner Decision No. 494-10, decided November 15, 2010, resulted from Code violations for soliciting – via the school email system – and receiving campaign contributions from school employees. The impact on the integrity of the boards of education in those cases was far more pronounced than in the instant case.

Although a six-month suspension is unduly harsh, the Commissioner agrees with the SEC that the proven conduct necessitates some form of penalty. The traffic-stop video reveals that appellant displayed questionable judgment in referencing her Board membership and her relationship with the South Orange Village president. Further, the use of inappropriate language toward Officer Horst and offensively referring to the police chief as a "skinhead" had a detrimental effect on the Board and the community. Therefore, the Commissioner finds that a 30-day suspension is a sufficient penalty to impress upon the appellant the significance of her errors in judgment displayed in this matter.

Accordingly, IT IS ORDERED that respondent is hereby suspended from the South Orange-Maplewood Board of Education for thirty (30) days as a school official having found to have violated the School Ethics Act.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/19
Date of Mailing: 10/31/19

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

New Jersey Commissioner of Education

Final Decision

The Children's Center of Monmouth County, Inc.,

Petitioner,

v.

New Jersey Department of Education, Office of School Finance,

Respondent.

Synopsis

Petitioner, The Children's Center of Monmouth County (CCMC) – a private school for students with disabilities – appealed the determination of the respondent, the New Jersey Department of Education's Office of School Funding (NJDOE; OSF), to classify a portion of an employee's salary for the 2012-2013 and 2013-2014 school years as a "non-allowable expenditure". CCMC also appealed OSF's determination that the write-off of certain uncollected accounts receivable is a "non-allowable expenditure". The parties filed cross motions for summary decision. The cross motion of the respondent OSF on the issue of write-offs was granted in July 2018, finding that the costs were not allowable as a matter of law. A hearing on the issue of the employee's salary was conducted in April 2019, and the ALJ's Initial Decision was issued on August 12, 2019.

The ALJ found, *inter alia,* that: private schools for children with disabilities are governed by *N.J.S.A.* 18A:46-2, which authorizes the NJDOE to promulgate regulations governing the tuition rates that approved private schools for students with disabilities (APSSD) may charge local public school districts; OSR reviews audited financial statements of APSSDs to ensure compliance with regulations, including *N.J.A.C.* 6A:23A-18.2, which pertains to private school employee salaries; in the instant matter, respondent asserted that the employee whose salary was partially disallowed was serving in a non-recognized job title and his salary was properly capped at the maximum permitted pursuant to *N.J.A.C.* 6A:23A-18.2(r); the petitioner argued that the position in question aligns to the duties and requirements of the recognized position of "Assistant Director" provided in *N.J.A.C.* 6A:23A-18.1, but included extra duties related to law, affirmative action and compliance. The ALJ concluded that the employee in question was acting as a Director of Law and Compliance, and not as Assistant Director of the school and his salary was properly capped. Accordingly, the ALJ affirmed the determination of the OSF, and dismissed the petition.

Upon a comprehensive review of this matter, the Commissioner agreed with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed with prejudice.

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

October 31, 2019

289-19
OAL Dkt. No. EDU 08259-17
Agency Dkt. No. 82-4/17

New Jersey Commissioner of Education

Final Decision

The Children's Center of Monmouth County, Inc.,

Petitioner,

v.

New Jersey Department of Education, Office of School Finance,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner The Children's Center of Monmouth County (CCMC), and the reply thereto by respondent New Jersey Department of Education, Office of School Finance (Department) have been reviewed and considered.

This matter involves a challenge to the Department's audit findings that the write-off of uncollected debts and a portion of an employee's salary were unallowable costs for purposes of calculating the tuition rate for educating students at CCMC, an approved private school for students with disabilities (APSSD). The Administrative Law Judge (ALJ) granted the Department's motion for summary decision regarding the write-off on July 20, 2018, finding that the costs were not allowable as a matter of law. On August 12, 2019, the ALJ issued an Initial Decision, concluding that disallowing the salary of Peter Kalac, an employee of CCMC, was proper.

In its exceptions, which largely reference its briefs below and present the same arguments, petitioner argues that the ALJ's decision regarding the write-off failed to acknowledge that the Department's guidance regarding back-billing was equivocal. According to the petitioner, while the regulation might contemplate APSSDs billing sending districts prior to the second year following the Department's certification of the final tuition rate, the Department has sometimes supported the position of sending districts that they are under no obligation to pay until after the conclusion of an audit or appeals, which could take years. Petitioner contends that this representation was unrebutted and should have been accepted as fact by the ALJ for purposes of the motion for summary decision. Furthermore, petitioner claims that its efforts to collect the debts were hampered by the Department through a 2013 memo that discouraged districts from honoring the school's requests for payment.

Regarding the disallowance of compensation for Peter Kalac, petitioner argues that it is unclear why the ALJ believed that Mr. Kalac's testimony was "not credible". If the ALJ believed that Mr. Kalac misstated the facts when he testified that he actually performed the specific duties of Assistant Director as spelled out in the regulations, his testimony was never challenged by the Department; this served to unfairly blindside petitioner since there was no challenge to Mr. Kalac's testimony on that point at the hearing. If the ALJ rejected as a matter of law Mr. Kalac's belief that his overall workload fit the definition of an Assistant Director because of the extra duties he performed, those extra duties were expressly why the Department disallowed his compensation, in which case petitioner points to its post-hearing brief for its legal argument. Finally, petitioner contends that the ALJ failed to consider the Department's prior approval of Mr. Kalac's job title and duties.

In a reply that also reiterates arguments made below, the Department argues that *N.J.A.C.* 6A:23-18.2(m) is clear that billing must occur in the second school year following the school year for which the charge was agreed upon and that an APSSD must undertake reasonable efforts to collect outstanding tuition. In light of these requirements, the Department contends that the ALJ properly found that CCMC's efforts to bill sending districts up to nine years beyond the billing timeframe in *N.J.A.C.* 6A:23-18.2(m) were not reasonable. The Department also submits that petitioner's arguments regarding the 2013 memo mischaracterize it. Moreover, the Department notes that the memo was issued two months after CCMC sent bills for the prior decade, and even if the memo provided a valid excuse for CCMC's failure to engage in efforts to pursue collection after its issuance, it does not excuse CCMC's failure to make any attempts to collect sooner.

Regarding Mr. Kalac, the Department argues that the ALJ's credibility finding was supported by the record and that his testimony was rejected because of the extra job duties he performed, which is a proper application of the relevant law to the facts presented. The Department notes that no documents in the record support petitioner's contention that the Department had previously approved Mr. Kalac's job title and duties.

After a comprehensive review of the record, the Commissioner concurs with the findings of the ALJ. Regarding the bad debt write-offs, *N.J.A.C.* 6A:23A-18.2(m)[1] clearly contemplates that APSSDs will timely bill sending districts for the difference between tentative and final tuition rates. Petitioner admits that it failed to send tuition adjustment bills for the 2002-2003 through 2010-2011 school years until October 2013. Rather than making reasonable efforts to collect these debts, petitioner made no effort at all for up to ten years. Such a lengthy delay is precisely

[1] The regulations governing APSSDs were revised in July 2017. This decision references the regulations that were in place at the time of the events at issue in this case.

what the regulation was intended to prevent. *See* 49 *N.J.R.* 1855(a) ("a reasonable effort is a sufficient measure to prevent an APSSD from including the amounts for which the APSSD *failed to timely bill* as a 'bad debt' in the tuition charged to sending school districts" (emphasis added)). Furthermore, although petitioner seeks to lay the blame for its failure to collect at the feet of the Department, the Department's actions are separate and distinct from petitioner's. Neither the Department's position that sending districts are not obligated to pay tuition adjustment bills until after an audit or appeals,[2] nor its 2013 memo regarding tuition adjustment, excuse CCMC's failure to send tuition adjustment bills for the ten years prior to that time. Similarly, petitioner's efforts to collect the bills after 2013 cannot cure its earlier failure.

Regarding the salary disallowance, Mr. Kalac's employment contract lists his title as Assistant Director of Law, Affirmative Action and Compliance, which was not included in the list of recognized job titles published by the Department. Moreover, looking beyond the title itself to the job duties performed by Mr. Kalac, the Commissioner accepts the ALJ's finding that Mr. Kalac's testimony was not credible.[3] Furthermore, his job description lists fourteen responsibilities, eleven of which are not included in the regulatory definition of Assistant Director. Because the vast majority of his responsibilities are unrelated to defined Assistant Director tasks, the Commissioner agrees with the ALJ and concludes that Mr. Kalac's role was significantly different from the role of Assistant

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[2] The record includes an email in which the Department acknowledged that some sending districts want to receive a desk review certification letter before remitting payment to the APSSD. The Department continues by stating, "this is often a policy within the sending districts [sic] business office and/or governance manuals" and encourages petitioner to work with the sending district. It is not clear from this email that the Department's position is that sending districts are not obligated to pay until after an audit or appeals, and – because the timing of the sending district's payment is not the subject of this matter – the Commissioner declines to reach any conclusion on this issue. However, assuming for purposes of argument that a sending district is not obligated to pay until after an appeal or audit, it would not relieve the APSSD from timely billing the sending district, as is required by *N.J.A.C.* 6A:23A-18.2(m).

[3] Despite petitioner's exceptions arguing that the ALJ's finding on this point was unclear, the Commissioner finds that the ALJ's credibility finding was clear and pertained to the nature of Mr Kalac's overall role; as the ALJ stated, "the testimony of Mr. Kalac that he was acting as an Assistant Director was not credible."

Director and therefore he served in an unrecognized job title.[4] The maximum salary for unrecognized job titles during the school years at issue was restricted to $110,610, pursuant to *N.J.A.C.* 6A:23A-18.2(r), and prorated to $44,244 for Mr. Kalac's part time employment. His salary of $60,000 exceeded the maximum allowable amount by $15,676, which the Department and the ALJ properly found was a non-allowable cost.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter; and the petition is dismissed with prejudice.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/19
Date of Mailing: 10/31/19

[4] Any prior approval by the Department of Mr. Kalac's salary is irrelevant to its audit for the years in question here. Petitioners' assertion regarding prior approvals is not supported by any documents in the record, and while the Department did not rebut this assertion, neither did it concede it. Nonetheless, the Department is not precluded from applying the requirements of *N.J.A.C.* 6A:23A-18.2(r) to disallow the excess salary in the audits at issue here, even if the salary was previously allowed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08259-17
AGENCY DKT. NO. 82-4/17

THE CHILDREN'S CENTER OF MONMOUTH COUNTY, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,

Respondent.

David B. Rubin, Esq., for petitioner, The Children's Center of Monmouth County, Inc.

Jaclyn M. Frey, Deputy Attorney General, for respondent, New Jersey Department of Education, Office of School Finance (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: July 29, 2019 Decided: August 12, 2019

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, The Children's Center of Monmouth County, Inc. (CCMC), a private school for students with disabilities, appeals the determination of respondent, the Department of Education's Office of School Finance (OSF), to classify a portion of an employee's salary for the 2012-2013 and 2013-2014 school years as a "non-allowable expenditure." CCMC also appealed OSF's determination that the write-off of certain uncollected accounts receivable is a "non-allowable expenditure." CCMC filed its appeal with the Department of Education and the Department transmitted the matter to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -13; N.J.S.A. 52:14F-1 to -13. On March 8, 2018, CCMC moved for summary decision. On March 26, 2018, OSF cross-moved for summary decision maintaining that its decisions were proper as a matter of law. The parties presented oral argument before the undersigned on May 25, 2018, and the cross-motion of the state on the issue of the write-offs was granted. The undersigned ruled that the uncollected accounts receivables were non-allowable as a matter of law. The petitioner's motion for summary decision on other issues was denied. The hearing was conducted on April 18, 2019, and the record closed after written summations from the parties were received on July 29, 2019.

STATEMENT OF FACTS

CCMC is an approved private school for students with disabilities in accordance with N.J.A.C. 6A:23-18.1 et. seq.[1] As far back as 2002, CCMC contracted with various New Jersey public school districts to receive preschool disabled children and charge the sending districts a tentative tuition rate for educating the students. Pursuant to N.J.A.C. 6A:23-18.1; N.J.S.A. 18A:46-21, the actual cost per student is later calculated and submitted to the Commissioner of Education (Commissioner) for approval.

[1] The regulations governing private schools who receive public students with disabilities, N.J.A.C. 6A:23-18.1 et. seq. were revised in July 2017. See 49 N.J.R. 365(a); 49 N.J.R. 1855 (a). Because the current regulations were revised, some substantially, this decision references the then existing regulations that petitioner was required to adhere to, which included the 2012-2014 regulations.

In accordance with N.J.A.C. 6A:23A-18.9,[2] CCMC obtained independent audited financial statements for the 2012-2013 and 2013-2014 school years. CCMC submitted the financial statements, which detailed the tuition costs, to the Commissioner for approval. Ibid. The Department of Education's Office of School Finance (OSF) is responsible for reviewing CCMC's audited financial statements to ensure compliance with Department's guidelines and regulations.

On June 17, 2016, OSF issued two letters informing CCMC that its audited financial statements for the 2012-2013 and the 2013-2014 school years conflicted with the Department's regulations. Specifically, the OSF informed CCMC that it "reviewed the audited financial statements for the 2012-2013 school year" and found that the employment contract of

> Mr. Peter Kalac reflects the unrecognized administrative position title of Director of Law, Affirmative Action and Compliance. In accordance with N.J.A.C. 6A:23-18.2(r), private schools for students with disabilities may use unrecognized administrative job titles, but the maximum salaries of these titles are restricted in accordance with N.J.A.C. 6A:23A-18.5(a)9 . . .
>
> Mr. Kalac's part time salary of $60,000 is in excess of the prorated part time lowest maximum salary of $44,244 . . . As such, the excess salary of $15,756 and the associated benefits must be considered non-allowable costs when calculating the Certified Actual Cost Per Student.

The petitioner argues that the disallowance of Kalac's salary was improper and that his salary and benefits should not have been disallowed just because he had an unrecognized job tittle. They also argue that they should have looked beyond his title to what his job duties were. The only issue is what these duties were and whether the salary of Peter Kalac which exceeds the maximum allowable salary under the statute is allowable.

[2] Current N.J.A.C. 6A:23A-18.10.

TESTIMONY AND FINDINGS OF FACT

For petitioner

Peter Kalac testified regarding his job duties and his role at the school. He is an attorney by trade and he practices school law and workers compensation. He started getting involved in the IDEA and saw that Districts were not doing a good job of serving children with disabilities, so he decided to open a school in Monmouth County. The school opened in 1990 for children with disabilities, mostly autistic children. He created the job title for himself and it was part of the contract. He also served as legal counsel handling anything from workers compensation to lawsuits regarding injuries at work. He had a lot of issues with workers compensation, so he handled a lot of that for the school. However, he was also involved in school plans as well, and went to one meeting a month, where they discussed everything from hiring to termination.

He was also the affirmative action officer and met with someone in State about their hiring practices. He dealt with a lot of Human Resources issues with employees. He testified that Assistant Director was an accurate description of what he did, but they had labeled it something else. If they had told him it was a problem, he would have changed it. He testified about the contract and the job duties listed in the contract. On cross-examination, it was pointed out that there are several things that are not listed but he handled as an assistant administrator for the school. He testified that a great deal of what he did was related to his practice involving school law issues and representing school boards. He reemphasized that if he knew it was an issue, he would have given himself a different title.

For respondent

Elsie Sadler Williams is an auditor for the New Jersey Department of Education. She was responsible for the audit conducted of the petitioner in this case. She has been with the Department since 2001 and is responsible for fiscal oversight

of private schools for children with disabilities. She testified that most of the funding comes from Local Education agencies in the form of tuition reimbursement. She was involved in the audit of the Children's school from 2011- 2012, 2012-2013 and 2013-2014. Mr. Kalac's job title was not listed as one of the authorized job titles, so payment above the maximum allowance was not permitted. If they are not using appropriate titles that is why it is held to the lowest maximum tile and since he was only a part-time employee, it was adjusted accordingly.

Ms. Williams testified that the school argued that his job title aligned with that of the Assistant Director. However, she reviewed the job description, and disagreed, finding that his job duties were more of a legal nature. She testified that if someone wanted approval for a title that was not recognized, they could have gone to the County Superintendent and obtained approval to have someone work outside a title. It appeared to her that not only was he performing duties outside the scope of the assistant director, he had a different job title. If he had the correct job title, they may not have flagged it, but looking at his duties, it was clear to her that he was not acting as an assistant director, and thus, the maximum permitted salary was appropriately capped. A director of law and compliance is not an authorized position. She believed upon review of what he was doing that he was in fact acting as a director of law and compliance and not the assistant director of the school. Accordingly, the salary was properly capped.

The resolution of the issue in this case requires that I make a credibility determination regarding the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the manner in which it "hangs together" with the

other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that the testimony of Mr. Kalac that he was acting as an Assistant Director was not credible. Moreover, his own testimony contradicted such a finding. It is clear that his background was in law, and he was acting as a director of law and compliance and not a director of school. Therefore, I **FIND** as **FACT** that Mr. Kalac was the assistant director of law and compliance at CCMC.

LEGAL ANALYSIS

Private schools for children with disabilities are governed by N.J.S.A. 18A:46-21. This enabling statute authorized the New Jersey Department of Education to promulgate regulations governing the tuition rates that approved private schools for students with disabilities (APSSD) may charge local public-school districts. Brookfield Schools v. New Jersey State Dep't of Ed., Div. of Finance, EDU 11447-10, Initial (June 15, 2011) adopted Comm'r (July 28, 2011).

To that end, the OSF reviews audited financial statements to ensure compliance with the Department's regulations, including N.J.A.C. 6A:23A-18.2,[3] the regulation pertaining to private school employee salaries. N.J.A.C. 6A:23A-18.2, states, in pertinent part:

> (o) An APSSD shall reference as guidance the list of maximum allowable salaries by job title and county, according to the job titles contained in N.J.A.C. 6A:9, which

[3] Current N.J.A.C. 6A:23A-18.3.

> pertain to approved private schools for students with disabilities that is published by the Commissioner . . .
>
> (p) An APSSD shall reference as guidance a list of maximum allowable salaries by administrative and job titles and county according to the job titles contained in N.J.A.C. 6A:9 and 6A:23A-18.1 which pertain to approved private schools for students with disabilities that is published by the Commissioner . . .
>
> (r) An APSSD shall employ staff pursuant to the list of the recognized job titles in accordance with N.J.A.C. 6A:9 that require certification and N.J.A.C. 6A:23A-18.1 that require a bachelor's degree, which is published by the Commissioner. An approved private school for students with disabilities shall only hire staff or consultants in job titles that require certification or a bachelor's degree if such titles are included on the list, or if such titles are unrecognized job titles that are approved annually in accordance with N.J.A.C. 6A:9B-5.5. The APSSD may use unrecognized administrative job titles, but maximum salaries for the titles are restricted in accordance with N.J.A.C. 6A:23A-18.5(a)(9). If an APSSD hires staff in administrative or support job titles such as but not limited to Chief Executive Officer or Chief Financial Officer, the maximum salaries of such job titles shall be limited to the maximum salary of a director in accordance with N.J.A.C. 6A:23A-18.2(p).
>
> [N.J.A.C. 6A:23A-18.2(o), (p), (r).[4]]

For the 2012-2013 and 2013-2014 school years, the Office School Finance listed the following approved administrative positions for private schools:

- 0700 Director
- 0701 Assistant Director
- 0702 Executive Director
- 0703 Business Manager

See Annual Information – Private Schools for Students with Disabilities – Recognized Job Titles – Effective July 1, 2012 – Attachment 1 Office of Fiscal Research and Data Planning (May 24, 2012), https://www.nj.gov/education/finance/fp/psd/1213/annual.shtml; see also Annual

[4] Current N.J.A.C. 6A:23A-18.3(o)(p)(q).

Information – Private Schools for Students with Disabilities – Recognized Job Titles – Effective July 1, 2013 – Attachment 1 Office of Fiscal Research and Data Planning (June 11, 2014), https://www.nj.gov/education/finance/fp/psd/1314/annual.shtml.

N.J.A.C. 6A:23A-18.1[5] defines Assistant Director as:

> An individual whose job function includes a majority of the following: the formulation of school goals, plans, policies, and budgets and the recommendation of their approval to the school's board of directors; the recommendations for all staff appointments and other personnel actions, such as terminations, suspensions and compensation, including the appointment of the business manager to the school's board of directors; responsibility for school operations and programs including administration, supervision and evaluation of administrators, supervisors, and all other school staff. The holder of this job title shall hold a bachelor's degree from an accredited institution but is not required to hold a school certification.
>
> [N.J.A.C. 6A:23A-18.1.]

Pursuant to N.J.A.C. 6A:23A-18.2(r),[6] the Commissioner determined that "whether salaries and fringe benefits of certain employees should properly be considered in establishing tuition rates payable to [APSSDs] requires one to look beyond titles and determine what the employee actually does." Youth Consultation Serv. v. Dep't of Ed, EDU 03573-06, Initial (Aug 6, 2007) adopted Comm'r (Oct 4, 2007) https://njlaw.rutgers.edu/collections/oal/html/initial/edu03573-06_1.html.

In Youth Consultation Serv., the OFPP found that a private school improperly charged the salaries of certain staff, functioning in unrecognized position titles, as part of its certified tuition rates. Ibid. The court, in its finding of facts, held that the duties, and not title alone, determined whether the position was an unrecognized title. Ibid. For example, the court held that "the duties of those individuals designated as Head Teachers (an unrecognized title) . . . primarily involve direct student instruction and not the continuing direction and guidance of the work of instructional personnel." Ibid.

[5] Current N.J.A.C. 6A:23A-18.2.
[6] Current N.J.A.C. 6A:23A-18.3(q).

Thus, "their duties correlate to those of certified Teachers of the Handicapped rather than Supervisors and that the lack of a Supervisor's certificate is not a basis for disallowing their salaries and fringe benefits." Ibid.

The Supreme Court also found that "[a]s Yvonne Montemurro is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel, I conclude that she is a supervisor within the meaning of N.J.A.C. 6A:9-12.3(c) rather than occupying an administrative position" as [the private school designated.] Thus, her salary and fringe benefits are disallowed by N.J.A.C. 6A:23-4.5(a) 6 and 10." Ibid.; see also Cerebral Palsy League of Union County v. N.J. Dep't of Educ., EDU 11301-07, Initial Decision (June 14, 2010), adopted, Comm'r (July 29, 2010) (stating disallowances that involve job duties is required to be guided by the actual job functions of the employee at issue.) https://njlaw.rutgers.edu/collections/oal/final/edu11301-07_1.pdf.

In the instant matter, OSF asserts that the Recognized Job Titles List in effect during the relevant time permitted the position of Assistant Director. However, Mr. Kalac's employment contract listed the administrative title of "Director of Law, Affirmative Action and Compliance." In accordance with N.J.A.C. 6A:23A-18.2(r), although an APSSD may use an unrecognized title, it is restricted to a maximum salary of $44,244. CCMC concedes that Mr. Kalac's title includes additional words – of Law, Affirmative Action and Compliance – that were not included in the approved title of Assistant Director, it argues that his actual job duties align with the requirements of "Assistant Director" provided in N.J.A.C. 6A:23A-18.1,[7] and simply include extra duties related to Law, Affirmative Action, and Compliance. However, the testimony of Mr. Kalac demonstrates that although some of the duties he performs correspond with the definition of an Assistant Director provided at N.J.A.C. 6A:23A-18, the majority of Mr. Kalac duties related to legal issues and compliance. I therefore, **CONCLUDE** that Mr. Kalac was acting as a Director of Law and Compliance, and not an Assistant Director of the school, and thus his salary was property capped and he is not entitled to reimbursement above the maximum permitted pursuant to N.J.A.C.

[7] Current N.J.A.C. 6A:23A-18.2.

6A:23A-18.2(r). Accordingly, the decision of the OSF is **AFFIRMED** and the appeal is **DISMISSED**.

CONCLUSION

Accordingly, I **CONCLUDE**, that the duties of Peter Kalac mainly that of a legal and compliance director and not the assistant director of the school, and thus the salary disallowance was proper.

ORDER

I hereby **ORDER** that the petitioner's appeal is **DISMISSED** and the determination of the OSF is **AFFIRMED**.

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

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

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

Sarah G. Crowley

August 12, 2019
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC/cb

APPENDIX

WITNESSES

For petitioner:

Peter Kalac

For respondent:

Elsie Sadler Williams, Auditor

EXHIBITS

For petitioner:

None

For respondent:

R-1 Children's Center of Monmouth County, Inc.'s 2012-2013 Annual Fiscal and Program Information Forms

R-2 Children's Center of Monmouth County, Inc.'s Financial Statements and Auditor's Report for Fiscal Year Ended June 30, 2013

R-3 Children's Center of Monmouth County, Inc.'s 2013-2014 Annual Fiscal and Program Information Forms

R-4 Children's Center of Monmouth County, Inc.'s Financial Statements and Auditor's Report for Fiscal Year Ended June 30, 2014

R-5 July 10, 2015 Letter from Elise Sadler-Williams to Joseph Merola, Jr. regarding 2012-2013 school year

R-6 Department of Education's Calculation of Peter Kalac's Maximum Allowable Part-Time Salary

R-7 July 10, 2015 Letter from Elise Sadler-Williams to Joseph Merola, Jr. regarding 2013-2014 school year

R-8 October 26, 2015 Letter from Children's Center of Monmouth County, Inc.'s Executive Director Joseph Merola, Jr. to Elise Sadler-Williams with Peter Kalac's contract and job description attached

R-9 June 16, 2016 Letter from Elise Sadler-Williams to Joseph Merola, Jr. regarding 2012-2013 school year

R-10 June 17, 2016 (*restated) letter from Elise Sadler-Williams to Joseph Merola, Jr. regarding 2012-2013 school year

R-11 Memo and List of Recognized Job Titles, 2012-2013

R-12 Table of Maximum Salaries for the 2012-2013 School Year

R-13 June 17, 2016 letter from Elise Sadler-Williams to Joseph Merola, Jr. regarding 2013-2014 school year

R-14 Memo and List of Recognized Job Titles, 2013-2014

R-15 Table of Maximum Salaries for the 2013-2014 School Year

R-16 June 22, 2016 Letter from Robert A. Fodera, CPA to Elise Sadler-Williams

R-17 December 1, 2016 Letter from David B. Rubin to Michael Mindlin

R-18 April 10, 2017 Letter from Michael Mindlin to David Rubin, Esq.

290-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Brick, Ocean County, et. als.,

Petitioners,

v.

Lamont Repollet, Commissioner of Education, and Elizabeth Maher Muoio, New Jersey State Treasurer,

Respondents.

Synopsis

Eight local boards of education, five municipalities and one individual taxpayer challenged recent amendments to the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 et. seq. Petitioners asserted that the school funding formula as it is now written: requires that they pay more than their fair share of local property taxes to financially support the public schools; has resulted in an underfunding of State aid; and has created a funding formula that is neither equitable, predictable nor constitutional. Petitioners further claim that they have been deprived of due process and equal protection under the law. Respondents filed a motion to dismiss, arguing that the petition fails to state a claim upon which relief can be granted.

The ALJ found, *inter alia,* that: the five municipalities lack standing to bring claims on behalf of their constituent taxpayers regarding whether the SFRA unfairly burdens those taxpayers or whether it deprives children of a thorough and efficient education (T&E); municipalities do not have the legal capacity to challenge State action based on equal protection grounds; boards of education lack standing to bring claims on behalf of taxpayers or on equal protection grounds, but do have standing to raise claims of educational inadequacy and inequality, though their claims are not viable; the school boards herein cannot rely on *Abbott v. Burke* cases to support their contention that the SFRA as amended is unconstitutional, as the educational disparity *Abbott* was concerned with readily dwarfs the claims raised herein; as to the taxpayer petitioner in this matter, she does have standing to assert that the SFRA amendments deny her children T&E, and to bring claims of unfair taxation as well as an equal protection claim, but has failed to state a viable equal protection claim. Based on the foregoing, the ALJ dismissed the petition.

Upon a comprehensive review of this matter, the Commissioner agreed with the ALJ – for the reasons thoroughly analyzed and discussed in the Initial Decision – that the petition must be dismissed on the basis of standing and for failure to state a claim. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

October 31, 2019

OAL Dkt. No. EDU 02207-19
Agency Dkt. No. 19-1/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Brick, Ocean County; Board of Education of the Township of Jackson, Ocean County; Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County; Board of Education of the Toms River Regional School District, Ocean County; Board of Education of the Township of Lacey, Ocean County; Board of Education of the Freehold Regional High School District, Monmouth County; Board of Education of the Township of Weymouth, Atlantic County; Board of Education of the Township of Ocean, Monmouth County; The Township of Brick Ocean County; The Township of Toms River, Ocean County; The Borough of South Toms River, Ocean County; The Borough of Beachwood, Ocean County; The Borough of Pine Beach, Ocean County; and Stephanie Wohlrab,

Petitioners,

v.

Lamont Repollet, Commissioner,
New Jersey Department of Education
and Elizabeth Maher Muoio,
New Jersey State Treasurer,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the respondents' reply thereto.

Petitioners in this matter are eight local boards of education, five municipalities, and one individual taxpayer. Collectively, petitioners challenge the recent amendments to the School Funding Reform Act of 2008 (SFRA), *N.J.S.A.* 18A:7F-43 *et seq.*, alleging that the new school funding formula is unconstitutional and inequitable as it results in an underfunding of State aid and forces petitioners to pay more than their fair share in local property taxes.

The Administrative Law Judge (ALJ) granted the respondents' motion and dismissed the petition. The ALJ found that the five municipalities lack standing to bring claims on behalf of their constituent taxpayers regarding whether the SFRA unfairly burdens those taxpayers or whether it deprives children of a thorough and efficient education (T&E); further, municipalities do not have the legal capacity to challenge State action based on equal protection grounds. Similarly, the ALJ found that the boards of education lack standing to bring claims on behalf of taxpayers or on equal protection grounds, but found that they do have standing to raise claims of educational inadequacy and inequality. Regarding the taxpayer petitioner, the ALJ found that she has standing to assert that SFRA amendments will deny her children T&E and to bring claims of unfair taxation, as well as an equal protection claim.

With respect to the T&E claim, the ALJ found that the school board petitioners and taxpayer petitioner failed to state a claim upon which relief could be granted. Specifically, the ALJ found that the petition does not demonstrate that "the students' educational opportunities are so deficient as to jeopardize their futures." (Initial Decision at 12). The *Abbott v. Burke* line of cases do not support their contention because the educational disparities in *Abbott* are of such a high magnitude that they are not comparable to the educational concerns in this matter. 119 *N.J.* 287 (1990) (*Abbott II*). Moreover, the ALJ found that claims involving "inequitable local

taxation cannot form the basis of a viable constitutional claim under the T&E clause." (Initial Decision at 13).

Additionally, the ALJ concluded that the petitioning boards have failed to state a claim that the New Jersey constitution entitles them to the funding set forth by the pre-amendment SFRA. The SFRA was declared constitutional in *Abbott v. Burke*, 199 *N.J.* 140 (2009) (*Abbott XX)* with respect to the educational inequality claims made only by Abbott districts, and the petitioners here are not Abbott districts. Finally, the taxpayer petitioner's equal protection claim alleges that she suffers from an unequal tax burden because she is required to pay more than her "fair share" in property taxes to support her local school district. The ALJ found that New Jersey courts are unwilling to decide school funding disputes through the equal protection clause, and therefore dismissed the claim, thus dismissing the entire petition.

In their exceptions, petitioners argue that the ALJ erred in failing to apply the proper legal standard on a motion to dismiss because she did not afford petitioners every reasonable inference of fact. For example, when the ALJ found that the educational deprivations in *Abbott* "dwarf" those presented by petitioners, and that therefore petitioners' claim could not be sustained, the ALJ compared and contrasted the educational disparities. Petitioners contend that "[e]ven if the educational inadequacies in *Abbott* were more extensive than Petitioner school districts . . . that would not automatically render Petitioners[']] claims without merit." (Petitioners' Exceptions at 3). Additionally, many issues of material fact were also presented, and "whether Petitioners can ultimately prove their case (and demonstrate an entitlement to a particular level of funding) is a factual determination, which can only be made after a full record has been developed." (*Id.* at 5). Further, to the extent that the ALJ found the pleadings were not

specific or needed clarity, petitioners maintain that the proper remedy would be to allow for an amended petition, rather than dismissal.

Petitioners also take exception to the ALJ's characterization of this case as one about unequal taxation, rather than unequal education. The petition makes clear that due to inadequate state aid, the petitioner school districts cannot deliver T&E without placing an excessive burden on taxpayers. The educational deficiencies resulting from underfunding include staff reductions, the reduction of course offerings, the discontinuance of extra-curricular activities, and the inability to fund text book purchases, technology needs, or building and grounds repairs. Petitioners emphasize that the real cause of action is one of unequal education, and that unequal taxation is simply a consequence of that. Additionally, petitioners point out that the goal of the legislature in enacting the SFRA was to create a funding formula that is fair, equitable and predictable. The SFRA amendments are inconsistent with that goal as they result in certain districts facing uneven and inequitable fiscal challenges. Further, petitioners argue that because the SFRA amendments will result in an unequal and unpredictable funding pattern, it violates petitioners' equal protection rights.

Petitioners contend that the ALJ erred in relying on *Stubaus v. Whitman*, 339 *N.J. Super.* 38 (App. Div. 2001) for the conclusion that petitioners lack standing.[1] While *Stubaus*, only involved claims of disparate and burdensome tax rates, this matter involves educational deprivations and the failure to comply with T&E requirements. Petitioners claim that the ALJ should have placed more reliance on *Elizabeth Board of Education v. New Jersey State Department of Education, Division of Early Childhood Education*, EDU 09004-15, Initial Decision (July 14, 2017), *adopted* Commissioner's Decision No. 251-17, decided

[1] The Commissioner notes that the ALJ did, in fact, find that the taxpayer petitioner had standing, and instead dismissed the petition on the basis that the taxpayer petitioner failed to raise a viable claim upon which relief can be granted.

August 24, 2017, as it is substantially the same as this matter since both cases involve the inability to deliver required services to students due to insufficient funding. In *Elizabeth*, the ALJ made factual determinations only after hearing testimony and reviewing evidence, ultimately finding that the budgetary shortfall was due to the board's own conduct. Similarly, in *Abbott v. Burke*, 206 *N.J.* 332 (2011) (*Abbott XXI*), a Special Master heard testimony from Superintendents before determining whether the school districts could provide their students with T&E, despite reduced levels of state aid. Here, petitioners contend that the ALJ made findings of fact – such as that the allegations here differed from those in *Elizabeth* – without having developed a factual record through testimony and evidence, and disregarding that allegations in the petition are assumed to be true for the purposes of a motion to dismiss.

Petitioners point out that the ALJ failed to address their arguments regarding the unconstitutionality of the SFRA amendments as it applies to petitioners. The funding formula fails to account for municipal tax abatements, which skew the formula by artificially depressing a municipality's ratable property tax base. The ratable property base does not consider improvements on a property that are subject to Payments in Lieu of Taxes (PILOTs), which divert funds away from school districts to the municipality, thus cutting school districts out of the revenue source. Essentially, the wealth of municipalities with an artificially depressed ratable property tax base is distorted because the PILOTs are not considered in the funding formula. Therefore, the local fair share of the petitioning districts is inequitably increased.

In reply, respondents urge the Commissioner to adopt the Initial Decision. First, respondents argue that the ALJ properly found that the petitioner municipalities did not have standing to bring T&E or equal protection claims on behalf of their residents, and that the petitioner school boards did not have standing to raise claims involving an unequal tax burden on

behalf of taxpayers. Second, respondents maintain that "[p]etitioners' ability to plead different, more specific, facts will still not permit it to claim that inequitable local taxation is an actionable equal-protection violation under the T&E Clause of the State Constitution." (Respondents' reply at 4). Third, respondents contend that petitioners' request to amend the petition is useless because the ALJ found that their causes of action are unstainable as a matter of law. Finally, respondents argue that the ALJ properly found that the case involves one of unequal tax burden, and not unequal education, as petitioners have not alleged that students are being denied T&E since they are still being provided a constitutional education.

Upon a complete review of the record in this matter, the Commissioner agrees with the ALJ – for the reasons thoroughly analyzed and expressed in the Initial Decision – that the petition must be dismissed on the basis of standing and for failure to state a claim. The Commissioner concurs with the ALJ that the petition does not properly allege a claim that the SFRA as amended denies students in the petitioning districts access to T&E, nor have the petitioners raised a viable claim that their State aid was under-funded. The Commissioner further agrees that since New Jersey courts have declined to decide school funding disputes through the equal protection clause, the taxpayer petitioner's claim that she has been required to pay more than her fair share in property taxes must also fail.

The Commissioner does not find petitioners' exceptions to be persuasive. The ALJ applied the appropriate standard in deciding the motion to dismiss, and made determinations on the basis of law regarding the issues of standing and whether petitioners alleged viable claims; therefore, a full hearing with testimony is unnecessary. Additionally, although petitioners allege that certain budget cuts will result from the decreased funding – and even assuming that every educational deficiency alleged by petitioners is true – petitioners still fail to

demonstrate that the school districts cannot deliver T&E. Instead, petitioners argue that taxpayers have to pay more than their fair share in property taxes in order to provide the necessary funding for the local school districts. But as the ALJ found, such arguments on the basis of equal protection have not been entertained by New Jersey courts.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/19
Date of Mailing: 10/31/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 02207-19
AGENCY DKT. NO. 19-1/19

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, ET. ALS,

Petitioners,

v.

LAMONT REPOLLET, COMMISSIONER OF EDUCATION, AND ELIZABETH MAHER MUOIO, NEW JERSEY STATE TREASURER,

Respondents.

Stephen Edelstein, Esq., and **Mark Tabakin**, Esq., for petitioners (Weiner Law Group, attorneys)

Joan M. Scatton, Deputy Attorney General, for respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: June 12, 2019 Decided: August 1, 2019

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

STATEMENT OF THE CASE

Eight local boards of education, five municipalities and one individual taxpayer challenge recent amendments to the School Funding Reform Act of 2008 (SFRA).

N.J.S.A. 18A:7F-43 et. seq. They assert that the school funding formula as it is now written requires that they pay more than their fair share of local property taxes to financially support the public schools; has resulted in an "underfunding" of State aid; and has created a funding formula that is neither equitable, predictable nor constitutional. Petitioners claim that they have been deprived of due process and equal protection under the law. Respondents have filed a Motion to Dismiss, urging that the petition fails to state a claim upon which relief can be granted.

PROCEDURAL HISTORY

Petitioners filed their petition of appeal with the Commissioner of Education (the Commissioner) on January 22, 2019 and filed a Motion for Emergent Relief on February 11, 2019. The contested case was transmitted to the Office of Administrative Law (OAL) as an emergent matter on February 13, 2019. I conferred with counsel via telephone on February 20, 2019, at which time it was agreed, and memorialized in an order of the same date, that respondents did not need to formally respond to the emergent application. Petitioners' counsel clarified that his goal simply was to obtain as expedited a review of his clients' concerns as possible. By consent, respondents were afforded additional time to file an answer or Motion to Dismiss.

A Motion to Dismiss was filed on March 20, 2019. Petitioners opposed the motion on or about April 12, 2019. Respondents replied to the opposition on April 26, 2019. Oral argument took place on May 6, 2019. At oral argument I invited the parties to file supplemental briefs. They did so on May 28, 2019, and June 12, 2019, at which time the record closed.

FINDINGS OF FACT

Respondents' motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a Motion to Dismiss in lieu of an Answer. For purposes of the pending motion, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975). I thus **FIND** as follows:

The petitioning school Boards are elected to supervise and direct the delivery of public educational services to students domiciled in their Type II school districts. The named municipalities are the governing bodies responsible for collecting the property taxes assessed for their local school districts. Stephanie Wohlrab is a resident of Brick Township, President of the Brick Township Board of Education, a parent of students who attend the public schools, and a taxpaying property owner in Brick.

The petition shares the history of New Jersey's struggle with constitutionally sound school funding as the backdrop for its challenge to the recent amendments to the SFRA. The SFRA was enacted in 2008 to provide a formula that would base State aid on needs of the student population and local fiscal capacity. N.J.S.A. 18A:7F-44. The statutory goal was to ensure that

> Every child in New Jersey must have an opportunity for an education based on academic standards that satisfy constitutional requirements regardless of where the child resides, and public funds allocated to this purpose must be expended to support schools that are thorough and efficient in delivering those educational standards. In turn, school districts must be assured the financial support necessary to provide those constitutionally compelled educational standards. Any school funding formula should provide State aid for every school district based on the characteristics of the student population and up-to-date measures of the individual district's ability to pay.
>
> [N.J.S.A. 18A:7F-44(d)]

The SFRA requires the adoption of an "adequacy budget" by each school district based on criteria established by the Department of Education (DOE). The DOE then determines the "local fair share;" or the amount that should be raised locally to support the schools, taking into account the taxable property and the income of the residents of the municipalities that comprise the school district. "Equalization aid" is the difference between the "adequacy budget" and the "local fair share." N.J.S.A. 18A:7F-53. Prior to the controverted amendments to the SFRA, a State Aid Growth Limit capped the total percentage increase in State aid a district could receive from year-to-year. N.J.S.A. 18A:7F-47 (repealed by P.L. 2018, c. 67, § 8, eff. July 24, 2018).

In July 2018 the Legislature amended the SFRA by enacting P.L. 2018, c. 67. These amendments eliminated Adjustment Aid[1] and the State Aid Growth Limit beginning with the 2018-2019 school year; thus modifying the way a school district's "local fair share" is calculated when a district is spending below "adequacy." See: N.J.S.A. 18A:7F-5d; N.J.S.A. 18A:7F-68. The amendments introduced a concept of "State Aid Differential," which is defined as

> . . . the difference between the sum of a school district's or county vocational school district's allocations of equalization aid, special education categorical aid, security categorical aid, transportation aid, adjustment aid, and non-SFRA aids in the prebudget year, and the sum of equalization aid, special education categorical aid, security categorical aid, and transportation aid as calculated for the budget year in each category in accordance with the provisions of sections 11, 13, 14, and 15 of P.L. 2007, c.260(C.18A:7F-53, C.18A:7F-55, C.18A:7F-56, and C.18A:7F-57), respectively.
>
> [N.J.S.A. 18A:7F-67]

Where State Aid Differential is positive, the excess aid would be phased out over a multi-year period. N.J.S.A. 18A:7F-68. Where the differential is negative, the statute provides that districts

> . . . shall receive State school aid in an amount equal to the sum of the district's State aid in the prior school year plus the district's proportionate share of the sum of any increase in State aid included in the annual appropriations act for that fiscal year and the total State aid reduction pursuant to subsection b. of this section based on the district's State aid differential as a percent of the Statewide total State aid differential among all school districts and county vocational school districts for which the State aid differential is negative.
>
> [N.J.S.A. 18A:7F-68(a)]

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[1] Adjustment Aid was an amount designed "to ensure that the district receives the greater of the amount of State aid calculated for the district pursuant to the provisions of the [SFRA] or the State aid received by the district for the 2007-2008 school year multiplied by 102%." N.J.S.A. 18A:7F-58. In subsequent years, the SFRA provided for differing amounts of adjustment aid; for example, for 2009-2011 and 2010-2011 districts would "receive adjustment aid in such amount as to ensure that the district receives the greater of the amount of State aid calculated for the district pursuant to the provisions of [the SFRA] or the State aid, other than educational adequacy aid, received by the district for the 2008-2009 school year." N.J.S.A. 18A:7F-58(a)(2).

Under the amendments to the SFRA, if a district receives a reduction in State aid and is spending below "adequacy," the "required local air share shall equal 102% of the budgeted local share for the prebudget year..." N.J.S.A. 18A:7F-5d.

Petitioners point out that the SFRA's funding formula fails to account for the widespread use of municipal tax abatements. This artificially depresses a municipality's ratable property base, thus skewing the formula and negatively impacting the availability of State aid for districts located in municipalities that do not likewise use tax abatements. As part of the calculation of the "local fair share", the amended SFRA requires that values be inputted for a district's "equalized valuation" and income. N.J.S.A. 18A:7F-52(c). But the amended SFRA's definition of "equalized valuation" accounts for a municipality's ratable property base, but does not consider improvements on property subject to Payments in Lieu of Taxes (PILOT), which by their nature divert funds from school districts to municipalities.[2] Petitioners thus urge that the amended SFRA "still fails to account for the true wealth of a community in its funding formula."

The petitioning Boards now receive less State aid. They cannot deliver necessary educational services to their students without compelling taxpayers to pay more than their "local fair share;" these amounts range from 100.05% to 100.99% of the "local fair share". The shortfall in funding is outlined below:

District	**2017-2018 State Aid**	**2018-2019 Proposed**	**2018-2019 Actual**	**Shortfall from 2017-2018**	**Shortfall from Proposed**
Brick	$35,304,821	$36,055,619	$34,142,597	$1,162,224	$1,913,022
Jackson	$49,635,886	$50,122,386	$48,770,072	$865,814	$1,352,314
Manalapan-Englishtown	$19,440,358	$19,938,658	$18,773,314	$667,044	$1,165,344
Toms River	$66,975,394	$$68,224,666	$65,984,284	$991,110	$2,240,382
Lacey	$21,204,577	$21,556,936	$20,970,400	$234,177	$586,536

[2] Ninety-five percent of each PILOT payment is retained by the municipality, and 5% goes to the County, thus essentially cutting the school districts out of this revenue source, unless the municipality and the school district voluntarily enter into a tax revenue sharing agreement.

Freehold Regional	$51,564,083	$51,564,083	$50,269,156	$1,294,927	$1,294,927
Weymouth	$2,326,148	$2,365,542	$2,245,862	$80,286	$119,680
Ocean	$7,614,796	$8,079,720	$7,472,792	$142,004	$606,928

In an effort not to unduly burden local taxpayers, the Boards have reduced staff and eliminated programmatic and curricular offerings; they find themselves unable to afford new textbooks or technology needs; and were forced to forego necessary investments in buildings and grounds. In order to offset further property tax increases, a number of the petitioning districts have spent down their Fund Balance levels.

By way of example and not by way of limitation, Brick has been forced to eliminate six teachers and two supervisors. Elective programs, sports and co-curricular activities will be cut, or participation fees will be imposed. Brick will be unable to meet the goals of its Long-Term Technology Plan, and may have to eliminate its full-day kindergarten. Class sizes will increase. Jackson will be forced to eliminate course offerings and discontinue courtesy bussing. It will have to cut after-school enrichment programs and increase activity fees for sports; Jackson fears that ultimately it will be impossible to continue these activities. It will have to reduce its technology and custodial budgets; eliminate a total of 25 teaching positions; and increase class size. Jackson anticipates closing one school building.

Manalapan-Englishtown has already been forced to cut a media specialist; three full-time push-in enrichment specialists; pull-out enrichment teaching positions; one physical education position; and staffing for extra-curricular programs at the elementary level. It will have to curtail its technology plan. Manalapan-Englishtown will have to charge activity fees, anticipates future staffing cuts, and the need to close its sixth-grade building. Lacy Township will be forced to eliminate instructional, administrative, paraprofessional and athletic positions. It will have to increase class size. Lacy will be unable to support its district-wide preschool program. It will be forced to eliminate support programs it offers to at-risk students. Toms River will be forced to reduce staff; will be unable to meet the goals in its Long-Range Technology Plan; and fears that it might be forced to eliminate kindergarten.

Freehold Regional will be unable to comply with its Strategic Plan; will be forced to reduce its student support systems; reduce its athletic offerings; and eliminate certain world language options. It will have to eliminate personnel and increase class size. Freehold anticipates reducing its buildings and grounds budget, and will be able to support only mandatory health and safety repairs to its facilities. Weymouth is a small district with only one classroom per grade. It will be unable to purchase needed instructional technology items, and be unable to move forward with an initiative to establish a Library/Media Center. It will have to consider the elimination of extra-curricular activities and courtesy bussing. The current full-day pre-K and kindergarten programs will have to be reduced to half-day. Weymouth will need to make staff cuts; to include instructional, custodial, and office staff, as well as, an assistant assigned to at-risk students.

Ocean has already been forced to eliminate three faculty positions, two secretarial positions, and defer the hiring of needed security guards. It has been forced to charge a fee for its preschool program. It lacks sufficient funds to perform necessary routine maintenance of its buildings and grounds, and will be unable to implement aspects of its Strategic and Technology Plan. Ocean was in the midst of a district-wide solar panel project which it has now been forced to defer.

ANALYSIS AND CONCLUSIONS OF LAW

In ruling on a Motion to Dismiss, my inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the petition. Printing Mart-Morristown v Sharp Electronics, 116 N.J. 739, 746 (1989); see also R. 4:6-2(e). A reviewing forum must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ," Printing Mart-Morristown, 116 N.J. 739 at 746 (citing DiCistofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div., 1957)). The petitioners are entitled "to every reasonable inference of fact. The examination of a complaint's allegations of fact . . . should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id. But dismissal of a complaint "is mandated where the factual

allegations are palpably insufficient to support a claim . . ." Rieder v State of N.J. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Under the foregoing standard, I **CONCLUDE** that the petition of appeal must be dismissed.

The SFRA was enacted in 2008 as part of New Jersey's ongoing effort to ensure that public schools throughout the state receive the financial support needed to deliver a thorough and efficient free public education (T & E) to our children. N.J. Const. art. VIII, § 4, para. 1; N.J.S.A. 18A:7F-43 et seq. The statute sought to create a "clear, unitary, enforceable statutory formula to govern appropriations for education." N.J.S.A. 18A:7F-44(g). The New Jersey Supreme Court found the SFRA facially constitutional in Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX). Two years later, the Court again addressed school funding with its determination that the action by the State in underfunding the SFRA could not be sustained, as "the shortfall in appropriations purports to operate to suspend not a statutory right, but rather a constitutional obligation. . ." Abbott v. Burke, 206 N.J. 332, 363 (2011) (Abbott XXI). Some seven years later, the legislature amended the school funding law in a manner, petitioners contend, that is inconsistent with the spirit and intent of the 2008 version of the SFRA. They posit several reasons why their State aid must be restored to pre-amendment levels.

These petitioners contend that their petition is motivated by a desire to maintain strong and vibrant public schools. I do not question the sincerity of their commitment to their students for a moment. Nonetheless, at its essence, their petition is a challenge to a perceived unfair local tax burden; this is a case about unequal taxation, not unequal education. The first count of the petition contains the somewhat odd allegation that the amendments to the SFRA violate the SFRA. As I am required to do, I have attempted to be hospitable to this claim, and I take this count to actually allege that the petitioning Boards are entitled to the level of State funding promised by the unamended SFRA; that the constitution demands nothing less. The second count quite directly avers that "[t]he SFRA, as amended ... is unconstitutional as applied."

Count three of the petition asserts that the amendments to the SFRA render it "unconstitutional as written," because the widespread use of municipal tax abatements inequitably impacts the availability of State aid, thus increasing the local burden in districts

that do not use tax abatements. This count thus grounds its allegations of unconstitutionality exclusively on local burden disparity. The fourth and final count of the petition alleges that "[b]y placing a property tax burden on taxpayers in the Petitioning Districts which is greater than is constitutionally approved, the methodology directed by the Legislature, the Commissioner and the Treasurer, each in his/her official capacity, have caused violations of the Due Process rights and the Equal Protection rights of taxpayers in the Petitioning Districts." Again, the focal point of this count is unfair and inequitable local taxation.

The Municipal Petitioners

The named petitioners include five local municipalities. Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div., 2004); Stubaus v. Williams, 339 N.J. Super. 38, 47 (App. Div. 2001). To have standing, a party "must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cty., 170 N.J. 439, 449 (2002). A petitioner must show a direct impairment of his own constitutional rights, and must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum. See Trombetta v. Atl. City, 181 N.J. Super. 203, 221 (Law Div. 1981), aff'd o.b., 187 N.J. Super. 351 (App. Div. 1982); New Jersey Turnpike Auth. v. Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988). A desire to vindicate the public interest is insufficient to confer standing; there must be a specific connection between the petitioner and the public interest he alleges to represent.

The municipal petitioners clearly seek only to vindicate the rights of their constituents and thus lack standing. The claim that the amendments to the SFRA unfairly burden taxpayers in their communities can be brought only by those taxpayers. And any allegations that the SFRA amendments deprive the children in their communities of T & E is a claim that belongs to those taxpayers and their children, and not to the municipalities in which those children reside. Stubaus v. Whitman, 339 N.J. Super. 38 at

56. To the extent that the municipal petitioners contend that they have asserted a direct impact or harm caused by the 2018 amendments to the SFRA, I have scoured the petition and could find no facts to support such a contention.

Additionally, relative to the claims raised in the petition's fourth count, our courts have recognized that "political subdivisions of the State, including municipalities and local boards of education, lack the legal capacity to challenge State action based on equal protection grounds." Stubaus v. Whitman, 339 N.J. Super. 38 at 48, citing Newark v. New Jersey, 262 U.S. 192, 196 (1923); McKenney v. Byrne, 82 N.J. 304, 315, n. 4 (1980); In re Charter School Application of Englewood, 320 N.J. Super. 174, 238 (App. Div. 1999). For this additional reason, I **CONCLUDE** that as to Brick Township, Toms River Township, South Toms River Borough, Beachwood Borough, and Pine Beach Borough, the petition must be dismissed.

The School Board Petitioners

Standing - The Unfair Taxation Claim

For the reasons expressed above, I **CONCLUDE** that the school Board petitioners likewise lack standing to vindicate the rights of their taxpaying citizens. And local Boards, like municipalities, cannot challenge State action on equal protection grounds. To reiterate, "[b]ecause school districts are 'creatures of the State,' no school district can be the 'subject of discriminatory practice by the State'." Stubaus v Whitman, 339 N.J. Super. 38 at 47, citing Borough of Glassboro v Byrne, 141 N.J. Super. 19, 23 (App. Div., 1976). I **CONCLUDE** that the claims by the Brick Township, Jackson, Manalapan-Englishtown, Toms River Regional, Lacey Township, Freehold Regional, Weymouth Township, and Ocean Boards of Education likewise must be dismissed.

The allegations of this petition stand in stark contrast to the claims made in Elizabeth Bd. of Educ. v. N.J. State Dept. of Educ., Div. of Early Childhood Education, EDU 09004-15, Initial Decision (July 14, 2017), aff'd, Comm'r (August 24, 2017), <https://www.nj.gov/education/legal/>. There, an Abbott district (now referred to as an SDA district) contended that early childhood funding provided by the Department was

insufficient, asserting alternatively that the district did not receive what the SFRA promised, or that the SFRA unconstitutionally offered it an insufficient amount of funding to permit it to deliver mandated pre-school services to its students. Unfair local tax burdens were not the central issue. Elizabeth thus offers these school district petitioners no solace.

The petitioners' reliance on Abbott XXI is likewise misplaced. The petitioning Boards urge that Abbott XXI reflects an evolution in the concept of standing, because in dicta the decision references "the importance of a predictable stream of education funding for any school district." Abbott v. Burke, 206 N.J. 332 at 370. But Abbott XXI dealt only with the aftermath of a legislative failure to fully fund the SFRA formula; it offers no precedential ruling concerning the standing of local school Boards to assert unfair local taxation claims.[3] I am accordingly unable to agree that Abbott XXI supports the claims of these petitioning districts that "now...school districts themselves have been granted entitlements adequate to form the basis for standing" for a claim that centers on inequities in local funding of schools.

The T & E Claim

But I must afford every inference to these petitioners, and I of course acknowledge that the petition does allege that programmatic cuts will flow from the controverted changes in the SFRA funding formula. In Stubaus the petitioning school districts were held to lack standing in large part because their petition did not allege that the funding system then at issue resulted in program inadequacy or educational inequality. I **CONCLUDE** that the school board petitioners have standing to raise claims of educational adequacy and inequality.

But their claims are not viable. The SFRA as amended, like any statute, is presumed valid. Stubaus v. Whitman, 339 N.J. Super. 38 at 52, citing In re CVS Pharmacy Wayne, 116 N.J. 490 (1989). These petitioners carry a heavy burden. Ibid;

[3] The plaintiffs in Abbott were school children. Standing was addressed only vis-à-vis the request that the relief sought extend to students outside the Abbott districts. The Court rejected the notion that its jurisdiction extended beyond the rights of the plaintiff class before it.

Smith v Penta, 81 N.J. 65 (1979). And as respondents correctly urge, a properly pled deprivation of T & E would allege that the students in the subject districts are not being equipped for their roles as citizens and competitors in the marketplace. Abbott v. Burke, 119 N.J. 287, 313 (1990) (Abbott II).

This pleading makes no claims of constitutional dimension. These non-Abbott districts allege that staff will be cut; courtesy bussing will be discontinued; half-day kindergarten would be reinstituted; increases would be made in class size; course offerings reduced; and limitations placed on some extra-curricular offerings as a result of the amendments to the SFRA. To their constituents, and to these Boards, these cuts potentially affect the quality of the education that is delivered to their children. It is not the intent of this decision to minimize or trivialize this legitimate concern. But these Boards cannot rely on the Abbott v. Burke cases to support their contention that the SFRA as amended is unconstitutional. The educational disparity Abbott was concerned with readily dwarfs the claims raised here. The following excerpt from Abbott II hammers home this point:

> In an elementary school in Paterson, the children eat lunch in a small area in the boiler room area of the basement; remedial classes are taught in a former bathroom. In one Irvington school, children attend music classes in a storage room and remedial classes in converted closets. At another school in Irvington a coal bin was converted into a classroom. In one elementary school in East Orange, there is no cafeteria, and the children eat lunch in shifts in the first 1 floor corridor. In one school in Jersey City, built in 1900, the library is a converted cloakroom; the nurse's office has no bathroom or waiting room; the lighting is inadequate; the bathrooms have no hot water (only the custodial office and nurse's office have hot water); there is water damage inside the building because of cracks in the facade; and the heating system is inadequate.
>
> [Abbott v. Burke, 119 N.J. 287 at 363.]

Respondents argue that T & E "is student focused and to allege a deprivation of T & E requires a demonstration that the students' educational opportunities are so deficient as to jeopardize their futures." They assert that petitioners' allegations "are insufficient for a T &E claim." I agree. I moreover concur that if the petitioning Boards would like more

generous State aid, "their argument should more appropriately be made to the legislature." Stubaus v. Whitman, 339 N.J. Super. 38 at 56.

Moreover, and importantly, inequitable local taxation cannot form the basis of a viable constitutional claim under the T & E clause. Stubaus v Whitman, 339 N.J. Super. 38 at 52-57. Our Supreme Court has "rejected the argument that T & E mandates statewide equality of tax burdens and [has] interpreted T & E to ensure equal educational opportunity, but not taxpayer equality." Id. at 53, citing Robinson v. Cahill, 62 N.J. 473 (1973)(Robinson I). The State is obliged to provide public school children "an equal educational opportunity." Robinson v. Cahill, 62 N.J. 473 at 513. But it can "meet its obligation by financing education either on a statewide basis with funds provided by the State, or, in whole or in part, by delegating the fiscal obligation to local taxation." Robinson v. Cahill, 69 N.J. 133, 142 (1975) (Robinson IV), citing Robinson v. Cahill, 62 N.J. 473 at 519.

If local funding for these schools was unavailable, there might be a different outcome here. But the petitioning school Boards do not aver with any specificity that they will be unable to raise the local taxes needed to deliver T & E. They allege, in passing, that "in some instances" districts would be "unable to [raise local taxes] altogether because of the State-imposed cap on property tax increases." But the petition does not indicate whether or how a cap would directly impact any of the named petitioners, or specifically how that cap would affect the delivery of essential programming. I **CONCLUDE** that, to the extent the petition alleges that the SFRA as amended denies students in the petitioning districts access to T & E, it fails to state a claim and must be dismissed.

The Claim that the Funding Promised by the Pre-amendment SFRA is Likewise Promised by the New Jersey Constitution

The petition alleges that the SFRA amendments have resulted in "underfunding," and that the petitioning Boards are entitled to the State aid that would have been available under the version of the SFRA found facially constitutional in Abbott XX. They argue that the amendments to the SFRA "on its face and as applied, [are] a repetition of the Legislature's failures highlighted in Abbott XXI .... [that the amendments] constitute a

failure by the State to honor its Abbott XX obligations to fund its SFRA obligations." But respondents reply persuasively that the SFRA was declared constitutional relative only as to the claims of educational inequality made by the Abbott districts. These petitioners are not Abbott districts; accordingly, their reliance on Abbott XXI is once again misplaced. The Court held that

> ...plaintiffs can look in vain for support in Abbott XX for a finding that the failure to provide full funding of SFRA to any district is the equivalent of the constitutional violation previously litigated and found to exist for children in the Abbott districts... in the prior application that led to the Abbott XX holding, we specifically declined to recognize that pupils from any district other than the Abbott districts were before us when taking up the question of the SFRA's facial constitutionality.
>
> [Abbott v. Burke, 206 N.J. 332 at 370 (Abbott XXI).]

Abbott XXI thus lends no support to petitioners' contention that they are constitutionally entitled to the level of funding they would have received under the unamended SFRA.[4] I **CONCLUDE** that the school district petitioners have not raised a viable claim that their State aid was "underfunded."

The Taxpayer

Taxpayer Stephanie Wohlrab has standing to bring her claims of unfair taxation, and standing to assert that the amendments to the SFRA will deny her children T & E. Notwithstanding, she has failed to state a claim for the reasons discussed above. Unlike the municipal and school board petitioners, as a citizen, Wohlrab may bring an equal protection claim. Accordingly, it is necessary to address the allegations of the fourth count on its merits. I **CONCLUDE** that Wohlrab has failed to state a viable equal protection claim.

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[4] The petition in paragraphs 32 and 33 avers that the State aid figures received by the petitioning districts were less than those included in the Governor's budget message. Respondents interpret these paragraphs as alleging that moneys promised by the SFRA were not properly appropriated. If this indeed is what the petition alleges, these claims "run directly into the holdings of" Camden v Byrne, 82 N.J. 133 (1980) and Karcher v Kean, 97 N.J. 483 (1984). Abbott v. Burke, 206 N.J. 332 at 370 (Abbott XXI). The Court has confirmed that "even though local government might find itself 'handcuffed' by statutory fiscal limitations, [the] Court is 'powerless to remove those handcuffs'." Camden v Byrne, 82 N.J. 133 at 157, citing N.J. State Policemen's Bene. Ass'n. Local 29 v. Irvington, 80 N.J. 271 (1979). The statutory fiscal constraints imposed on these petitioners is a matter of legislative, not judicial prerogative. Ibid.

New Jersey's equal protection clause provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, para. 1. The equal protection clause "prohibits the State from adopting statutory classifications that treat similarly situated people differently." Stubaus v. Whitman, 339 N.J. Super. 38 at 57, citing Sanchez v. Dep't of Human Servs., 314 N.J. Super. 11 (App. Div. 1998). Equal protection claims under the New Jersey Constitution are analyzed using a "balancing test to determine whether there is an appropriate governmental interest that is suitably furthered by the differential treatment." Stubaus v. Whitman, 338 N.J. Super. 38 at 60, citing In re Charter School Application of Englewood, 320 N.J. Super. 174, 237 (App. Div. 1999). Courts look to "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Ibid., citing Greenberg v. Kimmelman, 99 N.J. 552 (1985). Here, Wohlrab contends that the SFRA funding formula will cause an increase in her property taxes and an unequal tax burden; that she will be required to pay more than her "fair share" to support the public schools. Like the Stubaus plaintiffs, she contends that the "range of property tax rates establishes a 'present system of school funding [which] is irrational and grossly discriminatory'." Stubaus v. Whitman, 339 N.J. Super. 38 at 56-7.

Stubaus discusses at length the reluctance of the Robinson v. Cahill and Abbott v. Burke Courts to analyze school funding disputes on equal protection grounds. Stubaus observes that

> [t]he Court in Robinson I was unwilling to analyze the problem under equal protection because such an approach could raise questions regarding the delivery of all municipal services. In other words, if inequality in educational services among the various school districts in the State violated equal protection, it was an easy step to argue that so also would be unconstitutional any inequality among municipalities delivering fire, police and other services. The Court refused to mount this slippery slope, and instead turned the case on the T & E clause.
>
> [Stubaus v. Whitman, 339 N.J. Super. 38 at 57.]

As Stubaus points out, thereafter, every court called upon to review the funding of public education has relied exclusively on the T & E clause. Abbott II reiterated "the monumental governmental upheaval that would result if the equal protection doctrine were held applicable to the financing of education..." Stubaus v. Whitman, 339 N.J. Super. 38 at 58, citing Abbott v Burke, 119 N.J. 287, 390 (1990). The Stubaus court thus declined to allow the case before it to continue on equal protection grounds, stating "[w]e have unease about pronouncing a willingness to decide the claim on an equal protection basis, and we conclude that we remain bound by Robinson I and reject any attempt to project equal protection into the school funding dispute." Ibid. I accordingly will do likewise, and **CONCLUDE** that the equal protection claims of the fourth count must be dismissed.

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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.

August 1, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 1, 2019

Date Mailed to Parties:

sej

291-19E

OAL Dkt. No. EDU 12563-19
Agency Dkt. No. 229-9/19

New Jersey Commissioner of Education

Order on Emergent Relief

T.H., on behalf of minor child, H.H.,

Petitioner,

v.

Board of Education of the Township of Washington, Gloucester County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted. This case shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/19
Date of Mailing: 10/31/19

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDU 12563-19

AGENCY DKT. NO. 229-9/19

T.H. ON BEHALF OF MINOR CHILD, H.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

Respondent.

T.H. on behalf of minor child, H.H., petitioner, pro se

Joseph F. Betley, Esq., for respondent (Capehart and Scatchard, P.A., attorneys)

BEFORE **SUSAN L. OLGIATI,** ALJ:

STATEMENT OF THE CASE

Petitioner T.H., parent of minor child, H.H., challenges the decision of the Washington Township Board of Education (the Board) removing H.H. from Washington Township High

School (WTHS) and placing her in the Ombudsman Alternative Program. Petitioner seeks to overturn the Board's decision and have H.H. return to WTHS.[1]

PROCEDURAL HISTORY

Petitioner prepared a request for emergent relief which was received by the Department of Education, Office of Controversies & Disputes on September 11, 2019. The matter was transmitted to the Office of Administrative Law (OAL) on September 12, 2019. Oral argument on the request for emergent relief was held on September 18, 2019.

FACTUAL DISCUSSION

H.H. is in the ninth grade and currently attends the Ombudsman Alternative Program in Washington Township.

During the 2018-2019 school year, H.H. was an eighth grade student at Bunker Hill Middle School (BHMS). On May 30, 2019, following investigation of an in-school incident, H.H. was placed on a ten-day out-of-school suspension. The incident giving rise to the suspension arose out of student reports alleging that during class, H.H. took out a pair of Cutco kitchen scissors and began sharpening them while staring at her classmates and making various threatening remarks. In addition to disciplinary charges, school officials filed a police report regarding the incident. H.H. was placed on home instruction effective May 31, 2019. As H.H. is a student with a Section 504 plan, a manifestation determination meeting was held on June 5, 2019. H.H.'s actions were

[1] Petitioner also sought dismissal of the "felony charges" against H.H. See P-A. Aside from the charges being an issue over which this tribunal has no jurisdiction, the juvenile court charges against H.H. were adjudicated via a Civil Action Order, issued on September 11, 2019, thus, this aspect of the requested relief is now moot.

deemed not to be a manifestation of her disability and the school administration recommended that the suspension stand. [2]

A disciplinary hearing before the Board was scheduled for June 17, 2019. The parties agreed to adjourn the hearing and the matter was rescheduled for August 19, 2019. At the rescheduled disciplinary hearing, petitioner was represented by counsel, and T.H. and H.H.'s grandmother spoke on her behalf. By letter dated August 21, 2019, petitioner was advised of the results of the disciplinary hearing, including but not limited to, that the Board had, sustained the disciplinary charges against H.H., approved her removal from WTHS for the first semester[3] of the 2019-2020 school year, and approved her placement in the Ombudsman Program.

On September 11, 2019, T.H. entered a guilty plea to the downgraded charge of harassment. Pursuant to the Civil Action Order issued by the Honorable George H. Gangloff, Jr., JSC, T.H. received a deferred disposition on the juvenile charges for a period of twelve months (until September 10, 2020). The disposition/conditions of probation include: "the juvenile to follow all recommendations of court ordered evaluation(s); attend school with no unexcused absences or tardiness or suspension; cooperation with CMO; and Other: no new charges." P-F.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982) and N.J.A.C. 6A:3-1.6(b), emergent relief may be granted if the judge determines from the proofs that each of the following elements have been established:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

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[2] At oral argument, on the requested emergent relief, petitioner asserted that she was unaware she had a right to appeal the manifestation determination. Petitioner similarly indicated that she was unaware she had a right to appeal the recent determination that H.H. was not eligible for special education services.

[3] At oral argument, the parties acknowledged that the first semester ends on February 3, 2020.

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has the 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 has the burden of establishing all of the above required elements to warrant relief in her favor and must prove each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J.Agen LEXIS 814, 7 (October 25, 2017).

As to the first element, petitioner must show that irreparable harm will result if emergent relief is not granted, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). The threshold standard for irreparable harm in education matters is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Initial Decision (June 15, 2009), modified, Acting Comm'r (June 15, 2009), http://njlaw.rutgers.edu/ collections/oal/. The analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable. Howell Twp. Bd. of Educ. v. A.I. & J.I. ex rel. S.I., 2011 N.J. AGEN LEXIS 2017, (Order Granting Emergent Relief), (May 2, 2012).

Petitioner argues that the harm suffered by H.H. will include falling severely behind in her studies. Petitioner contends the Ombudsman Program is self-taught, on-line learning and that H.H. needs to learn under the instruction of a board certified teacher. Petitioner also argues that H.H. will suffer increased anxiety and depression due to social isolation. Petitioner further argues that H.H. will suffer harm because she is required to attend the afternoon session of the Ombudsman Program and that her medication wears off by mid-

day.[4] At oral argument on the requested emergent relief, petitioner also argued that H.H.'s Section 504 plan has not been implemented. [5]

Respondent argued that petitioner has not demonstrated immediate irreparable harm as there has been no denial or break in educational services to H.H. Respondent argued that petitioner's claim of irreparable harm is mere speculation of future harm and that petitioner's dislike of the Ombudsman Program, an accredited alternative education program within the district, is not evidence of irreparable harm.

Here, petitioner expressed genuine concern regarding her daughter's well-being and the appropriateness of her placement in the Ombudsman's Program. However, the concerns regarding H.H's academic performance and the impact upon her mental health are at this point, speculative and based on petitioner's subjective belief of future harm. While sincere, petitioner's claims, are not supported by any competent evidence from academic or medical professionals. Moreover, the alleged harm is not irreparable because it can be addressed through the provision of compensatory educational and/or related services at a future date.

During oral argument, petitioner also raised new issues regarding the Ombudsman Program, including claims that a student requested H.H. to perform oral sex, and that other students offered H.H. drugs and introduced her to "vaping." Petitioner advised that she brought these claims to the attention of the administration. Counsel for the Board responded that these claims had been looked into and that certain action had been taken to separate H.H. from the other students. To the extent that petitioner, raised new claims which appear to be beyond the scope of the request for emergent relief, petitioner should continue to bring her concerns to the

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[4] On September 19, 2019, counsel for the Board provided this ALJ with a copy of an email from counsel to T.H., dated September 19, 2019, confirming that the Ombudsman Program has agreed to accommodate petitioner's request to have H.H. moved to the morning session. Thus, it would appear this aspect of petitioner's claim of irreparable harm no longer exits.

[5] In his September 19, 2019, email to T.H., counsel for the Board, also advised T.H. that he is looking into "the 504 issues as well."

respondent/Ombudsman Program administrator and the parties are encouraged to continue to discuss such issues pending a full hearing on petitioner's due process underlying claims.

For the above reasons, I **CONCLUDE** that the petitioner has failed to meet her burden of establishing a clear showing that H.H. will suffer immediate irreparable harm unless the requested relief is granted.

Next, in order to obtain emergent relief, the petitioner must also demonstrate that the legal right underlying her claim is settled and must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. Petitioner seeks to overturn the decision of the Board which led to H.H.'s suspension, temporary removal from WTHS, and placement in the Ombudsman Program. Actions within a school board's authority, including establishing policies for student discipline, are entitled to a presumption of validity and will not be overturned in the absence of an affirmative showing that the decision was arbitrary, capricious, or unreasonable. Thomas v. Morris Twp. Board of Education, 89 N.J.Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). The arbitrary, capricious and unreasonable standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, EDU 1839-98, Initial Decision, (January 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J.

Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974)).]

The petitioner's legal right to challenge the Board's decision is well-established; therefore, I **CONCLUDE** that she has met her burden as to this element.

To obtain emergent relief, petitioner must also demonstrate a reasonable probability of success on the merits. Petitioner challenges the Board's action on the basis that H.H. was not provided due process. Despite her claims, the evidence admitted into the record at oral argument suggests that petitioner was properly afforded due process in accordance with N.J.A.C. 6A:16-7.3. Further, despite petitioner's continued denial that H.H. engaged in the conduct alleged, H.H. pleaded guilty to downgraded charges of harassment. Based upon the Civil Action Order issued on September 11, 2019, H.H. received a deferred disposition which will result in the charges being dismissed on September 10, 2020, assuming the conditions of probation have been met. Further, petitioner's belief that H.H.'s placement in the Ombudsman Program amounts to excessive or unwarranted discipline and that H.H. has already been sufficiently punished by her two-week suspension and being prevented from attending end of the year, eighth grade activities does not render the Board's decision arbitrary, capricious, or unreasonable.

For the above reasons, I **CONCLUDE** that the petitioner has failed to demonstrate a reasonable probability of success on the merits.

Finally, to demonstrate an entitlement to emergent relief, petitioner must also show that when balancing the relative equities and interests of the parties, she will suffer the greater harm if relief is not granted. Petitioner argues that H.H. will suffer the greater harm if she is not returned to the WTHS and that respondent will suffer no harm as H.H. is just one additional student to educate. Conversely, the Board argues that it has a substantial and valid interest in ensuring the safe and orderly operation of the activities of its' schools.

Here, the balance weighs in favor of the Board over H.H. because a ruling to the contrary could undermine respondent's authority and have a far reaching effect on its dealings with its students. See L.B. o/b/o S.C. v. Hamilton Township Board of Education, EDS 08561-17, Final Decision, (June 22, 2017) http://lawlibrary.rutgers.edu/oal/search.html. Therefore, in balancing the equities and interests of the parties, I **CONCLUDE** that the petitioner has failed to meet her burden to show that H.H. will suffer the greater harm if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to meet all four of the required elements set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and N.J.A.C. 6A:3-1.6(b), as a result, she is not entitled to the emergent relief requested.

ORDER

Accordingly, I **ORDER** that the petitioner's application for emergent relief is hereby **DENIED**.

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

September 20, 2019

DATE

SUSAN L. OLGIATI, ALJ

SLO/vj

APPENDIX

EXHIBITS

For petitioner:

P-A Undated, five page letter from T.H. to Commissioner of Education c/o Director of Controversies and Disputes (received by Controversies and Disputes on September 3, 2019) requesting that the Board's decision be overturned.

P-B August 19, 2019, After Visit Summary of Susan J. Blumenfeld, A.P.N.

P-C July 17, 2019, Independent Psychiatric Evaluation of Joseph N. Mobilio, D.O.

P-D June 8, 2019, letter from T.H. to the Washington Township School Administration.

P-E Undated, one page letter from T.H. to Commissioner of Education c/o Director of Controversies and Disputes (received by Controversies and Disputes on September 11, 2019) seeking emergent relief.

P-F Civil Action Order- Juvenile, signed by George H. Gangloff Jr., JSC, dated September 11, 2019.

For respondent:

R-A Affidavit of Michael D'Ostillio

R-B June 11, 2019, letter to T.H. from Joseph N. Bollendorf, Superintendent of Schools regarding the Notice of Disciplinary Hearing with attachments

R-C May 30, 2019, cover email from Michael D'Ostilio to T.H. and attached Notice of Suspension.

R-D Home instruction Plan, May 31, 2019

R-E Section 504 Manifestation Determination form, June 5, 2019; Waiver of Right to Board of Education Hearing form; Section 504 Committee Participants and Teachers Sign Off, June 5, 2019, Section 504 Procedural Safeguard and Parental /Student Rights form.

R-F Section 504 Plan, October 30, 2018.

R-G May 31, 2019, letter from Susan Blumenfled, RN, CPNP

R-H June 11, 2019, letter to T.H. from Joseph N. Bollendorf, Superintendent of Schools re: Notice of Disciplinary Hearing without attachments.[6]

R-I August 21, 2019, letter from Joseph N. Bollendorf to T. H. regarding Disciplinary Hearing -Results.

[6] This document is a duplicate of the cover letter found at R-B.

OAL Dkt. No. EDU 13908-19
Agency Dkt. No. 265-10/19

New Jersey Commissioner of Education

Order on Emergent Relief

Michael Rich,

Petitioner,

v.

Board of Education of the Township of North Brunswick, Middlesex County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 10/31/19
Date of Mailing: 10/31/19

[1] Petitioner submitted exceptions to the Order on October 28, 2019. *N.J.A.C.* 1:1-18.4 permits the filing of exceptions to an initial decision, but no provision of the Uniform Administrative Procedure Rules allows for exceptions to an Order Denying Emergent Relief. Accordingly, petitioner's submission was not considered.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 13908-19
AGENCY DKT. NO. 265-10/19

MICHAEL J. RICH,
Petitioner,
v.
NORTH BRUNSWICK BOARD OF EDUCATION,
Respondent.

Nicholas Poberezhsky, Esq. for petitioner (Caruso, Smith, Picini, P.C., attorneys)

Adam S. Weiss, Esq. for respondent, Ari D. Schneider, Esq. on the brief (Busch Law Group, LLC, attorneys)

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner, Michael Rich, filed a petition on an emergent basis to enjoin the respondent North Brunswick Board of Education (NBBOE), his former employer, from continuing to disclose that he resigned his former teaching position with the respondent while under investigation for sexual misconduct, and to rescind any such disclosures previously made to other New Jersey school districts where he is seeking employment.

The respondent contends that disclosing this information to other school districts considering hiring the petitioner is a mandatory statutory obligation pursuant to New Jersey's "Pass the Trash" law.

PROCEDURAL HISTORY

On October 2, 2019, the New Jersey Department of Education received the petition for emergent relief. The matter was transmitted to the Office of Administrative Law, where it was filed on October 3, 2019. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument on the petition for emergent relief was held on October 7, 2019.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS**:

1. On or about September 1, 2014, the petitioner was hired by the respondent to serve as a certified special education teacher of science at North Brunswick Township High School (NBTHS). (Pet. Br. at ¶ 1.)

2. The petitioner continued to work at NBTHS in this capacity and his contract for employment was renewed by the respondent for the 2019-20 school year. (Id. at ¶ 2.)

3. On or about May 22, 2019, the petitioner was working at NBTHS. (Id. at ¶ 12.) Around noon that day, a female NBTHS student came into the petitioner's classroom while he was working to prepare chemistry examination materials. (Id. at ¶ 14.) The student was sixteen or seventeen years old and was a former student of the petitioner's who was on her lunch period at the time.

4. The student came into the petitioner's classroom and approached his desk. (Ibid.) The respondent asserts that the petitioner then took the student's hand, "kissed it, and told her he loved her." (Resp. Br. at ¶ 2.)

a. The petitioner's version of this incident is that, because he did not have time to talk to the student at the time, when she reached over the desk to shake his hand, the petitioner took her hand, "placed his left hand on top of hers and, in jest, kissed the back of his own left hand. He then quickly pulled his hands away, said 'love ya,' and waved her goodbye." (Pet. Br. at ¶ 14.) Petitioner claims that this was, "in essence, a polite way of asking [the student] to leave." (Ibid.)

5. Based on this incident, on June 17, 2019, the respondent notified the petitioner that they intended to terminate his employment during the executive session at its next meeting. (Pet. Br. at ¶ 3.)

6. The petitioner tendered his resignation to the respondent on or about June 18, 2019, and his resignation was accepted by the respondent via official resolution approximately one week later. (Pet Br. at ¶ 5.)

a. By doing so, the petitioner waived his right to have the teacher's association file a grievance to challenge his termination from NBTHS. (Id. at ¶ 7.)

b. By tendering his resignation in lieu of termination, the petitioner believed he was improving his future employment prospects since "school board employers are generally hesitant to consider applicants who were terminated from their previous place of employment." (Id. at ¶ 6.)

7. Following his resignation from NBTHS, the petitioner was hired by the Monroe Township School District (MTSD) to serve as a special education teacher in August 2019. (Pet. Br. at ¶ 8.)

8. During a training seminar for MTSD on August 28, 2019, the petitioner was called to the superintendent's office. (Id. at ¶ 9.) The superintendent informed the

petitioner that "upon receipt of new information" MTSD had decided to rescind its offer of employment and the petitioner was immediately discharged and sent home. (Ibid.)

a. The petitioner asserts that this "new information" received by MTSD was a disclosure made by the respondent pursuant to N.J.S.A. 18A:6-6.7, et seq., that he was the subject of an investigation into sexual misconduct that was not determined to be false. (Id. at ¶ 11.)

b. The petitioner believes that this disclosure is based on the incident at NBTHS on May 22, 2019. (Id. at ¶ 12.)

9. The respondent notified MTSD about their investigation of the petitioner's conduct of May 22, 2019. (Resp. Br. at 5.) The respondent asserts that they reasonably determined that "its investigation of [the p]etitioner's alleged conduct, which included kissing and stating 'I love you' to a female student, was a 'sexual misconduct investigation' as defined by N.J.S.A. 18A:6-7.6 and -7.7" and their disclosures to MTSD regarding this investigation were required by law. (Id. at 6—7 (citing N.J.S.A. 18A:6-7.7).)

10. The petitioner asserts that the alleged conduct "does not rise to the level of 'sexual misconduct' as the term is defined" in the relevant statutes which the respondent cites to as the justification for their disclosures to MTSD. (Pet. Br. at ¶ 18.) The petitioner claims that the respondent "had no right to disclose" this information to MTSD that he "was the subject of a sexual misconduct investigation." (Id. at ¶ 18.)

a. The petitioner requested that the respondent retract its disclosure to MTSD and stop making disclosures of this nature to future prospective employers. (Id. at ¶ 20.) The respondent refused, citing to its obligations under N.J.S.A. 18A:6-7.5—7.9. (See Resp. Br. at 8.)

b. The petitioner claims that the respondent's actions are causing him "severe, immediate, and irreparable harm," by tarnishing his professional reputation, making him unable to secure employment at other school districts, and causing him financial harm. (Pet. Br. at ¶ 21.)

LEGAL DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the 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 has the burden of establishing all of the above requirements in order to warrant relief in his favor and must prove each of these Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J.Agen LEXIS 814, 7 (October 25, 2017).

Beginning with the first requirement, it is well-settled that emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132-33. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "substantial injury to a material degree coupled with the inadequacy of

money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F.Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). In this case, the petitioner claims a loss of employment opportunities at MTSD, and other potential future employers, which creates "extreme financial distress." (Pet. Br. at ¶ 21.) The irreparable harm requirement, however, cannot be satisfied where monetary relief is capable of adequately addressing the alleged harm. Crowe, 90 N.J. at 132–33. The loss of job opportunities and earning prospects can be compensated adequately by monetary damages awarded after a plenary hearing, making the harm in this matter not considered irreparable to justify the emergent relief sought. Id. at 133 (finding "reduction to poverty can be compensated adequately by monetary damages awarded after a distant plenary hearing" and not justification for emergent relief). Therefore, I **CONCLUDE** that the petitioner has failed to meet their burden of establishing a clear showing that he will suffer immediate irreparable injury unless the requested relief is granted.

Secondly, the petitioner must also demonstrate that the legal right underlying their claim is settled. Crowe, 90 N.J. at 133. The respondent's disclosures at issue in this matter were made subject to New Jersey's recently enacted "Pass the Trash" law, which set forth guidelines to ensue that teachers, administrators, and vendors who come into contact with students have not been previously accused of or convicted of abusive or predatory conduct prior to their hiring. The law requires school districts and others who hire persons serving in positions with regular contact with students to review potential employees' prior employment history, including determining if the potential employee:

> (a) Was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families, unless the investigation resulted in a

> finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;
>
> (b) Was disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct;
>
> [N.J.S.A. 18A:6-7.7.]

In addition, the law requires prior employers, like the respondent, who have had an employment relationship with these potential employees to disclose the information requested to the new school employer within twenty days of receiving the request. N.J.S.A. 18A:6-7.9(a). The petitioner alleges that the application of this statute's reporting provisions to the May 22, 2019, incident is improper because the allegations, even if accepted as true, do not rise to the "level of 'sexual misconduct' as the term is defined in the statute." (Pet. Br. at ¶ 18.) The relevant statute broadly defines "sexual misconduct" as follows:

> "Sexual misconduct" means any verbal, nonverbal, written, or electronic communication, or any other act directed toward or with a student that is designed to establish a sexual relationship with the student, including a sexual invitation, dating or soliciting a date, engaging in sexual dialogue, making sexually suggestive comments, self-disclosure or physical exposure of a sexual or erotic nature, and any other sexual, indecent or erotic contact with a student.
>
> [N.J.S.A. 18A:6-7.6]

The governing statutes became effective in June 2018, making interpretation of these statutes largely a case of first impression without the benefit of governing precedent to apply the intentionally broad language of the statute to specific conduct situations. Whether the alleged conduct fits within the statutory definition of "sexual misconduct" is, by its nature, a fact-intensive question. Factors, including the context of the alleged interaction between the petitioner and the student, and consideration of the relative power imbalance inherent in a student-teacher relationship all play a role in

evaluation of the propriety of the conduct at issue and these facts are not available for consideration in the limited factual record available in this petition for emergent relief. In light of the lack of available caselaw and the myriad of factors to be considered, I **CONCLUDE** that the petitioner has not met his burden to show a well-settled legal right underpins his claim.

The petitioner must also sustain their burden to make a preliminary showing of a reasonable probability of success on the merits of their claim. Crowe, 90 N.J. at 133. The respondent, in taking its action against the petitioner in June 2019, found the petitioner's conduct sufficiently egregious to justify termination proceedings. The petitioner, rather than challenging the respondent's determination on this matter, opted to resign from his position in order to "avoid having a 'termination' on his record." (Pet. Br. at ¶ 5.) The petitioner stated that he submitted his resignation under the circumstances to aid his employment prospects with future school employers "as school board employers are generally hesitant to consider applicants who were terminated from their previous place of employment." (Id. at ¶ 6.)

While the petitioner asserts the allegations, even if accepted as true, do not rise to the "level of 'sexual misconduct'" to invoke the reporting requirements of N.J.S.A. 18A:6-7.7 (Pet. Br. at ¶ 18), the conduct at issue, namely a male teacher grasping a female student's hand, manipulating her hand towards his lips and either kissing or feigning a kiss on the student's hand, and telling the student "love ya" is clearly inappropriate conduct which could, on its face and in the absence of appropriate context to demonstrate otherwise, be viewed as conduct which attempts to improperly sexualize the student-teacher relationship. See, e.g., James Dunckley v. Board of Education Rockaway Township, Morris County, 2018 N.J. Super. Unpub. LEXIS 615 (App. Div. March 19, 2018) (finding male teacher touching female students on the back, shoulder, arms, and hair "inappropriate behavior towards female students that appears designed to impose [his] will, gratify [his] perverse impulses, humiliate the student, and sexualize the student-teacher relationship"). On this record as developed at this stage in the proceedings, I **CONCLUDE** that the petitioner has failed to meet his burden to demonstrate a reasonable probability of success on the merits.

Finally, in balancing the relative equities of the parties' respective positions, this type of situation, where a school employee resigns while under investigation for allegations of possible sexual misconduct with the goal of preserving his future employment prospects with another school district by concealing the circumstances surrounding his resignation appear to be exactly the type of employee-shifting that New Jersey's "Pass the Trash" legislation is designed to combat. The petitioner faced credible allegations of improper conduct involving touching, kissing, and a verbal expression of "love" towards a minor student. Based upon these allegations, his school district employer took action to investigate them and to terminate the petitioner's employment. Rather than challenge the respondent's adverse employment action, the petitioner resigned his position, and quickly secured a teaching position with another New Jersey school district that was unaware of the circumstances surrounding his resignation from his former school district.

Although the petitioner argues that the respondent is improperly notifying potential employers that he was investigated for sexual misconduct when the conduct alleged does not qualify under the statutory definition of sexual misconduct, the statutory disclosure provisions go further than merely affirming the existence of an investigation or allegation. The statute also requires potential school district employers to make a full inquiry to ascertain the details of any reported information. See N.J.S.A. 18A:6-7.10(a) (requiring an employer, after receiving an affirmative response to their inquiries about a prospective employee's history, to "make further inquiries of the applicant's current or former employer to ascertain additional details regarding the matter disclosed" before continuing with the potential employee's job application process). This system of disclosures means that MTSD, and any future potential school employer had, and will continue to have, the full opportunity to evaluate the details of the petitioner's employment history at NBTHS and the incident in question to permit them to make a fully-informed evaluation of the petitioner's conduct in considering him for potential employment rather than relying only on the respondent's characterization of the allegations at issue as "sexual misconduct."

While the petitioner argues that the respondent "would suffer no harm whatsoever" if they were enjoined from making further disclosures regarding the petitioner's prior employment, the respondent is a public school employer that regularly hires teachers and others who have regular contact with students. As a public school district, the respondent has an interest in maintaining the trust that its students' parents have placed in them, and that trust is furthered by the system of disclosures between school employers that New Jersey's "Pass the Trash" statutes require. These disclosures are critical in helping school districts like the respondent protect their students and others from potential predatory teachers who move from school to school due to failures of their prior school district employers to disclose prior sexual misconduct investigations and allegations. (Pet. Br. at 5.) Against this potential harm of undermining this disclosure system which supports not only the respondent, but all school employers in New Jersey, is balanced the petitioner's interest in preserving his future employment prospects by hiding his actions which led to his resignation in lieu of termination from his prior teaching position at NBTHS from disclosure to potential school district employers. As the respondent notes in its briefing, the consequences that the petitioner is now facing are "entirely attributable" to his own conduct with a student at NBTHS on May 22, 2019, and his subsequent decision to resign his position there in lieu of termination. (Resp. Br. at 9.) In balancing of the respective equities, I **CONCLUDE** that the petitioner has failed to meet his burden to demonstrate that he will suffer greater harm than the respondent if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter.

ORDER

Accordingly, I **ORDER** that the petitioner's application for emergent relief be and hereby is **DENIED**.

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

October 8, 2019
DATE

DAVID M. FRITCH, ALJ

/dw

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

None

For respondent:

None

296-19
OAL Dkt. No. EDU 05847-19
Agency Dkt. No. 84-4/19

New Jersey Commissioner of Education

Final Decision

R.V., on behalf of minor children, D.C., Y.C., and R.O.,

Petitioner,

v.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/06/19
Date of Mailing: 11/07/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

R.V., ON BEHALF OF
MINOR CHILDREN, D.C., Y.C., AND R.O.,
Petitioner,

v.

BOARD OF EDUCATION, BOROUGH
OF MIDDLESEX, MIDDLESEX COUNTY,
Respondent.

OAL DKT. NO. EDU 05847-19
AGENCY DKT. NO. 84-4/19

R.V., petitioner, pro se

Anthony P. Sciarrillo, Esq., and **Scott D. Zucker,** Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: October 3, 2019 Decided: October 4, 2019

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This pro se residency appeal was filed on April 22 and 29, 2019, along with a request for emergent relief. On April 29, 2019, the Department of Education Office of Controversies and Disputes transmitted the emergent matter along with the petition of appeal to the Office of Administrative Law.

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.)

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

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

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

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

October 4, 2019 — Tricia M Caliguire
DATE — **TRICIA M. CALIGUIRE,** ALJ

Date Received at Agency: 10- -19

Date Mailed to Parties: 10-8-19

nd

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Stipulation of Settlement and Board Resolution

J-1

RECEIVED
2019 OCT -3 A 8:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC
238 St. Paul Street
Westfield, N.J. 07090
(908) 481-5000
Attorneys For Respondent
Middlesex Board of Education

R.V. o/b/o D.C., Y.C. and R.O., Petitioner, -vs- Middlesex Board of Education, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO.: 84-4/19 OAL DOCKET NO.: EDU-05847-19 **STIPULATION OF SETTLEMENT**

WHEREAS, R.V. ("Parent") is the parent of D.C., Y.C., and R.O. ("Students"), who were students enrolled in the Middlesex School District ("District") for the 2018-2019 school year; and

WHEREAS, the Middlesex Board of Education ("Board") had the belief that the Students ceased being domiciled in the District in November 2018, and that Parent was domiciled in North Plainfield; and

WHEREAS, a residency hearing was convened before the Board on March 25, 2019; and

WHEREAS, the Board voted to remove the Students from the District; and

WHEREAS, Parent appealed the Board's decision to remove the Students from the District's schools to the Commissioner of Education; and

WHEREAS, on or about May 9, 2019, the Honorable Tricia M. Caliguire, A.L.J., issued an Order on Emergent Relief, permitting the Students to continue their education in the District's schools pending a final decision by the Commissioner of Education; and

WHEREAS, the Students continued to attend the Middlesex School District's schools through the end of the 2018-2019 school year; and

WHEREAS, on or about June 18, 2019, the Commissioner of Education rejected the Order on Emergent Relief and denied Parent's application for Emergent Relief; and

WHEREAS, the Board's Answer to the Parent's Petition included an Affirmative Defense seeking tuition for each day the students were ineligible to attend school within the District; and

WHEREAS, Parent represented that on September 1, 2019, she will be moving to Piscataway, New Jersey; and

NOW THEREFORE, the parties hereby agree as follows:

1. Parent agrees to dismiss with prejudice her appeal of the Board's decision to remove the Students from the District.
2. The Board agrees not to seek an assessment of tuition from the Parent for the period that the Students were not eligible to attend school within the District for the 2018-2019 school year.
3. However, if, in the future, any of the Students attend the District's schools, and any of them is found not to be domiciled within the District, Parent agrees that the Board reserves the right to seek an assessment of tuition for the period that the Students were not eligible to attend school within the District for the 2018-2019 school year in addition to any relief afforded to the Board under law and regulation.

4. The parties have entered into this Settlement Agreement to avoid the expense and inconvenience of a hearing.
5. In consideration of the settlement of this matter, the Parents shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorneys' fees, compensatory education, money damages, civil liability, or any other equitable or legal relief relating to the Students' education in the District through the date of the execution of this Settlement Agreement.
6. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.
7. This Agreement shall be governed by the laws of the State of New Jersey.
8. 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.
9. This Agreement shall be construed as if it were drafted by both parties contemporaneously.
10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative, if any, and fully understand its requirements and limitations.
11. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.
12. This Agreement shall be incorporated into an Initial Order by the Honorable Tricia M.

Caliguire, A.L.J.

13. This Agreement is subject to ratification by the Middlesex Board of Education.

Rocio Vargas, Parent

Date: 9/4/19

ON BEHALF OF THE MIDDLESEX BOARD OF EDUCATION

Date: 9/23/19

Middlesex Public Schools
www.middlesex.k12.nj.us

300 John F. Kennedy Drive
Middlesex, NJ 08846-1498
732-317-6000
Ext. 20201
Fax 732-317-6005
loreem@middlesex.k12.nj.us

Michele A. Loree
Business Administrator/
Board Secretary

The Middlesex Board of Education met on September 23, 2019, in the Middlesex High School Library Media Center in the Middlesex High School, 300 John F. Kennedy Drive, Middlesex, New Jersey.

The following Board Members were present:

Mr. Coyle	Present	Mr. Oliver	Present
Mrs. Giardina	Present	Mrs. San Phillips	Present
Mr. Giovanni	Present	Mrs. Schueler	Present
Mrs. Harrity	Present	Mrs. DiNizio, President	Present
Dr. Hrevnack, Vice President	Present		

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Motion by Mr. Giovanni seconded by Dr. Hrevnack to approve the resolution listed below:

WHEREAS, upon the recommendation of the Superintendent of Schools, The Board approves the Settlement Agreement between the Board and the parent of students #2330601, 2370200, and 3010544.

Motion carried by roll call vote:

Mr. Coyle	Yes	Mr. Oliver	Yes
Mrs. Giardina	Yes	Mrs. San Phillips	Yes
Mr. Giovanni	Yes	Mrs. Schueler	Yes
Mrs. Harrity	Yes	Mrs. DiNizio, President	Yes
Dr. Hrevnack, Vice President	Yes		

I, Michele Loree, Business Administrator/Board Secretary of the Board of Education of the Borough of Middlesex in the County of Middlesex, State of New Jersey, hereby certify that the above extract from the minutes of the September 23, 2019 regular public meeting of the Middlesex Board of Education to be a true and accurate copy of the official minutes of the meeting.

Michele Loree
Business Administrator/Board Secretary

9/24/19
Date

th respect to the referenced matter, please see the attached.

Thank you.

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Ana Moco| Legal Assistant
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street | Westfield, NJ 07090
P) 908.481.5000 Ext. 5008 | (F) 908.264.2045
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www.sciarrillolaw.com

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297-19

OAL Dkt. No. EDU 11812-19
Agency Dkt. No. 166-7/19

New Jersey Commissioner of Education

Final Decision

Bonnie Huston,

Petitioner,

v.

Board of Education of the Borough of Saddle River, Bergen County,
Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/06/19
Date of Mailing: 11/07/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11812-19
AGENCY DKT. NO. 166-7/19

BONNIE HUSTON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,
Respondents.

Alfred Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

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

Record Closed: September 24, 2019 Decided: October 2, 2019

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

On August 23, 2019, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

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

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

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

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

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

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

10/02/19
DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

id

Saddle River School District - Wandell School
97 East Allendale Road, Saddle River, NJ 07458
201.327.0727 *www.wandellschool.org* *Fax: 201.236.8166*

Dr. Gina Cinotti
Superintendent/ Principal

Ms. Stephanie Kuchar
Business Administrator/Board Secretary

The following is a certified copy of the Saddle River Board of Education resolution at its meeting on September 17, 2019:

HR-19200901: Employee Agreement
Be it resolved, that upon the recommendation of the Superintendent, the Saddle River Board of Education approves the separation agreement with Employee #28 and further authorize the Board President to execute the agreement on its behalf.

Motion: TV *Second: PE* *Discussion: none*
Roll Call Vote EK: Y *PE: Y* *KH: Y* *JP: A* *TV: Y*
Motion Passed 4-0

I hereby certify that this is a true and accurate copy of the minutes of the Special Meeting Session of the Saddle River Board of Education held on September 17, 2019.

Stephanie Kuchar, Business Administrator /Board Secretary
September 17, 2019

SEPARATION OF EMPLOYMENT AGREEMENT AND RELEASE

This Separation of Employment Agreement and Release (hereinafter the "Agreement") is made and entered this ___ day of September, 2019 by and between **BONNIE HUSTON** (hereinafter "Huston"), the **SADDLE RIVER EDUCATION ASSOCIATION** (hereinafter the "Union") and the **SADDLE RIVER BOARD OF EDUCATION** (hereinafter the "Board") (collectively the "Parties"), according to the following:

WITNESSETH:

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

WHEREAS, HUSTON is currently employed as a Teacher with the Saddle River Board of Education and is a member of the Union; and

WHEREAS, HUSTON has acquired tenure in her position as a Teacher pursuant to N.J.S.A. 18A:28-5; and

WHEREAS, on April 24, 2019, the Board passed a resolution, effective the 2019-2020 school year, which reduced HUSTON's employment for the 2019-2020 school year from seven-tenths (7/10) of full time to six-tenths (6/10) of full time as part of a Reduction in Force ("RIF"); and

WHEREAS, on June 12, 2019, the Board rescinded its April 24, 2019 resolution that reduced HUSTON'S position; and

WHEREAS, on or about July 12, 2019, HUSTON filed a Verified Petition of Appeal with the Commissioner of Education, assigned Agency Docket No. 166-7/19, in which she disputed the Board's April 24, 2019 action; and

WHEREAS, the Board filed an Answer in response to HUSTON's Verified Petition of Appeal with the Commissioner of Education on or about August 13, 2019; and

WHEREAS, the Board, the Union and HUSTON have engaged in good faith discussions concerning HUSTON's separation from employment with the Board and have reached an Agreement that is in the best interests of the parties, which they wish to memorialize herein; and

WHEREAS, the Board, the Union and HUSTON wish to fully and finally resolve all the issues between them respecting her employment, of any kind whatsoever, whether known or unknown, which either Party may have against the other in this Agreement.

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

1. **SEPARATION FROM EMPLOYMENT**

HUSTON will be placed on sabbatical leave for the 2019-2020 school year, which shall begin on September 1, 2019, and continue through June 30, 2020. During her sabbatical for the 2019-2020 school year, the Board will provide HUSTON full time pay (1.0 of FTE) in accordance with the rates established in the applicable collective negotiations agreement for an individual holding an BA+30 degree on Step 18 of the salary guide for the 2019-2020 school year, including health insurance benefits.

HUSTON shall be placed on another sabbatical, beginning September 1, 2020 and ending on January 15, 2021, during which time the Board shall provide HUSTON with prorated pay at the rate of one (1/2), or five-tenths (0.5 of FTE), at the rate of pay afforded for an individual holding an BA+30 degree on Step 18 of the salary guide for the 2019-2020 school year in accordance with the rates established in the applicable collective negotiations agreement until January 15, 2019. HUSTON will not be entitled to Board-provided health benefits between the period of September 1, 2020 to January 15, 2021.

The Board will make appropriate pension contributions and take ordinary withholdings for taxes, social security, disability and other withholdings as required by law from her periodic salary payments. Sabbatical payments, in accordance with Paragraph 1 herein, shall be made in accordance with the collective bargaining agreement between the Board and the Union for the pay periods applicable to this Agreement. HUSTON is not entitled to any additional payment or benefits outside of those enumerated in this Agreement.

2. **HUSTON'S IRREVOCABLE RETIREMENT FROM THE BOARD**

Immediately following HUSTON'S sabbatical leave, effective January 15, 2021, HUSTON will formally and irrevocably retire from her employment with the Board. Effective January 15, 2021, or HUSTON's commencement of pension eligible alternative public employment in the State of New Jersey, whichever occurs first, HUSTON shall irrevocably retire from employment as a Teacher with the Saddle River Board of Education. Nothing herein shall require Huston to file for retirement with the New Jersey Division of Pensions, Teachers Pension and Annuity Fund.

Contemporaneous with her execution of this Agreement, HUSTON shall execute

her irrevocable letter of retirement from employment with the Board effective January 15, 2021, which letter is attached hereto as Exhibit A. Said letter shall be held in escrow by the Board's counsel until January 15, 2021, whereupon it shall be surrendered to the Board. However, should HUSTON accept alternative, pension eligible, public employment in the State of New Jersey prior to January 15, 2021, she shall notify the Board within seven (7) business days and provide the Board with an irrevocable letter of resignation effective on the date of her commencement of such employment. A sample of said letter is attached hereto as Exhibit B. Said letter, when presented to the Board shall void her letter of resignation effective January 15, 2021.

In the event HUSTON begins alternative, pension eligible, public employment in the State of New Jersey while she is on sabbatical, the Board will no longer be obligated to pay the salary or health benefits coverage provided herein, effective on the date of said employment. Nothing herein shall prohibit HUSTON from obtaining any other non-pension eligible or private employment during the sabbatical period or reduce the Board's salary obligation hereunder.

3. **HEALTH BENEFITS**

As set forth and limited by Paragraph 1 of this Agreement, the Board shall provide HUSTON with district-provided health and medical benefits between September 1, 2019 through June 30, 2020. If the Board is enrolled in the New Jersey State Health Benefits Program (NJSHBP), said health benefits shall continue through August 31, 2020 as provided by the plan. In no event shall HUSTON be entitled to Board-provided health benefits beyond June 30, 2020 unless said benefits are automatically provided by the NJSHBP. If not provided through the NJSHBP through August 31, 2020, effective June

30, 2020, HUSTON shall be removed from the Board's health benefits. She retains the right to pursue the continuation of her health benefits through the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") and will be notified as to her eligibility for COBRA by the insurance carrier and/or the New Jersey Division of Pensions and Benefits. HUSTON shall have the same COBRA rights as any other former employee and shall be solely responsible for all costs associated with said COBRA coverage. In the event HUSTON secures alternative public employment that offers health benefits prior to June 30, 2020, HUSTON will be removed from the Board's health benefits effective upon her commencement of service with the alternative public employment.

4. **NO FURTHER COMPENSATION/BENEFITS**

Other than as stated herein, HUSTON waives any right she may have to any other compensation emoluments of employment from the Board that otherwise may have been due to her as a result of any collective bargaining agreement, contract or Board Policy.

5. **NO ADMISSIONS**

The Parties agree that the entering of this Agreement and/or retirement of HUSTON does not constitute an admission of any liability, wrongdoing and/or improper conduct on the part of any party. Further, this Agreement shall not be construed as an admission by any Party or representative, of any violation of any federal or state law, administrative code, ordinance, regulation, or violation of any public policy.

6. **WITHDRAWAL OF COMMISSIONER OF EDUCATION APPEAL**

In exchange for the covenants contained herein, HUSTON agrees to enter into a Stipulation of Dismissal, with Prejudice, of the Verified Petition of Appeal filed with the Commissioner of Education, assigned Agency Docket No. 166-7/19.

7. **COMPLETE RELEASE AND MUTUAL COVENANT NOT TO SUE BY HUSTON**

In consideration for the payments, benefits, and other promises set forth in this Agreement, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "HUSTON") and the employer, its successors and assignees, (The Parties), voluntarily enter into this Agreement and certify that they have not been threatened or coerced into signing this Agreement, upon the terms which follow:

a. HUSTON hereby release, waive and discharge each other, their affiliated departments, and its officers, trustees, agents, employees, representatives and the Association their successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that HUSTON had, now has, or may in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement including, but not limited to, the employment of HUSTON. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, 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 attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under federal law, such as Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq. and equivalent State law, such as the New Jersey Law Against Discrimination (NJLAD), 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 the New Jersey Conscientious Employee Protection Act ("CEPA") (N.J.S.A. 34:19-1 et seq.), which, among other things, prohibits retaliation based on an employee engaging in protected conduct.

iii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iv. Any claim, cause of action, demand or complaint arising out of or under the federal Worker Adjustment and Retraining Notification ("WARN") Act (29 U.S.C. § 2101 et seq.), and/or equivalent State law, such as the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act (commonly referred to as the NJ WARN) (N.J.S.A.

34:21-2 et seq.), which, among other things, requires employers to provide employees with advance notice of business closing or mass layoff from the employer.

v. 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.

vi. 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.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA), and equivalent State law, 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.

viii. 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.

ix. 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.

x. 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. HUSTON represents that, with the exception of the Commissioner of Education Appeal addressed in Paragraph 6, there are no pending lawsuits, charges or other claims of any nature whatsoever by her against the Saddle River Board of Education and/or the Releasees in any state or federal court, agency or other administrative body on account of or arising out of HUSTON's employment with the Saddle River Board of Education. HUSTON understands that nothing in this Agreement shall be construed to prohibit her from filing a charge with, or participating in any investigation or proceeding conducted by, the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC), or with any other Federal, State or local court or agency. Notwithstanding the foregoing, HUSTON hereby waives any and all rights to recover monetary damages in any charge, complaint, or lawsuit filed by her or by anyone else on her behalf based on events occurring which arose or existed on or before the date on which this Agreement is fully executed. HUSTON specifically does not release any rights to enforce this Agreement, any claims based on events,

acts, or failures to act that occur after the date of this Agreement, or any claims that she is precluded from releasing or waiving as a matter of law.

8. **COMPLETE RELEASE AND COVENANT NOT TO SUE BY THE BOARD**

In consideration for the payments, benefits, and other promises set forth in this Agreement, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "HUSTON") and the employer, its successors and assignees, (The Parties), voluntarily enter into this Agreement and certify that they have not been threatened or coerced into signing this Agreement, upon the terms which follow:

The Board, on behalf of itself, its affiliated departments, officers, trustees, agents, employees, successors and assignees hereby releases, waives and discharges HUSTON from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that the Board had, now has, or may in the future have against HUSTON on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement including, but not limited to, the employment of HUSTON. This Release includes, but is not limited to, any claim, demand, cause of action, obligation, administrative or legal action, claim for damages of any kind, 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 attorney's fees and costs arising from the above acts; provided, however, the Board specifically does not release any rights to enforce this Agreement,

any claims based on events, acts, or failures to act that occur after the date of this Agreement, or any claims it is precluded from waiving by operation of law.

a. The Board represents that there is no pending or contemplated legal or administrative actions against Huston or the Association as contemplate in subparagraph 7b., above.

9. **REFERENCE INQUIRIES**

The Board agrees, through its Administration, not to make any disparaging remarks regarding HUSTON in response to any future employment inquiries and will limit any statements made, either orally or in writing, to confirming the dates of HUSTON's employment with the District, the positions that HUSTON held, and that she is either on sabbatical or retired, depending on the date of the inquiry. The Board will not initiate any administrative proceeding against HUSTON nor contest any application by HUSTON for unemployment compensation, retirement or related benefits. The Board shall characterize HUSTON's separation from service as a sabbatical or retirement, depending on the date of the inquiry. Upon receipt of a questionnaire from a prospective new employer under N.J.S.A. 18A:6-7, the Board and its Administrators agree to truthfully respond to such questionnaire(s) indicating in the negative with respect to any allegations of abuse or misconduct as defined in said statute.

10. **NON-DISPARAGEMENT**

The Parties and their agents shall refrain from public negative comment regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit HUSTON or the Board and its agents' obligation to provide information consistent with this Agreement, in response to legitimate requests for

required information from: the Division of Pensions and Benefits; the Unemployment Compensation Board and/or their agents or other governmental agency. The details of this Agreement shall remain confidential to the greatest extent permitted by law.

11. **SURRENDER OF PROPERTY**

HUSTON shall surrender all Board property in her possession and be able to retrieve any personal property located within district property upon the execution of this agreement on reasonable notice to each other. HUSTON will be permitted to recover her personal files on her school computer by placing them on a flash drive. An appointment will be made with the principal to arrange this action. HUSTON will not download or copy any proprietary or confidential information on said computer.

12. **VIOLATION OF AGREEMENT**

If a court of competent jurisdiction finds, by Order, that a party intentionally violated any term or terms of this Separation Agreement and Release, the violating party agrees to pay all costs and expenses of enforcement, including reasonable attorney's fees.

13. **CONSULTATION WITH ATTORNEY**

HUSTON and the Board have consulted with their attorneys with respect to this Agreement and have reviewed all of the terms and conditions of this Agreement prior to executing this Agreement. Further, the parties acknowledge that they are satisfied with the consultation and advice of their Attorneys.

14. ATTESTATION

The parties represent and warrant that they have carefully read each and every provision of this Agreement and fully understand all of its terms and conditions. The parties represent and warrant that they enter into this Agreement freely and voluntarily, without any pressure or coercion from any person or entity including, but not limited to, the each other.

15. REVOCATION

HUSTON may revoke this Agreement within seven calendar (7) days after the date this Agreement is signed by HUSTON. This revocation must take the form of written notice by HUSTON, which specifically indicates that she intends to revoke this Agreement. This revocation must be provided to the Board, c/o Matthew J. Giacobbe, Esq., Cleary Giacobbe Alfieri Jacobs, LLC, 169 Ramapo Valley Road, Upper Level - Suite 105, Oakland, New Jersey 07436. This seven (7) day revocation period may not be waived. In the event HUSTON revokes her acceptance of this Agreement, any and all payments to HUSTON from the Board made pursuant to this Agreement must be returned with the written letter of revocation.

16. REASONABLE PERIOD OF TIME

HUSTON agrees that she has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but that she has waived this twenty-one (21) day period by signing in the space provided at the end of this Agreement (See Exhibit "C" attached hereto).

17. PUBLIC INTEREST

This proposed settlement will serve the public interest because, as a result, the costs and time associated with litigation will not be necessary.

18. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns.

19. BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

20. ASSENT TO TERMS

Both HUSTON and the Board hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and have consulted with legal counsel of their choice in advance of execution. (see 14)

21. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the Parties with respect to the subject matters herein, and supersedes and integrates all prior representations, negotiations, discussions, understandings and agreements, whether oral or written with respect to this subject matter. There is no agreement on the part of any party to do anything other than what is expressly stated in this Agreement. It is understood between and among all Parties hereto that the terms of this Agreement shall not have a precedential effect or constitute binding precedent. This Agreement shall not be amended, changed or modified except in a writing signed by all Parties. Each party acknowledges that neither the other party, nor any agent or attorney of the other party,

has made any promise, representation or warranty, express or implied, not contained in this Agreement, to induce the other party to execute this Agreement.

22. 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, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement. The economic terms of this agreement (paragraphs 1 and 3), however, are of the essence of this agreement, in the absence of which, this agreement shall not be enforceable.

23. MODIFICATIONS:

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

24. GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

25. VENUE

Any controversies or disagreements arising out of, or relating to, this Agreement or the breach thereof, shall be resolved in the in the Law or Chancery Divisions of the Superior Court of New Jersey with venue in Bergen County or the United States District Court with venue in Newark, New Jersey.

26. **PRECATORY PHRASES**

The precatory phrases ("whereas clauses") are not mere recitals but are specifically agreed to by the Parties and are incorporated herein by reference.

27. **EXECUTION IN COUNTERPARTS & FACSIMILE SIGNATURES:**

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

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

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on the date that appears below:

Bonnie E. Huston
BONNIE HUSTON

9/11/19
Date

Maryann Valenzi
PRESIDENT
SADDLE RIVER EDUCATION ASSOCIATION

9/18/19
Date

Gina Cinotti
GINA CINOTTI, SUPERINTENDENT
SADDLE RIVER BOARD OF EDUCATION

9/18/19
Date

EXHIBIT A

BONNIE HUSTON
21 Stone Ledge Road
Upper Saddle River, NJ 07458-1524

September 6, 2019

GINA CINOTTI, SUPERINTENDENT
SADDLE RIVER BOARD OF EDUCATION

Dear Ms. Cinotti:

Effective January 15, 2021, I am resigning from my employment with the Saddle River Board of Education as a Teacher. I understand that this resignation is not revocable but is subject to compliance with the Separation of Employment and Release Agreement entered simultaneously herewith.

Very truly yours,

Bonnie E. Huston
BONNIE HUSTON

EXHIBIT B

BONNIE HUSTON
21 Stone Ledge Road
Upper Saddle River, NJ 07458-1524

, 2020

GINA CINOTTI, SUPERINTENDENT
SADDLE RIVER BOARD OF EDUCATION

Dear Ms. Cinotti:

Effective _____, I am resigning from my employment with the Saddle River Board of Education as a Teacher. I understand that this resignation is not revocable but is subject to compliance with the Separation of Employment and Release Agreement entered simultaneously herewith.

Very truly yours,

Bonnie C. Huston
BONNIE HUSTON

EXHIBIT C

WAIVER

By signing below, the undersigned hereby irevocably elects to waive the 21-day period referred to in Paragraph 16 of this Agreement.

Date: 9/11/19

Bonnie C. Huston
BONNIE HUSTON

303-19

New Jersey Commissioner of Education

Final Decision

J.S., on behalf of minor child, S.S.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner filed a pro se petition challenging the determination of the respondent Board that his child, S.S., was ineligible to receive a free public education in respondent's school district during a portion of the 2017-2018 school year. Petitioner asserted that he was domiciled in Elizabeth for 15 years but was forced to relocate to Roselle as of January 17, 2018 due to his employment situation. Petitioner returned to Elizabeth in mid-May 2018. The Board contended that petitioner and his child relocated from their Elizabeth home on or about January 3, 2018 through the end of the school year on June 25, 2018. The Board filed a counterclaim for tuition for this period of time.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1(a), public schools are free to any person over five and under twenty five years of age who is domiciled within the school district; in this case, petitioner relocated from Elizabeth for financial reasons and began residing in Roselle as of January 17, 2018, but returned to Elizabeth as of May 20, 2018; as petitioner was not domiciled in Elizabeth during this time period, S.S. was not entitled to attend school in the district, and tuition is owed for the period of ineligible attendance. The ALJ concluded, however, that the petitioner could only be assessed tuition for the period after the date of the Board's final notice of ineligibility, which in this case was after February 21, 2018. Accordingly, the ALJ ordered petitioner to pay tuition for a modified period of ineligibility, from February 22, 2018 to May 20, 2018, in the amount of $4,477.20, representing 56 school days at a daily tuition rate of $79.95.

Upon review, the Commissioner concurred with the ALJ that petitioner failed to sustain his burden of establishing that he was domiciled in Elizabeth from January 17, 2018 to May 20, 2018. However, the Commissioner determined that, pursuant to *N.J.A.C.* 6A:22-6.2, the Board is entitled to tuition reimbursement for the full period of time that S.S. was ineligible to attend Elizabeth schools. Accordingly, petitioner was directed to reimburse the Board in the amount of $6,236.10 for tuition costs for the time period from January 17 through May 20, 2018. The Initial Decision of the OAL, as modified herein, was adopted as the final decision in this matter. The petition was dismissed.

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

November 18, 2019

OAL Dkt. No. EDU 04500-18
Agency Dkt. No. 60-3/18

New Jersey Commissioner of Education

Final Decision

J.S., on behalf of minor child, S.S.,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

In this matter, petitioner is challenging the Board's determination that he did not reside in Elizabeth from January 3, 2018 to the end of the 2017-18 school year, and that the minor child was therefore ineligible to attend school in the district during that time. The Administrative Law Judge (ALJ) found that petitioner left Elizabeth and began residing in Roselle as of January 17, 2018, but returned to Elizabeth as of May 20, 2018. However, the ALJ found that petitioner should not be assessed tuition until after February 21, 2019, the date on which the Board's Notice of Final Ineligibility was sent. Accordingly, the ALJ ordered tuition reimbursement in the amount of $4,477.20, representing 56 school days from February 22, 2018 to May 20, 2018, at a daily tuition rate of $79.95.

[1] The Commissioner was not provided with a transcript of the June 14, 2019 hearing at the OAL.

Upon review, the Commissioner agrees with the ALJ that petitioner failed to sustain his burden of establishing that he was a domiciliary of Elizabeth from January 17, 2018 to May 20, 2018, and that the minor child was, therefore, not entitled to a free public education in the District's schools during that time. Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Elizabeth. However, the Commissioner notes that pursuant to *N.J.A.C.* 6A:22-6.2, the Commissioner may only assess tuition for "up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal." Therefore, as the ALJ found that petitioner was no longer a domiciliary of Elizabeth as of January 17, 2018, the Commissioner finds no reason to limit the Board's assessment of tuition to the date following the Notice of Final Ineligibility. The Board is entitled to tuition reimbursement in the amount of $6,236.10 ($79.95 per day for 78 days) for the time period from January 17, 2018 to May 20, 2018, during which time petitioner's minor child was ineligible to attend school in Elizabeth.

Accordingly, the Initial Decision of the OAL is adopted – as modified herein – as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $6,236.10 for tuition costs incurred during the period in which S.S. was ineligible to attend school in Elizabeth. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 11/18/19
Date of Mailing: 11/19/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. EDU 04500-18
AGENCY REF. NO. 60-3/18

J.S. o/b/o MINOR CHILD, S.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondents.

J.S. on behalf of minor child S.S., petitioner pro se

Christina M. DiPalo, Esq., for respondent (Lacorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: July 15, 2019 Decided: October 7, 2019

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.S., on behalf of minor child S.S., (petitioner or J.S.) appeals the residency determination and tuition due associated with it, of the respondent, Board of Education of the Township of Elizabeth, Union County (respondent or BOE).

Petitioner filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, which transmitted this matter to the Office of Administrative Law (OAL), where it was filed on March 29, 2018 as a contested case, pursuant to N.J.A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A hearing was held on June 14, 2019, and the record left open for post hearing submissions until July 15, 2019 when the record closed. An order of extension was entered to extend the time for filing the initial decision in this matter.

FACTUAL DISCUSSION AND FINDINGS

The BOE charged that at some point in the 2017-2018 school year, but no later than January 3, 2018, petitioner, J.S., S.S. a minor child, and their family changed their residency from the City of Elizabeth to Roselle. The BOE submitted essentially uncontested proofs that at some point in the 2017-2018 school year, J.S. and his family, including his child, S.S., moved out of their home in Elizabeth and relocated to a home in Roselle owned by S.S.'s mother, C.M. The school seeks the assessment for tuition for S.S.'s enrollment in Elizabeth schools from the date January 3, 2018 when a Notice of Initial Determination of Eligibility (R-2) was mailed to them until the end of the school year, June 25, 2018.

Investigator David Salnier testified that in December 2017 and January 2018, he conducted surveillance of a house in Roselle which mortgage and deed data listed it as being owned by C.M., the mother of S.S. He also checked voting information and found that C.M and J.S. were registered voters in Roselle. On two occasions he saw J.S., once with S.S., entering said residence in Roselle. On the second occasion, he confronted J.S., who admitted that while he owned a house in Elizabeth, he and his family live in Roselle. (R-1).

On or about January 3, 2018, the BOE notified J.S. of their initial determination that S.S. was ineligible for a free public education from Elizabeth schools as it determined S.S. did not reside in the district. The Initial notice advised J.S. of his right to appeal this determination to the District Board. J.S. appealed and on February 6, a

contested residency determination tool place at the BOE (R-3). On February 21, 2018, the BOE issued a Notice of Final Ineligibility. (R-4) This Notice advised J.S. of his right to file an appeal within 21 days to the Commissioner of Education. The Notice stated in pertinent part.

> [I]f no appeal is filed by the 21st day following the date of this notice [S.S.] will be removed from school , you will be asked to indicate where he will be educated...and we may assess your tuition at the rate of $64.55 for each day [S.S.] attended school during this period...
>
> [I]f you appeal to the Commissioner but abandon your appeal through withdrawal, failure to prosecute, or any means other than settlement with the district and/or [S.S.] is found not to be entitled to free education in the district you may be assessed for any period of [S.S.] ineligible attendance, including the initial 21 day filing period and the period during which the appeal was pending before the Commissioner.

J.S. testified that he lived in and owned a home where he and S.S. resided in Elizabeth for 15 years. Owing to his "employment situation," sometime during the 2017-2018 school year, he had to "let this property go" to relocate to a house in Roselle, which was owned by C.M., who is S.S.'s mother. (R-7) He also testified that owing to his family's continued financial problems, he and C.M. then lost the Roselle home in a distress sale, after which, and still during the same school year, they moved in with R.R. who owns a home in Elizabeth, in the same school district as the former J.S. home. R.R. testified that he is a close family friend and cousin to the J.S. family. He stated that, while he was not certain of the exact date, soon after the distress sale of C.M.'s home in Roselle, the J.S. family moved in with him. The distress sale had taken place in the "first or second week of May," during which time they relocated all the home furnishings to C.M.'s home. The family, including S.S., resided in Elizabeth with R.R. until J.S. found new employment and finally relocated he and his family to Florida in the summer of 2018. There was no evidence presented to refute any part of J.S.'s or R.R.'s testimony.

Considering the documentary and testimonial evidence presented in this matter, I **FIND** the following **FACTS:**

1. At some point during the 2017-2018 school year, J.S. and S.S. were forced to leave their residence in Elizabeth and relocate to a residence in Roselle, which was owned by S.S.'s mother.

2. Since J.S. admitted that at least as of January 17, 2018, he and S.S. were living in Roselle, and by that time J.S. was a registered voter in Roselle, the family relocated to Roselle at least by that date.

3. During the same school year, the J.S. family lost the house in Roselle and relocated back to Elizabeth in mid-May 2018.

4. In the Summer of 2018, J.S and his family became permanently domiciled in Florida.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom.; Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

The domicile of an unemancipated child is that of his parent, custodian or guardian. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001); 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).

A student may attend school in a district in which he is not domiciled, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2. A superintendent or administrative principal may also have a non-domiciled student removed from that school, on application to the board of education. N.J.S.A. 18A:38-1(b)(2).

When, as here, a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal for the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner 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 section.

A student's "domicile" is where the student's parent or guardian has a permanent home in the school district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J 238, 250 (1955); In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

When a person arguably has more than one residence, there are factors to consider in determining his or her domicile: the physical characteristics of each place; the time spent and the things done in each place; the other persons found there; the person's mental attitude towards each place; and whether or not there was an intention, when absent, to return to that address. Mercadante v. City of Paterson, 111 N.J.

Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, supra.

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4, stating,

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;
>
> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.

> (b) A district board of education may accept forms of documentation not listed in (a) above and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

(Emphasis supplied)

N.J.A.C. 6A:22-6.3(b) provides that,

> Nothing in this chapter shall preclude an equitable determination by the district board of education or the Commissioner that tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district when the particular circumstances of a matter so warrant. In making the determination, the district board of education or Commissioner shall consider whether the ineligible attendance was due to a school district's error.

The BOE's Notice of Final Ineligibility states that the BOE may assess tuition after the Notice is sent, and that even if an appeal is filed, it may assess for "this period" i.e. "following the date of this notice..." in this case being, after February 21, 2018, "including the 21 day filing period" and during the pendency of the appeal to the Commissioner. Accordingly, any tuition reimbursement commences after the date of the Notice of Final Ineligibility, i.e. after February 21, 2018. There remains the question of how much of the remaining part of the 2017-2018, the family remained in Roselle, and therefore remained ineligible for free public education in Elizabeth.

Uncontroverted evidence showed that, owing to S.S.'s family's continued financial problems, after they relocated from their home in Elizabeth to C.M.'s house in Roselle, they had to leave the Roselle home owing to a distress sale and returned back

to Elizabeth. The Roselle sale took place in the "first or second week of May 2018" according to both J.S. and R.R. Thereafter, the J.S. family moved back to Elizabeth with R.R., a family friend and cousin, and remained there from mid-May until the family finally relocated to Florida in the summer of 2018. Although difficult to pinpoint the exact day that S.S. and his family began living with R.R., it is safe to conclude that they were completely moved in to R.R.'s house in Elizabeth within a week after the short sale in Roselle.

The Board claims, however, that there was "no proof submitted to the District or the Court regarding proof of residency with respect to the required forms, pursuant to N.J.A.C. 6A:22-3.4(a)." (Post hearing brief, page 2). However, N.J.A.C. 6A:22-3.4 (c) provides that "the district board of education shall consider the totality of information and documentation offered by an applicant and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented." (emphasis supplied). Here it would be arbitrary and capricious and contrary to the plain intent of N.J.A.C. 6A:22-3.4 (a) to simply ignore the credible "other evidence" of the J.S. family's relocation to R.R.'s Elizabeth home as provided by uncontroverted and credible testimony, simply because of the absence of correct "forms." Moreover, it was established that S.S. and the family resided with R.R., not because J.S. wanted S.S. to attend school there but because they were under continued financial distress which caused them all within one year to leave their home of longstanding in Elizabeth, to temporarily relocate to Roselle to a home J.S.'s wife owned, then to relocate back to Elizabeth to R.R's house after being forced out of Roselle by having to accept a short sale, and to eventually take up new permanent residency in Florida.

N.J.A.C. 6A:22-6.3(b) provides that, nothing precludes "an equitable determination by the district board of education or the Commissioner that tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district when the particular circumstances of a matter so warrant." J.S.'s move to Roselle was precipitated by the financial loss of the family residence of 15 years in Elizabeth. J.S.'s and S.S.'s residency in Roselle, even if it established a domicile was not precisely settled, as they soon lost the

Roselle house as well. Based on their precarious financial circumstances of S.S. and the loss of one home in Elizabeth, and then, after relocating to Roselle, losing that home, J.S. and S.S. were living an almost nomadic like existence until J.S. found new employment and they became domiciled finally in Florida. It is surely equitable that given this family's "particular circumstances" that year, that tuition should not be assessed from the time J.S. and S.S. relocated back to Elizabeth in R.R.'s house from mid-May to the end of the school year.

I do however, agree with the Board that their administrative error in the Final Notice of Ineligibility which stated that J.S. would be assessed tuition for S.S. at the rate of $64.55 (the kindergarten student's rate) per school day, rather than the first to fifth grader rate of $79.95 per school day does not warrant the assessment of the tuition during the period of ineligibility at the lower rate. The notice itself referred to the amount tuition that could be assessed being an "estimated" amount. Further, although N.J.A.C. 6A:22-6.3(b) provides that, a "district board of education or Commissioner shall consider whether the ineligible attendance was due to a school district's error," it would be inequitable for the petitioner to receive such a windfall for a mere technical error.

Accordingly, I **CONCLUDE** that the period of ineligibility for which J.S. may be assessed tuition for S.S. while S.S. resided in Roselle rather than in Elizabeth while S.S. attended school in Elizabeth was February 22, 2018, the day after the Notice of Final Ineligibility was sent to J.S., to May 20, 2018, when J.S. and S.S. had relocated back to Elizabeth. The school calendar (R-5) shows there were 56 school days during that time. At the rate of $79.95 a day, the BOE is entitled to an assessment of $4477.20 for tuition reimbursement during the aforesaid period.

ORDER

Based upon the foregoing it is **ORDERED** that the respondent's decision is **MODIFIED,** and that the petitioner pay respondent tuition in the amount of $4,477.20

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 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 08625-500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 7, 2019

DATE

ERNEST M. BONGIOVANNI

Date Received at Agency: 10/7/19

Date Mailed to Parties: 10/9/19

id

APPENDIX

LIST OF WITNESSES

For Petitioners

J.S.

R.R.

For Respondent

David Saulnier, Investigator, District's legal Department.

LIST OF EXHIBITS IN EVIDENCE

For Petitioners:

None

For Respondent

R-1 Investigation Report, dated January 15, 2018

R-2 Notice of Initial Determination of Ineligibility, dated January 3, 2018

R-3 Result of Hearing at District, dated February 5, 2018

R-4 Notice of Final Ineligibility, dated February 21, 2018

R-5 Budget Worksheet -Tuition rates for out of district students, 2017/2018

R-6 Elizabeth Public Schools Calendar four 2017-2018

R-7 Pro Se Residency Appeal, dated March 12, 2018

304-19

OAL Dkt. No. EDU 13587-17
Agency Dkt. No. 167-7/17

New Jersey Commissioner of Education

Final Decision

Derrick Carrington,

Petitioner,

v.

Board of Education of the City of Pleasantville, Atlantic County,

Respondent.

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

Under the term #1 of the Agreement, petitioner was to receive a payment from the respondent Board on or before June 7, 2019. Further, under term #5 of the Agreement, petitioner was to voluntarily submit a letter of resignation from his employment with the Board, effective June 30, 2019. These dates have preceded the consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/18/19
Date of Mailing: 11/19/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-SETTLEMENT
OAL DKT. NO. EDU 13587-17
AGENCY DKT. NO. 167-7/17

DERRICK CARRINGTON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

Respondent.

Robert P. Merenich, Esq., for petitioner (Gemmel, Todd and Merenich, attorneys)

Benjamin B. Brenner, Esq., for respondent (The Carroll Law Firm, attorneys)

Record Closed: October 10, 2019 Decided: October 15, 2019

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on September 14, 2017, 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 agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), 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 on the attached document and the attached Board Resolution.

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** which by law is authorized to make a 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.

10/15/19
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 10-21-19

Date Mailed to Parties: 10-21-19

JSK/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on October 9, 2019 with Board Resolution

RECEIVED
2019 OCT -9 P 2:20
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DERRICK CARRINGTON Petitioner v. PLEASANTVILLE BOARD OF EDUCATION AND SCHOOL DISTRICT, Respondent	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY AGENCY REF. NO: 167-7/17 OAL DOCKET NO: EDU-13587-17 S

FULL AND FINAL RELEASE AND SETTLEMENT AGREEMENT

WHEREAS Petitioner Derrick Carrington (hereinafter "Petitioner"), an employee of the Pleasantville School District, filed a complaint with the Department of Education, State of New Jersey against the Pleasantville Board of Education (hereinafter "PBOE") in the above referenced matter;

WHEREAS, the parties have amicably resolved any and all disputes and acknowledge the extinguishment of any and all debts, obligations, rights and liabilities of any kind between the parties.

IN CONSIDERATION WHEREOF, the parties herein hereby duly execute this Full and Final Release and Settlement and comply with the terms and conditions set forth below.

IT IS AGREED:

1. Petitioner hereby acknowledges PBOE payment in the amount of $62,522.00. Assuming PBOE approval that payment shall be made on or before June 7, 2019.

2. Petitioner here acknowledges and agrees that PBOE's full payment is satisfactory and there are no other remaining debts and/or liability owed to Petitioner.

3. Petitioner hereby releases and forever discharges PBOE from any liability, claims, demands, damages, costs, expenses, causes of action, grievances, complaints, and/or contested petitions against the District relating to his voluntary resignation, and/or relating to any reductions in force, tenure rights, transfers and/or any other employment actions that have occurred during his employment with the PBOE prior to the date of this Agreement.

4. This Full and Final Release shall be valid and binding and insure for the benefit of the heirs, successors and assigns of both parties.

5. The parties herein hereby acknowledge, understanding and agree to the terms and conditions and executed this Full and Final Release foregoing and as follows:

   a. PBOE will pay Petitioner in the amount of $62,522.00

   b. Petitioner will voluntarily submit a letter of resignation from his employment with the Pleasantville School District effective June 30, 2019.

   c. Petitioner will withdraw his Complaint in the above referenced matter immediately upon signing this Agreement.

6. Petitioner acknowledges that he has had an opportunity to review this Agreement with his attorney, Mr. Robert Merenich, and is not under any duress in signing this Agreement.

7. The parties agree that this Agreement cannot be used as a precedent or binding past practice in any way.

Date: 5/7/2019

Dr. Clarence Alston, Superintendent

Date: 5/2/19

Derrick Carrington

Date: 5/2/19

Robert Merenich, Esq.
Counsel for Mr. Carrington

RECEIVED
2019 OCT -9 P 2:20
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Pleasantville Public Schools

Mr. Elisha Thompkins Jr.
Business Administrator/Board Secretary
E-mail: thompkins.elisha@pps-nj.us

Phone: (609) 383-6800 ext. 2551
Fax: (609) 677-8118

Home of the Greyhound

May 30, 2019

Motion to approve items after closed session

I Certify, that during the Pleasantville Board of Education Regular Board Action Meeting of May 7, 2019, the Pleasantville Board approved the following resolution for Derrick Carrington Settlement Agreement The resolution, motion, and vote are as follows:

Motion to approve Derrick Carrington Settlement Agreement Settlement Agreement and Release to pay $62,522.00 Agency Ref. No. 167-7/17 OAL Docket No: EDU-13587-17S

MOTION BY: Richard Norris SECOND BY: Jerome Page Yea: X No:

Roll Call:

Member	Yes	No	Abstain	Absent
James Barclay	√			
Hassan Callaway				√
Cassandra Clements				√
Bernice Couch	√			
Anny Melo				√
Sharnell Morgan				√
Richard Norris	√			
Jerome Page	√			
Carla Thomas	√			

FIVE YES; MOTION PASSED

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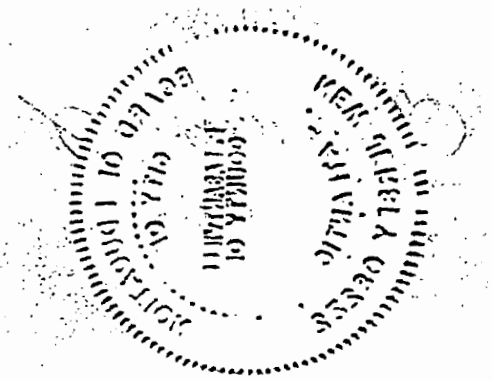
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Thank you,

Elisha Thompkins Jr.,
Business Administrator/Board Secretary
ET/mr



305-19

New Jersey Commissioner of Education

Final Decision

R.R., on behalf of minor child, W.R.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner filed a pro se petition in July 2019 challenging the determination of the respondent Board that her child, W.R., was not domiciled in the city of Elizabeth, and was therefore ineligible to receive a free public education in respondent's school district. The Board filed a counterclaim for tuition.

The ALJ found that petitioner advised during a telephone conference on September 12, 2019 that she was withdrawing the petition; in return, the respondent Board agreed to waive its counterclaim for tuition. An email, dated September 13, 2019, memorialized this telephone conference and requested that petitioner submit a withdrawal letter with copies to the Board and counsel. To date, no withdrawal letter has been submitted despite two additional requests for same. The ALJ concluded that the petitioner has unreasonably failed to comply with the ALJ's order to submit a withdrawal letter. Accordingly, the ALJ dismissed the case pursuant to *N.J.A.C.* 1:1-14.14(a)(1).

Upon review, the Commissioner concurred with the ALJ's findings and conclusion in this matter. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

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

November 18, 2019

305-19

New Jersey Commissioner of Education

Final Decision

R.R., on behalf of minor child, W.R.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner filed a pro se petition in July 2019 challenging the determination of the respondent Board that her child, W.R., was not domiciled in the city of Elizabeth, and was therefore ineligible to receive a free public education in respondent's school district. The Board filed a counterclaim for tuition.

The ALJ found that petitioner advised during a telephone conference on September 12, 2019 that she was withdrawing the petition; in return, the respondent Board agreed to waive its counterclaim for tuition. An email, dated September 13, 2019, memorialized this telephone conference and requested that petitioner submit a withdrawal letter with copies to the Board and counsel. To date, no withdrawal letter has been submitted despite two additional requests for same. The ALJ concluded that the petitioner has unreasonably failed to comply with the ALJ's order to submit a withdrawal letter. Accordingly, the ALJ dismissed the case pursuant to *N.J.A.C.* 1:1-14.14(a)(1).

Upon review, the Commissioner concurred with the ALJ's findings and conclusion in this matter. Accordingly, the Initial Decision of the OAL was adopted as the final decision and the petition was dismissed.

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

November 18, 2019

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 10711-19
AGENCY DKT. NO. 174-7/19

R.R. ON BEHALF OF MINOR CHILD W.R.,
Petitioner,
v.
BOARD OF EDUCATION FO THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

R.R., petitioner, pro se

Christina M. DiPalo, Esq. for respondent (LaCorte Bundy Varady & Kinsella)

Record Closed: September 12, 2019 Decided: October 17, 2019

BEFORE **NANCI G. STOKES**, ALJ

STATEMENT OF THE CASE

On September 12, 2019, petitioner agreed to withdraw her residency petition if respondent, Elizabeth Board of Education (Elizabeth), agreed to waive its counterclaim for for tuition. Elizabeth agreed and waived its counterclaim, but petitioner failed to withdraw

withdraw her petition; despite my instructions to do so. Should this case be dismissed? Yes. Yes. Under N.J.A.C. 1:1-14(c)(1), dismissal may be granted for the unreasonable failure to to comply with a judge's order.

PROCEDURAL HISTORY

On April 4, 2019, Elizabeth determined that petitioner's child, W.R., was not domiciled in the city of Elizabeth, New Jersey; therefore, W.R. was not eligible for public education in the school district.

On July 18, petitioner filed a residency appeal on behalf of her child.

On July 29, 2019, Elizabeth filed an Answer with the New Jersey State Department of Education.

On August 5, 2019, the Office of Controversies and Disputes within the New Jersey State Department of Education transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On August 21, 2019, I held a telephone prehearing conference and Elizabeth advised that it would be filing a Motion for Summary Judgement, which I received on September 10, 2019.

FINDINGS OF FACT

On September 12, 2019, during a telephone status conference, petitioner advised advised that a hearing was no longer needed because W.R. was enrolled in school in Elizabeth. Petitioner stated that she "did not care about last year," and that she would

submit a letter withdrawing her petition. In return, Elizabeth agreed to waive its counterclaim for tuition if the petition was dismissed.

On September 13, 2019, an email was sent to the parties memorializing the telephone conference and requested that petitioner submit a withdrawal letter with a copy to Elizabeth and Elizabeth's counsel at the addresses provided. (Exhibit 1). A memorandum restating these instructions was sent to petitioner by regular mail. (Exhibit 2). On September 18, 2019, I received a letter from Elizabeth withdrawing its counterclaim regarding tuition. (Exhibit 3).

Petitioner, however, failed to send her letter withdrawing her request for a hearing. On October 3, 2019, an email was sent to petitioner again requesting that she submit the withdrawal letter. To date, I have not received a withdrawal letter from petitioner.

Given these circumstances, petitioner has failed to act, and I **FIND** that she has abandoned her case.

CONCLUSIONS OF LAW

Under N.J.A.C. 1:1-14.14 (a)(1), a dismissal may be granted for the unreasonable failure to comply with judge's order. In this case, I instructed petitioner to submit a withdrawal letter, based upon Elizabeth's waiver of its counterclaim for tuition, but petitioner failed to do so. Meanwhile, petitioner had stated that she no longer cares about this case, and I found that petitioner constructively abandoned it. Given the circumstances, I conclude that petitioner has unreasonably failed to comply with my order and that this case be **DISMISSED**.

ORDER

Based on the foregoing, I **ORDER** that this case 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 is authorized by law to make a 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 under N.J.S.A. 52:14B-10.

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

October 17, 2019
DATE

NANCI G. STOKES, ALJ

Date Received at Agency: October 17, 2019

Date Mailed to Parties: October 18, 2019

ljb

EXHIBITS

1-September 13, 2019, E-mail to petitioner

2-September 13, 2019, Memorandum

3-October 3, 2019, E-mail to petitioner

307-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

November 22, 2019

Arnold M. Mellk, Esq.
Mellk O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

Alicia D'Anella, Esq.
Comegno Law Group
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Re: *Denise Patrylo-Murray v. Board of Education of the Hunterdon Central Regional High School District, Hunterdon County, OAL Dkt. No. EDU 10979-18, Agency Dkt. No. 139-6/18.*

Dear Counsel:

I have reviewed the papers filed in connection with petitioner's request for interlocutory review of Administrative Law Judge Jeffrey N. Rabin's order issued July 31, 2019, granting in part and denying in part respondent's motion to quash petitioner's discovery requests. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, petitioner's request for interlocutory review is hereby denied.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

LOR/JKH/BCM

cc: Jeffrey N. Rabin, Administrative Law Judge
Clerk, Office of Administrative Law

VIA E-MAIL ONLY

308-19LM

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

November 22, 2019

Alfred F. Maurice, Esq.
Springstead & Maurice
Court Plaza South, East Wing
21 Main Street, Suite 304
Hackensack, NJ 07601

Dennis McKeever, Esq.
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street
Westfield, NJ 07090

Re: *Jamie Truncellito v. Board of Education of the Township of Lyndhurst, Bergen County. Agency Dkt. No. 150-6/18, Commissioner Decision No. 271-19*

Dear Counsel,

I have reviewed the materials filed in connection with respondent Lyndhurst Board of Education's Motion for Reconsideration of the Commissioner's October 16, 2019 decision. Based upon the information submitted by counsel to respondent, demonstrating that the copy of the Initial Decision he received from the Office of Administrative Law indicates a mailing date of September 12, 2019, rather than the September 10, 2019 date indicated on copy transmitted to the Commissioner, this matter will be reopened for the Commissioner to consider the exceptions filed by respondent on September 25, 2019. The reply to exceptions filed by the petitioner, Jamie Truncellito, were considered in the Commissioner's October 16, 2019 decision and will be considered in the Commissioner's amended decision.

Accordingly, the respondent's Motion for Reconsideration is hereby granted.

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner

c: County Superintendent
State Law Library

309-19

OAL Dkt. No. EDU 1768-19
Agency Dkt. No. 294-12/18

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Washington, Gloucester County,

Petitioner,

v.

Ave Altersitz, Executive County Superintendent, Gloucester County, and P.S. on behalf of minor children, G.S. and C.D.,

Respondents.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/19

Date of Mailing: 11/26/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01768-19

AGENCY DKT. NO. 294-12/18

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

Petitioner,

v.

AVE ALTERSITZ, EXECUTIVE COUNTY SUPERINTENDENT AND P.S. ON BEHALF OF MINOR CHILDREN, G.S. AND C.D.,

Respondents.

Lauren E. Tedesco, Esq., for petitioner (Capehart and Scatchard, P.A., attorneys)

Jaclyn M. Frey, Deputy Attorney General, for respondents (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: October 29, 2019 Decided: October 30, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 1, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document. (J-1.) A certified copy of the minutes is attached as (J-2.)

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

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

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

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

October 30, 2019 — Judith Lieberman

DATE — **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 11-06-2019

Date Mailed to Parties: 10-31-19

/vj

APPENDIX

EXHIBIT

Jointly Submitted:

J-1 Settlement Agreement
J-2 Certified copy of the minutes

CAPEHART SCATCHARD
ATTORNEYS AT LAW

Lauren E. Tedesco
856.840.4938
ltedesco@capehart.com
Fax: 856.235.2786

October 16, 2019

Hon. Judith Lieberman, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: Washington Township Board of Education v. Ave' Altersitz, NJ Department of Education, P.S. o/b/o G.S. and C.D.
OAL Docket No. EDU 01768-2019 S
Agency Ref. No. 294-12/18
Our File No. 9240-31870

Dear Judge Lieberman:

As Your Honor will recall, I represent the Washington Township Board of Education ("Board") in the above-referenced matter. Enclosed please the fully executed Settlement Agreement. Also enclosed is a copy of the Board's minutes approving the Agreement.

Should Your Honor have any questions or need anything further, please do not hesitate to contact me at the office.

Respectfully,

CAPEHART & SCATCHARD, P.A.

Lauren E. Tedesco

LET/amc
Enc.
cc: Ms. Patricia Secoolish (w/enc.) *Via U.S. Mail*
Jaclyn M. Frey, Esq. (w/enc.) *Via U.S. Mail*
Janine M. Wechter (w/o enc.) *Via Email*

Capehart & Scatchard, P.A. 8000 Midlantic Drive, Ste. 300S P.O. Box 5016 Mount Laurel, New Jersey 08054-5016
856.234.6800 Main Fax 856.235.2786 WC Fax 856.439.3168 www.capehart.com

(J-1)

SETTLEMENT AGREEMENT BETWEEN THE WASHINGTON TOWNSHIP BOARD OF EDUCATION AND PATRICIA SECOOLISH ON BEHALF OF CROSS DHANSE AND GIAVANNA SECOOLISH

This Settlement Agreement ("Agreement") dated September ___, 2019 is entered into by and between the Washington Township Board of Education, a local public school board of education organized under Title 18A of the New Jersey Statutes with its principal offices at 206 East Holly Avenue, Sewell, New Jersey 08080 in Gloucester County ("Board") and Patricia Secoolish on behalf of minor children, Cross Dhanse and Giavanna Secoolish (herein collectively referred to as the "Parties"), to resolve and settle any and all outstanding issues involved between the Parties regarding the Executive County Superintendent's homeless determination with respect to Cross Dhanse and Giavanna Secoolish's enrollment in the Washington Township School District ("District").

WHEREAS, Patricia Secoolish ("Ms. Secoolish") is the parent of Cross Dhanse and Giavanna Secoolish;

WHEREAS, Cross Dhanse and Giavanna Secoolish are students currently enrolled in the District who currently reside with Patricia Secoolish within the District;

WHEREAS, during the Fall of 2018 enrollment the District sought to transfer Cross from Thomas Jefferson Elementary School ("TJES") to Wedgwood Elementary School ("Wedgwood ES") and Giavanna from Orchard Valley Middle School ("OVMS") to Chestnut Ridge Middle School ("CRMS") based upon their residency at the Washington Way Apartments;

WHEREAS, on or about August 28, 2018, Ms. Secoolish disagreed with the District's position that the students should be transferred on the basis of the McKinney Vento Homeless Education Assistance Act, 42 U.S.C.A. §11431 et seq. and N.J.A.C. 6A:17 et. seq. and provided support that the children should remain at TJES and OVMS as they were evicted from their prior home and resided at the Washington Way Apartments with a family member out of necessity;

WHEREAS, on or about August 29, 2018, the District notified Ms. Secoolish that the children could remain at TJES and OVMS based upon their homeless status under the law;

WHEREAS, on or about August 30, 2018, the District obtained a copy of the Secoolish's lease at the Washington Way Apartments which indicated that the lease was executed on May 23, 2017;

WHEREAS, on September 18, 2018, the District notified Ms. Secoolish that the District was disputing the prior determination of homelessness since the Secoolish family had been living at the Washington Way Apartments for approximately fifteen (15) months and therefore must attend their proper sending schools;

WHEREAS, on September 25, 2018, the District filed for a review of the documentation and determination of homeless with the Gloucester County Executive County Superintendent, Ave Altersitz;

WHEREAS, on November 16, 2018, Ms. Altersitz determined that Giavanna Secoolish and Cross Dhanse remain McKinney Vento eligible and must be allowed to continue in their schools of origin at the time of their initial McKinney Vento eligibility, OVMS and TJES;

WHEREAS, on November 29, 2018, the District filed a Petition of Appeal of the Homeless Determination of Ms. Altersitz, captioned as Washington Township Board of Education v. Ave Altersitz/Executive Co. Supt. and P.S. o/b/o minor children, G.S. and C.D., OAL Dkt. No. EDU 01768-2019S, Agency Ref No. 294-12/18;

WHEREAS, in order to resolve any and all disputes between the Parties without continuing with time-consuming and costly litigation, the Parties have agreed to a full and final settlement; and

NOW THEREFORE, the Parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. For the 2019-2020 school year, Giavanna Secoolish will remain at OVMS for the remainder of her eighth grade year, with transportation to OVMS to be provided by Ms. Secoolish;

2. For the 2019-2020 school year, Cross Dhanse will remain at TJES with transportation to TJES to be provided by Ms. Secoolish;

3. For years beyond the 2019-2020 school year, Ms. Secoolish agrees to provide transportation for Cross Dhanse for as long as Cross is attending school outside of the family's school sending zone. For example, if Cross continues to attend TJES and then attends middle school at OVMS, Ms. Secoolish agrees to provide transportation for Cross for the time he is attending school outside of the family's school sending zone.

4. Within fifteen (15) calendar days of full execution of this Agreement, the Board agrees to dismiss the Petition of Appeal captioned as Washington Township Board of Education v. Ave Altersitz/Executive Co. Supt. and P.S. o/b/o minor children, G.S. and C.D., OAL Dkt. No. EDU 01768-2019S, Agency Ref No. 294-12/18, with prejudice.

5. This Agreement resolves any and all issues regarding Cross Dhanse and Giavanna Secoolish's eligibility under McKinney Vento, their ability to remain at OVMS and TJES and the Executive County Superintendent's determination of homelessness dated November 16, 2018.

6. This Agreement does not waive the Board's ability to challenge the Secoolish's eligibility for enrollment within the Washington Township School District in accordance with the law, after the date of this Agreement.

7. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of litigation. It is understood that the execution of this Agreement does not constitute an admission by either party.

8. Each party shall be responsible for their own fees and costs.

9. This Agreement contains the entire Agreement and understanding between the Parties and constitutes a full and final Agreement on any and all issues.

10. This Agreement shall be governed by the laws of the State of New Jersey.

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

12. The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The Parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed this Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

13. Ms. Secoolish represents that she has sole authority to enter into this Agreement on behalf of her children, Giavanna Secoolish and Cross Dhanse.

14. Ms. Secoolish acknowledges that she has read and understands the terms of this Agreement, that she has had the opportunity to have the Agreement reviewed by counsel or with a representative of her choice, that she is satisfied with the advice of her respective counsel or representative, and that she is entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

15. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

16. This Agreement is binding upon the Parties and their respective heirs, assigns or successors in interest.

17. The Parties expressly reserve the right to enforce this Agreement in a court of competent jurisdiction.

18. This Agreement may only be amended in writing by way of a document signed by all Parties.

19. The Parties agree that this Agreement can be executed in counterparts and that each counterpart has the full effect and meaning as any other.

20. This Agreement is subject to approval by the Board during its next regularly scheduled meeting following the execution of this Agreement.

Patricia Secoolish – Parent of Cross Dhanse Date: 10/3/19

Patricia Secoolish – Parent of Giavanna Secoolish Date: 10/3/19

ON BEHALF OF THE WASHINGTON TOWNSHIP BOARD OF EDUCATION

Julie Kozempel, Board President Date: 10-14-19

Joseph Bollendorf, Superintendent Date: 10/15/19

(J-2)

This is certified to be a true and accurate copy of the minutes.

Janine Wechter

Janine M. Wechter, CPA
School Business Administrator/Board Secretary

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2019 OCT 29 A
STATE OF NEW
OFFICE OF

The following person spoke:

Marianne Muller, Pitman

MOTION

Moved by Mrs. Zachwoski, seconded by Dr. Garrison, to close to the public.

MOTION CARRIED.

W. COMMITTEE REPORTS

The committee chairs gave a synopsis of their current committee meeting.

X. WS OLD BUSINESS FROM THE BOARD - none.

Y. WS DISCUSSION ITEMS - none.

Z. ****WS ADMINISTRATIVE REQUESTS ****

AA. SUPERINTENDENT
Action: 1. HIB Report
Recommended Action: Approval to affirm the Superintendent's recommendation on the HIB incidents reported in the September 24, 2019 HIB Report to the Board pursuant to Policy 5512.

202730_WTH_09052019
202760_WTH_09092019
202731_BHM_09052019
202894_OVM_09162019

Action: 2. Resolution - School Violence Awareness Week
Recommended Action: Approval of Resolution recognizing the week of October 21 through October 25, 2019 as School Violence Awareness Week in all Washington Township Public Schools. Attachment AA.2

Action: 3. Settlement Agreement - P.S.
Recommended Action: Approval of the Settlement Agreement between the Board of Education and P.S.

MOTION

Moved by Mrs. Zachowski, seconded by Dr. Garrison, to approve Items 1-3 under Report of the Superintendent.

ROLL CALL

Yes: Mr. Esposito, Dr. Garrison, Miss Halpin, Mrs. Metz, Mrs. Murphy, Mrs. Orihel, Mrs. Zachowski, and Miss Kozempel.

MOTION CARRIED.

310-19

OAL Dkt. No. EDU 13085-19
Agency Dkt. No. 204-8/19

New Jersey Commissioner of Education

Final Decision

K.W. and J.W., on behalf of minor child, M.W.,

Petitioners,

v.

Board of Education of the Sandyston-Walpack Consolidated School District, Sussex County,

Respondent.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/19
Date of Mailing: 11/26/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13085-19

AGENCY DKT. NO. 204-8/19

K.W. AND J.W. ON BEHALF OF MINOR CHILD, M.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SANDYSTON-WALPACK CONSOLIDATED SCHOOL DISTRICT, SUSSEX COUNTY,

Respondent.

K.W. and J.W. on behalf of M.W., parents appearing pro se

Shifra Tarica, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 1, 2019 Decided: November 1, 2019

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 17, 2019 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof. A copy of the Settlement Agreement is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

November 1, 2019

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: November 12, 2019

Mailed to Parties: November 8, 2019
sej

METHFESSEL & WERBEL
A Professional Corporation

JOEL N. WERBEL>
JOHN METHFESSEL, JR.>
FREDRIC PAUL GALLIN*+^
STEPHEN R. KATZMAN#
WILLIAM S. BLOOM>*
ERIC L. HARRISON*+
MATTHEW A. WERBEL>
LORI BROWN STERNBACK*+
I. BLAKELEY JOHNSTONE,III+*
GINA M. STANZIALE>
PAUL J. ENDLER JR.>

Of Counsel
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(1964-1995)
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ED THORNTON>

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WILLIAM J. RADA+
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LEVI E. UPDYKE+^

* Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
+Member of NY & NJ Bar
^Member of PA & NJ Bar
>Member of NJ Bar only
#Member of NJ & LA. Bar
<Member of NJ & DC Bar
≥Member of NJ, PA & DC Bar
~Member of NY, NJ & DC Bar
=Retired from the practice of law

Please reply to New Jersey

October 21, 2019

VIA EMAIL: witfamily1020@gmail.com
Jonathan and Katelyn Witowski
3 Vansickle Road
Sandyston, NJ 07826

RE: **J.W. AND K.W. O/B/O M.W. VS. SANDYSTON WALPACK BOE**
Our File No. : 88152 STA
Claim No. : SPL002276
Agency Ref No. : 201-8/19
Docket No. : EDU 13085-19

Dear Mr. and Mrs. Witowski:

As you are aware, I represent the Sandyston-Walpack Board of Education ("Board" or "District") with respect to this matter. Please accept this correspondence memorializing the agreement between the parties.

Please sign below and return a copy to my attention.

The parents, individually and on behalf of M.W., and the District agree as follows:

1. Any reference to discipline related to the HIB matter of May 24, 2019 will be removed from M.W.'s records.
2. There will be no reference in M.W.'s school records to the alleged incident of May 24, 2019.
3. There will be no reference in M.W.'s school records to any HIB violation related to the May 24, 2019 incident.
4. In the event the parents authorize the District to release M.W.'s school records to a third party, for any reason, those school records will not include any reference to discipline or a HIB violation relating to the alleged incident of May 24, 2019.
5. This agreement resolves the issues raised in the parents' pending petition of appeal.

6. Except as required by law, the Parties agree to keep confidential and not disclose to any third party the terms and conditions of this agreement.
7. By entering into this agreement, neither party makes any admission of any wrongdoing.

Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

METHFESSEL & WERBEL, ESQS.

Shifra Tarica
tarica@methwerb.com
Ext. 205

STA:

We have read this correspondence and fully understand the terms set forth herein. This accurately reflects our understanding of the agreement with the Sandyston-Walpack Board of Education.

Jonathan Witowski, individually and o/b/o M.W. — Dated 10/28/2019

Katelyn Witowski, individually and o/b/o M.W. — Dated 10/28/19

cc: japryasz@sandystonwalpack.org
imachado@machadolawgroup.com

311-19

OAL Dkt. No. EDU 17029-18
Agency Dkt. No. 252-10/18

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of North Bergen, Hudson County,

Petitioner,

v.

Board of Education of the City of Clifton, Passaic County, Melissa Pearce, Interim Executive County Superintendent, Hudson County, Christopher Irving, Interim Executive County Superintendent, Passaic County.

Respondents.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/19

Date of Mailing: 11/26/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17029-18

AGENCY DOCKET NO. 252-10/18

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, MELISSA PEARCE, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, HUDSON COUNTY, CHRISTOPHER IRVING, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, PASSAIC COUNTY,

Respondents.

Jason M. Ryglicki, Esq. appearing on behalf of North Bergen Board of Education (Ryglicki & Gillman, P.C.)

Donald T. Okner, Esq., appearing on behalf of Clifton Board of Education (Dwyer Connell & Lisbona, LLP)

Geoffrey N. Stark, DAG on behalf of State of New Jersey Department of Education (Gubir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 30, 2019 Decided: October 25, 2019

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 29, 2018, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on January 9, 2019. Several conferences and hearings were scheduled and adjourned, the last being April 25 and June 11, 2019, which were adjourned due to the parties negotiating settlement. On September 30, 2019, the parties submitted the fully executed settlement agreement.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

10-25-19
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: October 29, 2019

Date Mailed to Parties: October 29, 2019

ljb

2019 OCT 25 A 9:30

WHEREAS a dispute arose between the Clifton Board of Education and the North Bergen Board of Education regarding tuition;

WHEREAS a settlement recommendation has been made;

BE IT RESOLVED THAT the settlement of the matter as set forth in the attached Settlement Agreement is hereby approved and adopted; and

BE IT FURTHER RESOLVED THAT the Board's officers and employees are authorized to take all actions necessary to effectuate this resolution.

DATED: June 12, 2019
JG/gcd

Clifton Settlement RESOLUTION 53

TRUSTEE	MOTION	SECOND	YES	NO	ABSENT	ABSTAIN
Rao					X	
Rabelo	X		X			
Bartoli					X	
Baselice			X			
Patel			X			
Rogers					X	
Rodriguez			X			
Shaw					X	
Jaafar			X			
Diaz		X	X			

RYGLICKI & GILLMAN, P.C.
Jason M. Ryglicki, Esq.
9060 Palisade Avenue, Suite C-6
North Bergen, New Jersey 07047
Attorney No. 032522011
Attorney for North Bergen Board of Education

North Bergen Board of Education, **Petitioner,** **v.** **Clifton Board of Education; Melissa Pearce, Interim Executive County Superintendent - Hudson County; Dr. Christopher Irving, Interim Executive County Superintendent – Passaic County;** **Respondents.**	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **AGENCY REF #** 252-10/18 **SETTLEMENT AGREEMENT**

WHEREAS, a student, S.C.W. was enrolled in the North Bergen School District ("North Bergen"); and

WHEREAS, S.C.W., disenrolled from North Bergen and enrolled in the Clifton School District ("Clifton") and was found by Clifton to be homeless; and,

WHEREAS a dispute arose between North Bergen and Clifton (collectively "the Parties") regarding the determination of homelessness, and responsibility to pay for S.C.W.'s Tuition; and

WHEREAS, the Clifton Board of Education asked the Interim Executive County Superintendent ("ECS") of Passaic for a determination as to the child's homelessness;

WHEREAS, on or about July 9, 2018, Melissa Pearce, Interim ECS of Passaic County and ECS of Hudson County, issued a decision finding that S.C.W. was homeless, and that North Bergen bore responsibility for the cost of the student's education;

WHEREAS, North Bergen challenged the ECS' decision by filing a Petition of Appeal with the Commissioner of Education on or about October 1, 2018.

WHEREAS, the Parties, without alleging or admitting deficiencies in their own determinations, or the determination of the ECS, are desirous of arriving at an amicable resolution regarding responsibility for S.C.W.'s tuition, and

WHEREAS, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties enter into this Agreement to outline their agreement, release claims, and express the full and complete terms of same; and

NOW THEREFORE, the parties having a desire to settle the above matter in an amicable way and in consideration of the following terms, hereby agree as follows:

1. For the 2017-2018 school year, North Bergen shall reimburse Clifton for one-half of the tuition rate for the Clifton Public School District for those school years. For the above school year, North Bergen agrees to reimburse Clifton the amount of Five Thousand Eight Hundred and Seventy ($5,870.70) Dollars and Seventy Cents, as calculated by the daily tuition rate of $65.23 x 90 days.

2. The payments reflected in paragraph 1 from North Bergen shall be the sole, final, and total remaining financial obligation toward the education of S.C.W. in the Clifton School District. All other costs, including, without limit, any additional tuition, extended school year costs, related services, evaluations or transportation costs shall be the sole responsibility of Clifton School District.

3. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a due process hearing under the special education laws. It is understood that the execution of this Agreement does not constitute an admission by North

Bergen or Clifton.

4. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

5. This Agreement shall be governed by the laws of the State of New Jersey.

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

7. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties, and the Parties agree to waive any claim against the other for any action which may have arisen from the alleged facts for which this action was instituted.

8. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

9. The Parties mutually waive any claims for attorney's fees with the understanding that each party shall be responsible for their own fees and costs, including physicians', experts', and attorneys' fees and costs, incurred in connection with this dispute, to the extent applicable. No party shall be deemed a "prevailing party."

10. The Parties agree and acknowledge that this Agreement is subject to approval by the North Bergen Board of Education during its next regularly scheduled meeting following the execution of this Agreement.

11. The Parties agree and acknowledge that this Agreement is subject to approval by

the Clifton Board of Education during its next regularly scheduled meeting following the execution of this Agreement.

12. Upon approval of both Boards of Education, the North Bergen Board of Education will withdraw their Petition of Appeal, and except for as otherwise provided for above, the obligations of the Parties to each other relating to the Education of S.C.W. shall be considered null and void.

12. The Parties agree that the terms of this Agreement shall remain strictly confidential to the fullest extent permitted by law, and they shall not share or communicate the existence of the settlement or the terms of same with any other individual, unless enforcement of same is sought by either party in a court of law.

13. This Agreement may only be amended in writing by way of a document signed by all Parties.

NORTH BERGEN BOARD OF EDUCATION

_____ Date: _____
Board President

_____ Date: _____
Business Administrator

CLIFTON BOARD OF EDUCATION

_____ Date: June 24, 2019
Board President

_____ Date: 6/24/19
Business Administrator

Education will withdraw its Petition of Appeal, and except as otherwise provided for above, the obligations of the Parties to each other relating to the education of S.C.W. shall be considered null and void.

12. The Parties agree that the terms of this Agreement shall remain strictly confidential to the fullest extent permitted by law, and they shall not share or communicate the existence of the settlement or the terms of same with any other individual, except as required by law, or unless enforcement of same is sought by either party in a court of law.

13. This Agreement may only be amended in writing by way of a document signed by all Parties and approved by the North Bergen Board of Education and the Clifton Board of Education.

NORTH BERGEN BOARD OF EDUCATION

_____ Date: 7-1-2019
Board President

_____ Date: 6-25-19
Business Administrator

CLIFTON BOARD OF EDUCATION

_____ Date: _____
Board President

_____ Date: _____
Business Administrator

312-19

OAL Dkt. No. EDU 17169-18
Agency Dkt. No. 268-11/18

New Jersey Commissioner of Education

Final Decision

Michael Marino,

Petitioner,

v.

Cumberland County Technical Education Center,
Cumberland County,

Respondent.

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

Term #14 of the Agreement addresses the effective date of same, stating that the Agreement shall become effective on the date that the Agreement has been fully executed by both parties. That date has preceded the consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/26/19
Date of Mailing: 11/26/19

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CORRECTED
INITIAL DECISION-SETTLEMENT
OAL DKT. NO. EDU 17169-18
AGENCY DKT. NO. 268-11/18

MICHAEL MARINO,
Petitioner,
v.
CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER, CUMBERLAND COUNTY,
Respondent.

Amy L. Gillette, Esq., for petitioner (Zeller and Wieliczko, L.L.P., attorneys)

John A. Carleton, Esq., for respondent (Grace, Marmero, and Associates, L.L.P., attorneys)

Record Closed: October 30, 2019 Decided: November 4, 2019

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on November 30, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), 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 on the attached document and the attached Board Resolution.

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

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

I hereby **FILE** 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,** which by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

November 4, 2019
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on October 29, 2019

Albert K. Marmero Δ
James K. Grace Δ □
Michael R. Burns Δ †

Grace Marmero & Associates, LLP
A New Jersey Limited Liability Partnership
ATTORNEYS AT LAW
44 Euclid Street
Woodbury, NJ 08096

Tel: (856) 848-6440
Fax: (856) 848-5002
www.gracemarmero.com

Δ Member NJ Bar
† Member PA Bar
□ Member NY Bar

October 28, 2019

RECEIVED
2019 OCT 29 P 12:52
OFFICE OF ADMINISTRATIVE LAW

Via Facsimile: (609) 441-3824
Honorable John S. Kennedy, ALJ
Office of Administrative Law
1601 Atlantic Avenue, Suite 601
Atlantic City, NJ 08401

Re: Michael Marino v. Cumberland County Technical Education Center
OAL Docket No.: EDU-17169-2018 S
Agency Ref. No.: 268-11/18

Dear Judge Kennedy:

As you are aware, this office represents the Respondent, Cumberland County Technical Education Center, with regard to the above referenced matter.

Enclosed please find a copy of the executed Settlement Agreement and General Release. Also enclosed please find the Resolution from the Cumberland County Board of Vocational Education authorizing the Settlement Agreement. We kindly ask that Your Honor issue an Initial Decision Settlement confirming Your Honor's review and approval of the settlement.

Thank you for Your Honor's time and attention to this matter.

Respectfully submitted,
GRACE, MARMERO & ASSOCIATES, LLP

/s/ John A. Carleton

John Carleton, Esquire

JAC/
cc: Matthew B. Wieliczko, Esq. (via email)
Amy L. Gillette, Esq. (via email)

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter "Agreement") is entered into by and between the Cumberland County Technical Education Center (hereinafter "CCTEC" or "Respondent") and Michael Marino (hereinafter "Marino" or Petitioner"). CCTEC and Marino are hereinafter collectively referred to as "the Parties" or individually as "a Party."

WHEREAS, Marino is a former employee of CCTEC who worked as an Automotive Technical Teacher; and

WHEREAS, Marino was laid off by virtue of a reduction in force ("RIF"); and

WHEREAS, Marino claimed tenure and seniority to Respondent's posted Automotive Technology Teacher position in June 2018 but another candidate was chosen; and

WHEREAS, Marino filed a Complaint with the Commissioner of Education bearing New Jersey Department of Education (hereinafter "NJDOE") docket number 268-11/18, which was transferred to the Office of Administrative Law (hereinafter "OAL") and assigned docket number EDU 18169-2018S, making certain claims against CCTEC related to his tenure and seniority to the Automotive Technology Teacher position; and

WHEREAS, the CCTEC maintains that it did nothing improper when it selected another candidate for the Automotive Technology Teacher position; and

WHEREAS, the Parties engaged in settlement discussions in an attempt to find a mutually agreeable resolution to their respective claims and disputes; and

WHEREAS, the Parties now wish to compromise and settle all claims and disputes among and between them including but not limited to the claims articulated in OAL docket number EDU 18169-2018S (also NJDOE docket number 268-11/18); and now

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, Marino and CCTEC agree that this matter shall be settled and compromised pursuant to the following terms and conditions:

1. **Payment**. CCTEC agrees to pay Marino the sum of One Hundred Thousand Dollars and 00/100 ($100,000.00) within sixty (60) days of the effective date of this Agreement (hereinafter "Settlement Payment"). With respect to the Settlement Payment:

a. The Parties agree that payment shall be rendered in a single check made payable to Michael Marino and mailed to Zeller & Wielickzo, LLP at 120 Haddontowne Court, Cherry Hill, New Jersey 08034.

b. Marino shall supply CCTEC with a typed IRS Form W-9 in conjunction with the Settlement Payment to be made by CCTEC. Marino shall be issued an IRS Form 1099 in connection with the payment.

c. Marino shall be solely liable for the payment of all applicable state, federal and local taxes, if any, with respect to any Settlement Payment described herein. Marino shall also be solely liable for the payment of any liens required by law that he may have against him. Marino agrees to indemnify and hold harmless CCTEC from any and all penalties and/or fees and/or interest relating to and/or arising from any state, federal or local taxes and/or any liens that may be required by law to be paid by Marino with respect to the Settlement Payment described herein.

d. Marino expressly understands and agrees that he shall not receive any other payment of any kind other than the Settlement Payment described in this Paragraph 1.

2. **Dismissal of Action**. Marino understands and expressly agrees that in conjunction with this settlement and the payment of the amounts referenced herein, in the manner described herein, the Complaint field at OAL docket number EDU 18169-2018S (also NJDOE docket number 268-11/18) shall be dismissed with prejudice. A stipulation of dismissal with prejudice as to all Respondents shall be prepared by Marino and shall be executed and provided to Matthew B. Wieliczko, Esquire to be held in escrow until payment of the sums described in Paragraph 1 is made to Marino.

3. **Unconditional Release**. In exchange for the Settlement Payment and other covenants contained in this Agreement, Marino does for himself and for his dependents, heirs, executives, administrators, predecessors, successors and assignees, agree to hereby irrevocably and unconditionally release and forever discharge the "Released Parties" (as defined *infra*) from any and all "Released Claims") (as defined *infra*) from the beginning of time up to and including the effective date of this Agreement.

a. "Released Parties" as used in this Agreement shall mean (1) the CCTEC Board of Education; (2) the Cumberland County Technical Education Center School District; (3) School Board's past, current and future employees; (4) the School Board's officers, directors, agents, attorneys, consultants, affiliates, and other representatives; (5) the School Board's insurers; (6) School Board vendors and entities under contract with the School Board; (7) the School Board's heirs, successors and assignees; (8) all of the aforementioned individuals in both their official and individual capacities; and (9) any other person or entity whom/which might be claimed to be jointly and/or severally liable with any of the aforementioned entities and/or individuals.

b. "Released Claims" as used in this Agreement shall mean any and all liabilities, claims, demands, causes of action, suits at law or in equity, covenants, charges, debts, dues, costs, any sums of money, attorneys' fees, accounts, bills, reckonings, extents, judgments, and rights, whether known or unknown, whether accrued or unaccrued, whether contingent on non-contingent, whether or not capable of proof, regardless of the theory of recovery, and whether common law or statutory in nature that occurred at any time in the past up to and including the effective date of this Agreement. Expressly excluded from this Release are claims for the breach of this Agreement including, but not limited to, the failure to pay any of the compensation set forth herein. "Released Claims" shall also include the following:

i. All claims relating to and/or arising from Marino's employment with CCTEC, including but not limited to the hiring decisions as to the Automotive Technology Teacher position;

ii. All claims of discrimination and/or harassment based on any one or combination of the following: sex, race, religion, color, creed, ancestry, national origin, disability, citizenship, age, marital status, military status, gender, sexual or affectional orientation, pregnancy, and any other protected class recognized by local, state and/or federal law;

iii. All claims pursuant to Title VII of the Civil Rights Act of 1964, the New Jersey Law Against Discrimination, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the National Labor Relations Act, the New Jersey Employer-Employee Relations Act, the Equal Pay Act, the Equal Pay Act of New Jersey, the Americans With Disabilities Act, the Occupational Safety and Health Act, the New Jersey Worker Health & Safety Law, the Fair Labor Standards Act, the Immigration Reform Control Act, the Family Medical Leave Act, the New Jersey Family Leave Act, The New Jersey Wage and Hour Law, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, ERISA, HIPAA, Title IX of the Education Amendments 1972, the Rehabilitation Act of 1973, Sections 1981 through 1988 of the Title 42 of the United States Code, any anti-retaliation provision of any of the foregoing laws, and all other similar local, state and federal laws;

iv. All claims for any alleged unpaid and/or withheld wages, severance, bonuses and/or other compensation of any kind;

v. All claims for alleged wrongful discharge and/or breach of any alleged employment contract, whether express or implied;

vi. All claims for alleged breach of any contract whatsoever, whether express or implied;

vii. All claims based on any alleged wrongful act, including but not limited to invasion of privacy, defamation, fraud, and infliction of emotional distress that occurred at any time in the past up to and including the effective date of this Agreement;

viii. All claims for any compensatory and/or punitive damages for any incident, act or omission that occurred at any time in the past up to and including the effective date of this Agreement; and

ix. All claims for any attorneys' fees, costs, disbursements and the like for any incident, act or omission that occurred in the past up to the date of execution of this Agreement.

c. The CCTEC does for itself and its executives, administrators, predecessors and assignees, agree to hereby irrevocably and unconditionally release and forever discharge Marino

from any and all Released Claims from the beginning of time up to and including the effective date of this Agreement.

d. The Parties agree that neither Party nor any person or entity acting on either Party's behalf will file any type of complaint, charge, claim and/or cause of action, or cause or permit any complaint, charge, claim and/or cause of action to be filed, against any Released Party or Marino involving any matter whatsoever which occurred at any time from the beginning of time up to and including the effective date of this Agreement, or involving any continuing effects or any acts or practices which may have arisen or occurred prior to the effective date of this Agreement. It is understood that if a class action is filed against the CCTEC that the mere filing of said class action does not place Marino in breach of this Agreement provided that Marino immediately takes reasonable steps with all due speed to remove himself from the class.

e. The Parties agree that if either Party brings any type of complaint, charge, claim and/or cause of action in any administrative and/or judicial forum against any Released Party for any Released Claim, the filing Party will be in breach of this Agreement. In such event, the filing Party will be liable for (1) paying all of the Released Party's attorneys' fees and costs associated with the defense of any such complaint, charge, claim and/or cause of action, and (2) paying all of the Released Party's attorneys' fees and costs associated with the enforcement of this Agreement.

4. **Attorney's and Mediator Fees.** Marino and CCTEC each agree to bear his/its own costs and attorney's fees, if any, which have been incurred in connection with the within matter and in connection with the negotiation and preparation of this Agreement. Marino and CCTEC each agree that no amounts other than the Settlement Payment described in Paragraph 1 shall be paid in connection with this matter, and Marino expressly agrees that he shall not receive any other payment and shall not seek to collect any attorneys' fees or costs. It is expressly agreed by Marino and CCTEC that neither Party will be considered a prevailing Party.

5. **Satisfaction of Claims and/or Liens.** It is further understood that as a condition of this settlement, all claims and/or liens, past, current and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Marino, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claims based subrogation or any other legal or equitable theory, Marino therefore agrees, upon prompt presentation of any such claims and/or liens, to indemnify and hold the School Board harmless against any judgment entered against the School Board based on such claims and/or liens, including the payment of any fines or charges incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Marino agrees to pay all costs and interest relative to any such lien.

6. **No Admission of Liability.** Marino and CCTEC agree that this Agreement represents a compromise to resolve a dispute. None of the terms of this Agreement shall be construed to be an admission of wrongdoing by either Party. It is expressly understood that

neither the execution of this Agreement, nor any other action taken by the School Board in conjunction with Marino's alleged claims, nor the Settlement Payment defined herein constitutes an admission by the School Board or any violation of any law, duty or obligation. Marino and CCTEC both agree that they have entered into this Agreement for reasons other than the merits of the case, including but not limited to the cost and uncertainty of litigation. It is also expressly understood that acceptance of this Agreement does not constitute any representation by or to Marino as to the merits of the underlying claims or lack thereof.

7. **Confidentiality**. Marino agrees that neither he nor his spouse, partner, immediate family members, dependents, heirs, executives, administrators, predecessors, successors, assignees, attorneys, or representatives will publish, publicize or disseminate, or cause to be published, publicized or disseminated, to the news, social media, communications media or any agent thereof, or to any online/internet based forum, or to any employees, friends or any other third party, any of the following: the amount of the Settlement Payment described herein, any offers or counteroffers leading to the Settlement Payment, and/or any of the terms or conditions of this Agreement. The only exception to this Paragraph 7 is that Marino may share the amount of the Settlement Payment with his spouse, attorney and/or tax preparer for tax purposes.

8. **Open Records**. Marino acknowledges that this Agreement may be subject to disclosure pursuant to New Jersey's Open Public Records Act and that CCTEC has no legal authority to negotiate or bargain away any of the statutory requirements of the Open Public Records Act. Marino acknowledges and agrees that whether or not the School Board is required to disclose this Agreement pursuant to the Open Public Records Act in no way diminishes Marino's obligations pursuant to Paragraph 7.

9. **No Reemployment/Future Employment**. Marino agrees that he shall not apply or be eligible for employment with CCTEC in any capacity. In the event that Marino should apply for employment with CCTEC, CCTEC shall disregard said application. It is expressly agreed by the Parties that CCTEC's disregard of any such employment application shall be pursuant to this Agreement and shall not be the result of any unlawful conduct of CCTEC. Marino agrees that he is waiving and relinquishing any and all tenure rights for which he had attained while employed at CCTEC for any and all positions including but not limited to Automotive Technology Teacher.

10. **Neutral Reference**. CCTEC agrees that, if contacted by any third party for a reference, CCTEC shall only provide Marino's dates of employment, positions held and salary information. Marino shall refer all third parties seeking reference checks to CCTEC's Superintendent.

11. **Consultation with Legal Counsel**. Both Parties acknowledge and agree that they had ample time and opportunity to review this Agreement with legal counsel of their own choosing and that each Party is satisfied with the advice received.

12. **Breach**. If either Party fails and/or refuses to comply with any obligation she/it has pursuant to this Agreement, regardless of the reason for said failure and/or refusal to comply,

that Party shall be in breach of this Agreement. In such event, the breaching Party will be liable for paying all of the attorneys' fees and costs associated with the enforcement of this Agreement.

13. **Knowing and Voluntary Execution of Agreement**. Marino acknowledges and agrees that he freely and voluntarily agreed to all of the terms and conditions contained in this Agreement after consulting with legal counsel of her choosing and after considering all of his options. Marino further acknowledges and agrees that he had ample time to read and understand the Agreement. Marino's agreement is not the result of any fraud, coercion or duress. Further, Marino warrants and represents that he is under no disability or impairment that would prevent him from understanding this Agreement or from knowingly and voluntarily entering into this Agreement.

14. **Effective Date**. This Agreement shall become effective on the date that the Agreement has been fully executed by both Marino and CCTEC. Marino acknowledges and agrees that this Agreement is subject to a vote of approval by the CCTEC Board of Education.

15. **Entire Agreement**. This Agreement represents the sole and entire agreement between the Parties. This Agreement supersedes all prior agreements, representations or understandings, oral or written, express or implied, with respect to the subject matter hereof.

16. **Modification and Waiver**. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement.

17. **Rules of Construction**. This Agreement shall be interpreted in accordance with the laws of the State of New Jersey and, to the extent applicable, the United States government. Marino acknowledges and agrees that in consideration of the fact that he has carefully read, reviewed and considered the terms of this Agreement and that he has had full opportunity to obtain legal advice from counsel of his choice in connection with this Agreement, the normal principle of contract construction whereby all ambiguities are to be construed against the drafter shall not be employed in this interpretation and construction of this Agreement.

18. **Choice of Venue**. The Parties agree that any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which parties hereby acknowledge and agree to be the Superior Court of New Jersey in Cumberland County.

19. **Counterparts**. In the event that two or more counterparts of this Agreement are executed, all such counterparts shall collectively constitute the same instrument.

20. **Severability**. All agreements and covenants contained herein are severable. In the event that any provision of this Agreement should be held to the unenforceable, the validity and enforceability of the remaining provisions hereof shall not be affected thereby. Any court (or

arbitrator) construing this Agreement is expressly granted the authority to revise any invalid or unenforceable provision hereof in order to render same enforceable.

IN WITNESS WHEREOF, the Parties hereto, intending to be legally bound hereby, have set their hands and seals on the dates indicated:

CUMBERLAND COUNTY TECHNICAL EDUCATION CENTER

By: _____

CARLOS VILLAR (Print Name)

School Board President

By: _____

Megan Duffield (Print Name)

School Board Secretary

Date: 10/17/19

MICHAEL MARINO

_____

Witness

Attorney at Law
State of New Jersey

Date: 10-2-19

Cumberland County Board of Vocational Education

3400 College Drive, Vineland, NJ 08360

Board of Education
Resolution 2019-05

RESOLUTION AUTHORIZING EXECUTION OF THE COURT-ORDERED CONFIDENTIAL SETTLEMENT AGREEMENT WITH MICHAEL MARINO

WHEREAS on November 1, 2018, former Cumberland County Technical Education Center ("CCTEC") employee, Michael Marino ("Marino") filed a Verified Petition of Appeal with the New Jersey Department of Education alleging violations of tenure rights; and

WHEREAS the parties have reached a settlement agreement ordered through the Office of Administrative Law as per the Consent Order mutually executed between the parties resolving all outstanding claims and disputes.

NOW, THEREFORE BE IT RESOLVED

that the Cumberland County Board of Vocational Education hereby authorizes the Board President to execute the confidential Settlement Agreement negotiated between the parties.

I certify that this Resolution was adopted by the Cumberland County Board of Vocational Education at its meeting held on October 17, 2019.

Megan Duffield
Board Secretary/School Business Administrator

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2019 OCT 29 P 12:52
BUREAU OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against
Maria Rodriguez

NEWARK BOARD OF EDUCATION,
-ESSEX COUNTY

119-5/19

Petitioner

Opinion
and
Award

- and -

MARIA RODRIGUEZ

Respondent

Before: **Deborah M. Gaines, Arbitrator**

APPEARANCES:

FOR THE PETITIONER:

ADAM S. HERMAN, ESQ.

FOR THE RESPONDENT:

MARIA RODRIGUEZ (pro se)

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 and P.L. 2015, c. 109("TEACHNJ"), the tenure charges brought by the Newark Board of Education ("the District" or "Petitioner") against Maria Rodriguez ("Rodriguez" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and Decision on July 18, 2019. I conducted a hearing at

the offices of the New Jersey Board of Mediation on September 19, 2019.

The Respondent represented herself at the hearing. However, she was not represented by Counsel. The undersigned had sent multiple communications to Respondent prior to the hearing, advising Respondent of the seriousness of the proceeding and the recommendation to obtain counsel. The undersigned repeated this recommendation at the hearing, but Respondent indicated she wished to proceed without counsel. At the hearing, the parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The hearings were transcribed. The District submitted a written closing statement and Respondent sent multiple emails regarding the matter. The record was declared closed on October 25, 2019

THE CHARGES

Respondent is charged with incapacity, insubordination and conduct unbecoming as described in Board's Statement of Tenure Charges. The charges provide:

Charge Number One
(Incapacity: Inability to Perform Duties)
Ms. Rodriguez is guilty of Incapacity by way of the following:

a. At all times relevant, Ms. Rodriguez has been employed by the district as a teaching staff member.
b. Ms. Rodriguez was first hired by the District to serve as a special education teacher beginning in January 1999.
c. Ms. Rodriguez was most recently assigned as a teacher of home instruction.

d. Ms. Rodriguez has been, and is, incapable of fulfilling her duties as a teacher.
e. In October 2012, Ms. Rodriguez underwent a psychiatric examination, which included an assessment of Axis I, Axis II, Axis III, Axis IV and Axis V.
f. By way of report dated October 15, 2012, it was determined Dr. Mario Finkelstein that Ms. Rodriguez was "not fit to return to work as a teacher for the Newark Public School" at that time.
g. As part of Dr. Finkelstein's diagnosis, he opined as to certain findings under Axis I.
h. Upon medical clearance several month later, Ms. Rodriguez returned to work as a home instruction teacher.
i. On or about September 21, 2017, after Ms. Rodriguez continued to exhibit conduct deviating from normal mental health of a teaching staff member, she was placed on paid administrative leave.
j. On or about September 22, 2017, Ms. Rodriguez was directed to undergo a fitness for duty psychiatric examination.
k. A work status form dated November 13, 2017 from the Jersey City Medical Center determined that Ms. Rodriquez was not "fit for duty."
l. On December 11, 2017, Ms. Rodriguez was evaluated by Dr. Mary Ann Kezmarsky, a New Jersey Licensed Psychologist.
m. By way of report dated December 11, 2017, Dr. Kezmarsky diagnosed Ms. Rodriguez.
n. Dr. Kezmarsky's report, in part, states the following:

> Given the continued reports of her behavior that are causing problems at school, it is my opinion that she is not fit to return to her position at this point [and] . . . it is highly likely that she is going to make a dramatic change.

o. As a result of Ms. Rodriguez's inability to return to work, she remained on paid administrative leave pending the results of a follow up psychiatric examination.
p. A follow up fitness for duty psychiatric examination was scheduled in April 2018. However, Ms. Rodriguez did not attend the examination.
q. In August 2018, Ms. Rodriguez underwent treatment at University Hospital.
r. A follow up fitness for duty psychiatric examination was rescheduled for February 14, 2019.
s. Ms. Rodriguez failed to appear at the February 14, 2019 examination.
t. Ms. Rodriguez has been and is incapable of fulfilling her duties as a teaching staff member.

u. Ms. Rodriguez is not fit for duty as a teaching staff member.

Ms. Rodriguez's medical condition as described above constitutes Incapacity by a tenured teaching staff member sufficient to warrant dismissal from employment.

Charge Number Two

Insubordination: Failure to Attend IME

Ms. Rodriguez is guilty of Insubordination by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. A follow up fitness for duty psychiatrist examination for Ms. Rodriguez was scheduled on April 3, 2018.
c. The April 3, 2018 fitness for duty psychiatric examination for Ms. Rodriguez was re-scheduled for April 24, 2018.
d. Ms. Rodriguez did not attend the April 24, 2018 fitness examination.
e. A follow up fitness for duty psychiatric examination was re-scheduled for February 14, 2019.
f. Ms. Rodriguez refused to appear at the February 14, 2019 fitness for duty psychiatric examination.
g. Ms. Rodriguez's inappropriate and unprofessional conduct violated law and District policy.
h. Ms. Rodriguez's actions were sufficiently flagrant and egregious to warrant termination.
i. Ms. Rodriguez's actions demonstrate that she is not fit to serve as a support staff member.
j. Ms. Rodriguez has been, and it, incapable for fulfilling her duties as a teaching staff member.

Ms. Rodriguez's willful and intentional misconduct as described above constitutes Insubordination by a tenured teaching staff member sufficient to warrant dismissal from employment.

Charge Number Three

Conduct Unbecoming: Failure to attend IME

Ms. Rodriguez is guilty of Conduct Unbecoming by way of he following:

a. The District repeats and reiterates the allegations in all the Charges set forth above.
b. Ms. Rodriguez did not attend the April 24, 2018 fitness examination.
c. Ms. Rodriguez also refused to appear at the February 14, 2019 fitness for duty psychiatric examination.
d. Ms. Rodriguez's inappropriate and unprofessional conduct violated law and District policy.
e. Ms. Rodriguez's actions were sufficiently flagrant and egregious to warrant termination.

f. Ms. Rodriguez's action demonstrate that she is not fit to serve as a teaching staff member.
g. Ms. Rodriguez has been, and is, incapable of fulfilling her duties as a teaching staff member.

Ms. Rodriguez's willful and intentional misconduct described above constitutes Conduct Unbecoming by a tenured teaching staff member sufficient to warrant dismissal from employment.

Charge Number Four

Conduct Unbecoming: Improperly Reporting to Work to Sign IN and Sign Out While on Leave

Ms. Rodriguez is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. On or about September 21, 2017, Ms. Rodriguez was notified by the District that she was being placed on paid administrative leave until further notice.
c. Ms. Rodriguez ignored said notification and reported to work on September 25, 2017.
d. On September 25, 2017, Ms. Rodriguez was reminded again that she was on paid administrative leave until further notice.
e. Ms. Rodriguez was subsequently placed on illness leave by the District in March 2018.
f. Despite being on illness leave, and being directed not to report to work, Ms. Rodriguez visited various District locations between April 17, 2018 and April 25, 2018 to clock in and out of work.
g. Said locations included the Family Support Center, Camden Middle School, Cleveland Elementary School and Central High School.
h. Ms. Rodriguez's inappropriate and unprofessional conduct violates Board policy and law.
i. Ms. Rodriguez's intentional actions are sufficiently flagrant and egregious to warrant termination.
j. Ms. Rodriguez's intentional actions demonstrate that she is not fit to serve as a teaching staff member.

Ms. Rodriguez's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment.

Charge Number Five

Conduct Unbecoming: Improperly Reporting to Work to Sign In and Sign Out While on Leave

Ms. Rodriguez is guilty of Conduct Unbecoming by way of the following:

a. The District repeats and reiterates the allegations in all the charges set forth above.
b. Despite being on illness leave, Ms. Rodriguez visited the District's facility at 301 West Kinney Street on February 4, 2019 to clock in and out of work.
c. Ms. Rodriguez's inappropriate and unprofessional conduct violates Board policy and law.
d. Ms. Rodriguez's intentional actions are sufficiently flagrant and egregious to warrant termination.
e. Ms. Rodriguez's intentional actions demonstrate that she is not fit to serve as a teaching staff member.

Ms. Rodriguez's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment.

BACKGROUND

This case arises out of charges of incapacity, insubordination and conduct unbecoming. Respondent is a tenured teacher who has been employed by the District since approximately 1997. Her last position was as a home instructor.

In 2012, Respondent was directed to undergo an independent medical examination (IME) based on her behavior. The IME found her to be unfit for duty. She received medical clearance to return to work in 2013.

According to Homere Breton, Executive Legal Assistant and 504 Accommodation Officer, testified he received reports of strange and upsetting behavior from the Grievant in 2017. As the 504 Accommodation Officer, Breton is responsible for the

intake of requests for accommodation as well as making arrangements for employees to undergo IME, when required.

Breton testified that beginning in September 2017, reports of Respondent "acting out of sorts" began again. He received documents from Principal of Home Instruction Gerald Samuels. One staff member reported she overheard Respondent talk about the need to protect herself and that she had a permit to carry a gun. The person also reported she heard her speak badly of Muslims and unwed mothers. [See, District Exhibit 8] Breton testified he also received a letter from Rev. Dr. David O. Carter that was sent to Principal Samuels. It noted that he has been called on to intervene numerous times between Respondent and co-workers. He wrote:

> I have had to go downtown on one occasion to the Newark Public Schools Law Office as her representative for antagonizing her fellow colleagues, stating fictitious accusations, and numerous arguments. This is all factual, documented, and this problem has escalated to the point where something has to be done to correct a now volatile problem. [District Exhibit 9]

Another teacher, Eneida Dias-Castro also sent a letter to her principal about her observations of Respondent. They included racial comments, yelling incoherently, making unfounded accusations. [District Exhibit 10].

According to Breton, these concerns warranted sending her to the IME, especially in light of her prior history. He testified she was sent to Jersey City Medical Center, RWJ

Barnabus Health. She was determined to be unfit for duty. [District Exhibit 12] She was referred for a psychological IME with Dr. Mary Ann Kezmarsky. Dr. Kezmarsky issued a Fitness for Duty Evaluation. She diagnosed Respondent with Delusional Disorder, Paranoid Type.

The report provided further:

> Given the continued reports of her behavior that are causing problems at school, it is my opinion that she is not fit to return to her position at this point in time. She most likely could be helped by psychiatric medications as well as psychotherapy, though given the longstanding issues that this has undergone, it is highly unlikely that she is going to make a dramatic change. [District Exhibit 13]

Respondent was then placed on medical leave.

Breton testified he sent follow up letters to the Respondent's Union representative advising him that a follow-up evaluation was scheduled for April. [See, District Exhibits 14, 15, 16] According to Breton, Respondent failed to appear for the follow-up examination.

He further testified that Respondent violated the rules regarding her leave status, by showing up at various sites to clock in to work. He explained that when on such leave, she was not allowed on school property. He submitted a punch report showing her attempts. [District Exhibit 17].

Principal Samuels testified he spoke with Respondent on April 17, 2018. He told her that she was not allowed to return

to work because of her leave status. However, he testified, she returned at the end of the day to clock out. She continued to do so on April 18, 19, 20, 23, and 24.

As a result of Respondent's attempts to clock in, the Security Department to advise that she was not allowed on site. On one occasion the Newark Police Department was called.

Breton testified that on October 31, 2018, Respondent went to a location referred to as Zion Towers to attempt to provide services as a home instructor. It was reported to the District she attempted to enter the building and became rude when told to leave. The incident report provided in relevant part:

> Maria Rodriguez refused to show I.D. to enter building. I informed her all visitors must sign in with security. Rodriguez then proceed to tell me she doesn't have to show ID because she has her PhD and finished school all the way. I then informed Rodriguez that she was being disrespectful and the she would have to leave the property Rodriguez proceeds to tell by stating that their living in jail. Tenants felt disrespected and approached Rodriguez. I (s/o Smith) informed Rodriguez if she didn't leave I would call the police. Which I did to defuse the situation between Rodriguez and the bystanding tenants.

Respondent also clocked in at a District site on February 4, 2019. Breton testified she was on illness leave at this time as well. He noted she attempted to clock in at a District site even though she was still on illness leave and was not allowed to be on site.

The District continued to attempt to have Respondent undergo a medical examination. On January 28, 2019, Mr. Breton

sent Respondent another letter directing her to undergo a follow-up psychiatric IME with Dr. Kezmarsky on February 14, 2019. The letters advised Respondent that her failure to comply with the directive could result in disciplinary action. The District also sent a letter to her counsel advising of the follow-up IME. On February 13, 2019, her attorney Steven Schuster, sent the District a letter indicating he advised her to attend the examination. However, on February 14, 2019, Dr. Kezmarsky advised Breton by letter that Respondent failed to appear for the examination. [District Exhibit 27]. Dr. Kezmarsky copied Respondent on the email she sent to Breton.

In May 2019, Respondent sent an email to Mr. Breton which read:

> I am not your show and none of that. Tried to confused me with "you have to pay some liability" of the liability tort of the Constitution and instead you sent me to a tort doctrine of the indenture servants of the Brit. They are under the Brexit order right now after the Declaration of the Independence and the expulsion from Breogan. I am the public system not he private schools of the Brit, therefore my position in the public schools belongs to me first not to the Brits and not to the civil rights and disobeying the law, a lot of those lost their rights specially the right to vote for others. [District Exhibit 28]

Respondent decided not to be represented by Counsel. The undersigned allowed her to testify in a narrative form to address any issues she believed were important. Respondent claims these charges are retaliation for a complaint she raised

in 2010 against another teacher. She testified that others were pushing her to have a sexual relationship with her.

With respect to the IME report, Respondent asserts she is fully capable of working. She testified that she answered over 600 written questions in the appointment, most of them relating to sex.

Positions of the Parties

Position of the District

The District argues it has proven the charges by a preponderance of the evidence. With respect to the charge of incapacity, it argues the education statute and supporting caselaw demonstrate the concept of fitness to teach is based on a broad range of factors, including "whether there is any harm or injurious effect which the teacher's conduct may have upon the maintenance of discipline and the proper administration of the school system." [District Brief at 14].

It argues the 2017 IME report establishes Respondent's incapacity. It notes the December 2017 indicates Dr. Kezmarsky conducted a thorough review. It included interviews with Respondent as well as the administration of 5 psychiatric tests. The diagnosis of delusional disorder; paranoid type led her to conclude Respondent's incapacity at that time.

The District maintains that despite repeated attempts to re-evaluate Respondent, she has failed to comply with these directives. Thus, it can only conclude that she remains incapacitated and, thus, unable to perform her job duties.

The District argues the Respondent has been insubordinate by refusing the District's lawful directives to undergo a follow-up IME to determine her medical status. Likewise, it argues, it has also demonstrated she has committed unprofessional conduct and insubordination by clocking in and out of work when she is not allowed to be on school property as well as being confrontational when told to leave.

Position of Respondent

As noted earlier, Respondent represented herself in this proceeding. She rejected her Union representation and although urged by the undersigned to obtain counsel, she declined. At the hearing, she stated she could not afford private representation.

As a result, the undersigned provided Respondent latitude in addressing the charges. Respondent did not submit a final closing statement, but rather sent messages and copies of laws or articles she believed relevant to the proceeding.

Rather than summarize, I have copied relevant portions of her statements.

On October 22, 2019, she wrote:

[referring to the binder of evidence submitted by the District]

The 3 ring binder does not address the legal characteristics of a teacher tenure charges, it addresses the characteristics of a morgue summary instead. Therefore "all charges dropped by prejudice" it means they can't be revive again. Reinstate my payroll instead that I am entitled to and stop the imbecility.

On October 25, 2019:

It was replied with evidence that the charges belong to my colleagues not to me. They are having a lot of intra personal and inter personal relationships problems due to lack of knowledge of the law of USA along with no faith or other different from the Christian/Masonic, the morality and they display the opposite at work, during lunch and after work punching the Kronos and going back up to the 2rd. Floor to conduct serious business until late at night. They aren't my charges and it is felony and treason to a citizen of USA, myself.
Remove them by dropped of charges with prejudice and pay me my salary as the most fit for the position. I have morality and teach the subjects to the contrary from my colleagues, they are immoral and instead of teaching the subjects they write to others as therapy of their problems.

Finally, respondent forwarded a letter send to "Judge C." which read:

Case:#2:19-CV-05842-CCC-JBC
Your Honor:
I have received another repetition of the same when it was solved and I am cleared to return to work.
This repetition isn't normal, the board of Ed. Sent 24 pages repeating the word "fit" an average of 5 times on each page, which it accounts for about 120 times repeating the same word "fit". I never saw anything like it
Another pattern that I encountered of repetition was to repeat mandatorily appointments for no reason of $1,900.00 cash from Homere's Breton pocket where on two consecutive years I had to go for a letter of fit already in existence and cleared to return to work on Christopher Columbus Day and at 11:00 a.m. not option of rescheduling the appointment or it will be a threat of insubordinate, disobedient, bad conduct, etc., opportunity for writing charges against me and I would have to pay the cash from my pocket when I had Aetna insurance at that time. Other repetitions were appointments for a physical to mandatorily independent doctors at 9:00 a.m. when I

had my doctor to go to If I needed. After collecting all the letters of fit they told me that I was rescheduled to do it again using the same pattern of appointments at 9:00 a.m. 11:00 a.m. and as well a series of repetitions involving mandatorily appointments for no reason at 3:00 p.m. this to go to Ho HO Ho Kush of Homere's business friends. Asking for the reason to it, was an opportunity for them to write word charges against me, the same over and over. I received orders which is prohibited under the Constitution of USA where we the people hold the power and don't live in fear under the law. They are above the law ones.

During the workshops which were banned a long time ago in the Public Schools, the board sent the employees a letter stating that the board of Ed. Has the right to throw us workshops any time they wanted, it is illegal, only to create problems and write me more word charges, when trying to participate in the dialogues, I was considered insubordinate and sabotage for no reason, when working in groups I was isolated and mocked, throwing prepared math applications with the answer sheet pretending holding the power. I know the content of the subjects I teach and they don't, this was an opportunity for engaging in immoral conduct to obtain favors as the answer keys they were throwing to the students instead of teaching the curriculum, it is negligence. The word tiered was the leading word of all the workshops very characteristic of the style of the columns supporting the arches of the ancient Mosques.

To engage in this type of repetition coupling with the socialization of brothers and sisters instead of Mr. and Mrs. walking the hallways embracing each other, female/male and very intimately, the Principal Samuels walking the hallways with a baby bib around his neck and looking at the females with a dirty look was an incitation or provocation to sex in his secret room he held across his office, telling me in one occasion, "you can come too, I have something for you as well". He is ill and a sex predator, it happened in the hallway, where there is surveillance.

My personal opinion as a teacher, nurse and psychologist, I recommend them, all the ones involved in accumulating harmful bad intentional words against me to instead take the test DSM-5 or diagnostic statistical manual to take care of their intellectual disability characterized by limitations in both intellectual functioning and adaptive behavior. They feel inferior to me mainly because of my ability to speak other languages and be certified to teach them and they aren't.

Due to persistent repetition of the same, they may suffer from spectrum disorder, which can cause impairment in important areas of life as performing daily schedules or readjustments in their lives.

Probably factitious disorder is applicable as well, this happens when an individual intentionally creates, fakes or exaggerates something that is irrelevant, probably to attract attention. When engaged in factitious behavior obsessive and disruptive eating patterns happens and they are always eating and chewing gun, socking hard candy and repetitive talking without given others turns to have a fluent conversation.

Conduct disorder is very characteristic of them, Homere Breton and his gang called team, when a team isn't required to work home instruction. They violate the social norms and the rights of others, individuals or in groups display aggression toward people, Eneida Dias Castro hit me twice at work, she suffers from bipolar disorder and

misconduct at work, destroys property, Eneida broke my telephone at work and Shareida Tarver, stole Zuleika's phone during work because this student took a picture of her sleeping instead of imparting education to the student, the student's mother got it back, Tarver slapped the student's face and through all the items from the table to the floor, she created a tsunami in the student's house during instruction time and let the student play Pokemon instead, this is to destroy others property and conduct disorder, all of my colleagues deceive along with the board of Education and violate others rules of the law. These types of behavior result in significant problems at work, intra and inter personal functioning, they refuse to comply with the requests all the time resulting in repetition of the same for no reason and engage in behaviors to deliberately annoy others. They do it for fun and is a serious mental problem.
Your honor drop the charges of repetitive words they invented into my persona, my tenure is legal as well as my teaching proceedings and social interaction and let me get back to work. I am cleared to go back to work and the imbeciles of the board of Ed. Persecute me around prohibiting me the entrance to the public schools which they are my business of the law, the Constitution. I am a 100% professional and the board and my colleagues don't hold the credentials to fit in the Public System, they are a shame to have them as staff members and the parents of the students make comments about them as well, the teachers don't teach and the principal falls asleep while observing the teachers and without a license to write comments and they don't comprehend why they still at work.
Cordially;
Maria Rodriguez; Licensed Teacher

Decision

After carefully considering the entire record before me, including my assessment of witnesses' credibility and the probative value of evidence, I find the Board has met its burden under the statute to sustain the charge of Incapacity. My reasons follow.

At issue in this case is the Incapacity of the Grievant. The record evidence demonstrates the Grievant was placed on illness leave after being examined by the IME as being unfit for duty as a result of a diagnosis of delusional disorder, paranoid

type. The psychiatrist found there was little hope for dramatic improvement, although she recommended therapy and medication.

Contrary to Respondent's assertions, I find the decision to refer the Grievant for an IME to have been justified. I credit Mr. Breton's testimony that he received numerous complaints regarding Respondent's irregular behavior, which included making derogatory comments about muslims and unwed mothers, accusations of improper sexual behavior with no evidence and telling individuals she was permitted to carry a gun. Given her prior history of mental incapacity, he was more than justified in seeking a medical examination of Respondent to determine fitness for duty.

The IME included a detailed report indicating extensive testing and interviews with Respondent to reach her conclusions. Thus, I find Respondent was determined to be incapacitated upon reasonable medical evidence.

At this time, no evidence has been submitted to refute or change the determination of the IME. In fact, Respondent has failed to undergo follow-up examinations after being ordered to do so on multiple occasions. Thus, not only does the evidence show she is currently not fit for duty, she has failed to follow lawful direction.

The undersigned, however, finds insufficient evidence to conclude Respondent was insubordinate and/or engaged in conduct

unbecoming. Clearly, her failure to follow direction and also disruptive behavior meets those standards. However, given the medical diagnosis, it is not clear in this record whether Respondent had requisite intent. Without testimony from a psychiatrist, I do not find it necessary to reach a conclusion on these charges.

The undersigned determines the record evidence is sufficient to discharge the Respondent from service. The District provided her with extensive medical leave to care for her health. There is no evidence of further treatment and she has not She has been given lengthy leave with the intent to restore her to health. However, her failure to undergo treatment and abide by needed follow up examinations has left the District with no choice but to discharge her from service. The undersigned finds no reason to disturb that decision.

AWARD

The charges of Incapacity are substantiated. The District has demonstrated just cause for termination.

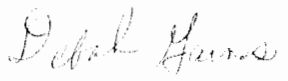
Dated: November 25, 2019

Deborah Gaines, Arbitrator

Affirmation
State of New York }
County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: November 25, 2019



STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of Shawn M. Cicale

Monroe Township School District (Gloucester County),

"Petitioner,"

- and -

Shawn M. Cicale,

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 210-8/19

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the Petitioner:
Robert A. Muccilli, Esq.
Capehart & Scatchard

For the Respondent:
Michael C. Damm, Esq.
Selikoff & Cohen

On September 12, 2019, I was assigned as the arbitrator for the above referenced matter. The parties chose to engage in settlement discussions in lieu of proceeding on the evidentiary record. A settlement conference took place on September 18, 2019. The parties continued to have discussions through November that finally produced a settlement.

In November 2019, the parties formally executed and adopted the settlement resolving the tenure charges that the Monroe Township Board of Education filed with the State of New Jersey Department of Education on August 21, 2019. The terms of settlement are included in the settlement agreement attached hereto. On November 26, 2019, I conducted a final conference with the parties' Counsel and the Respondent to discuss the terms of settlement.

N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement.

The parties' settlement agreement expressly details the basis for resolution. I have thoroughly reviewed and considered the parties' reasons for settlement set forth therein. Having considered the stated reasons in conjunction with the issues raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Response to Tenure Charges filed by the

Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: November 27, 2019
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 27th day of November, 2019, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-21

Robert Muccilli, Esq. #026821987
CAPEHART & SCATCHARD, P.A.
8000 Midlantic Drive, Suite 300S
Mount Laurel, N.J. 08054
Direct: (856) 914-2074
Attorneys for Monroe Township Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST SHAWN M. CICALE,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
BY THE MONROE TOWNSHIP BOARD OF EDUCATION, GLOUCESTER COUNTY.	:	AGENCY DKT. 210-8/19
	:	**SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, the Monroe Township Board of Education ("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 School District; and

WHEREAS, Shawn M. Cicale is employed by the Board as a tenured secretary; and

WHEREAS, on July 8, 2019, Dr. Richard Perry Superintendent of Schools filed sworn tenure charges against Ms. Cicale together with a sworn statement of evidence in support thereof, and said charges were certified by the Board to the Commissioner of Education on August 15, 2019.

WHEREAS, the Commissioner of Education transmitted the matter for hearing and determination by an arbitrator; and

WHEREAS, the parties, now wishing to resolve the within matter amicably without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein;

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

1. **Tenure Charges to be Abandoned**

The Board agrees that upon execution of the within Settlement and Release ("the Agreement") by the parties, the subject tenure charges shall be moot and shall be deemed to be withdrawn and abandoned by the Board.

2. **Acceptance of Suspension Without Pay**

Ms. Cicale, by signing this Agreement, hereby accepts a fifty-two (52) day suspension without pay from August 16, 2019, through October 6, 2019. From October 7, 2019 through November 15, 2019, she will not be considered as suspended but on medical leave. She shall be permitted to utilize fourteen (14) paid sick leave days during that leave for which the Board agrees to pay her. The remainder of the days shall be considered unpaid medical leave. She will be placed back on payroll at full salary beginning November 18, 2019. It being understood that the suspension/leave shall not change her status as a tenured secretary.

3. **Agreement to Undergo Medical Examination**

Ms. Cicale, by signing this Agreement, hereby agrees to promptly undergo a medical examination (not a psychological or psychiatric examination) to determine whether she is presently physically or physiologically able to perform her essential job functions with or without reasonable accommodations and without posing a direct threat to self or others, said examination to be scheduled with a board certified medical doctor chosen by the school district and paid for by the Board. Ms. Cicale further agrees that the Superintendent may provide the examining physician with Exhibit C to the Statement of Evidence. The Board, giving reasonable notice, will advise counsel for Ms. Cicale with the name and address of the physician along with the date and time of the examination. Regardless of the results of the examination, the Board will not be relieved of the obligation to place Ms. Cicale back on payroll effective November 18, 2019. It being understood that the Board reserves its right to take such other action as it deems appropriate based on those findings, if adverse to Ms. Cicale. Ms. Cicale likewise, reserves all of her rights to challenge such findings if adverse.

4. **No Admissions**

The parties agree that neither the suspension without pay of Ms. Cicale, nor the Board's approval of this Agreement, constitute an admission of liability or wrongdoing by either party.

5. **Mutual Release**

In exchange for the above consideration, Shawn M. Cicale, her heirs and assigns hereby irrevocably and unconditionally waives, releases and forever discharges any and all claims or rights whether known or unknown, which she has or may have, personally or officially, individually or collectively, against past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially as well as their successors and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Release and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and

1991, Section 1983, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Older Working Benefit Protection 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 Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Civil Rights 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 and all 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 *el seq.*, the Public Employee Retirement System laws, the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions, for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (referred to as "COBRA") as well as claims arising from any breach of this Agreement. To the extent Ms. Cicale pursues any of the exempted claims, the Board's rights to oppose and/or dispute such claims shall be preserved. Ms. Cicale represents that she does not have knowledge of any claims or causes of action which would require or implicate the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1

In exchange for the above considerations, the Board hereby releases and forever discharges any and all claims against Ms. Cicale which it has as of the date this Agreement is executed. Specifically exempted from this release are any employment claims or causes of action arising directly or indirectly from (1) proceedings in State v. Shawn M. Cicale (complaint number 0811 S 2018 001015), or (2) the medical examination described above, or (3) claims arising from breach of this Agreement. To the extent the Board pursues claims under (1), (2) and/or (3) above, Ms. Cicale's rights to oppose and/or dispute such claims shall be preserved.

It is understood that pursuant to this agreement Ms. Cicale is to continue as an employee of the Board and therefore nothing herein shall be construed to impact the rights of either party in connection with any future event or occurrence.

6. **Public Interest Served**

The within settlement will serve the public interest, eliminating potentially costly additional litigation costs.

7. **Assent to Terms**

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

Ms. Cicale understands and acknowledges that she has had the opportunity to consult her attorney, has been advised of her right to take at least twenty-one (21) days to consider whether or not to execute this Agreement and Ms. Cicale has decided to waive this right and sign this Agreement in less than twenty-one (21) days. Ms. Cicale further agrees that she has had the opportunity to review this Agreement in its entirety with her attorney, Michael C. Damm, Esq., of Selikoff & Cohen, P.A.

Ms. Cicale may revoke her signature of this Agreement within seven (7) calendar days of signing it by delivering written notice of revocation to Sanmathi Dev, Esq. Capehart & Scatchard, P.A., 8000 Midlantic Drive, Suite 300-S, P.O. Box 5016, Mount Laurel, New Jersey, 08054. If Ms. Cicale has not revoked her signature of this Agreement by written notice received within the seven (7) day period, it becomes effective immediately thereafter. In the event of such revocation, this Agreement shall be null and void and the subject tenure proceedings shall be reinstated.

It is understood that this Agreement is subject to formal approval by the Monroe Township Board of Education.

8. **Compliance with N.J.A.C. 6A:3-5.6**

The parties agree that settlement of this case is justified by the need for an expeditious and final resolution. As a result of Ms. Cicale's acceptance of a suspension without pay and her agreement to undergo a medical examination (not a psychological or psychiatric examination) to determine whether she is presently physically or physiologically able to perform her essential job functions with or without reasonable accommodations and without posing a direct threat to self or others, the Board will achieve a guaranteed result, in an expeditious manner, at a comparatively low cost and will avoid the uncertainty of litigation before an arbitrator. Additionally, the within matter involves extensive testimony of witnesses, both lay and expert, whose interests would be better and permanently served by resolution through this Agreement.

The parties further agree that the proposed settlement will serve the public interest. As a result of Ms. Cicale's acceptance of a suspension without pay and her agreement to undergo the medical examination, the Board will not have to incur any further expenses associated with arbitration of any subsequent action related to this matter..

9. **Entire Agreement**

This Agreement represents the entire understanding of the parties.

10. **Severability**

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 to the extent that they do not materially impair the consideration upon which the parties have mutually relied.

11. **Governing Law**

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

12. The Parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures as well as electronic signatures through the use of email or .pdf files will have the same force and effect as original signatures.

13. By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved and consented to as to terms.

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

Shawn M. Cicale

Dated: 11/18/19

FOR THE MONROE TOWNSHIP BOARD OF EDUCATION:

Fred Powell, Board President

Dated: 11/22/19

Dr. Richard Perry, Superintendent

Dated: 11/19/19

316-19L

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

LAMONT O. REPOLLET, ED.D.
Commissioner

December 3, 2019

Askiaa J. Nash, *pro se*
981 Madison Avenue
Plainfield, New Jersey 07060

Geoffrey N. Stark, DAG
Division of Law
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: *Askiaa Nash v. New Jersey State Board of Examiners, Agency Dkt. No. 51-3/19*

Dear Parties:

I have reviewed the petition of appeal, as well as the materials filed in connection with the respondent's motion to dismiss the petition in the above-referenced matter. Upon review of the submissions, I have determined to dismiss this matter as explained below.

Petitioner contends that he is entitled to the former Associate Educational Media Specialist (AEMS) endorsement because he met the relaxed requirements that were in effect in 2006 – which, according to petitioner, removed the requirement that individuals hold a standard teaching certificate. Petitioner argues that, at that time, individuals who were "in the pipeline" were given the opportunity to be "grandfathered in"; further, he argues that he was not advised of the rule changes due to his incarceration. (*See* Petitioner's letter dated March 6, 2019). Petitioner explains that the AEMS endorsement was subsequently replaced by the Associate School Library Media Specialist endorsement.

The Board advises that the Commissioner issued a final agency decision in a prior case involving the parties on January 4, 2019, i.e., *Askiaa Nash v. New Jersey State Board of Examiners*, Commissioner's Decision No. 14-19, decided, January 4, 2019. Petitioner appealed that decision, and the matter is currently pending before the New Jersey Superior Court, Appellate Division. The Commissioner finds that, as the issues in this matter were previously raised and decided in a prior Commissioner decision, this matter is barred by the doctrine of res judicata.

Accordingly, the Board's motion to dismiss the petition is GRANTED, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Sincerely,

Lamont O. Repollet, Ed.D.
Commissioner of Education

c: County Superintendent
State Law Library

LOR/JKH/BCM

VIA E-MAIL ONLY

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

317-19

New Jersey Commissioner of Education

Final Decision

Catherine Coyle,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent,

and

Jersey City Education Association,

Intervenor.

Synopsis

Petitioner – a resident of the City of Jersey City – alleged that the Board violated the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*, during negotiations members engaged in regarding a Memorandum of Agreement (MOA). The MOA related to a collective bargaining agreement (CBA) between the Board and the Jersey City Education Association (JCEA) that went into effect on July 1, 2019. Petitioner contended, *inter alia*, that certain board members who participated in negotiations had conflicts of interest, and that the Board had improperly invoked the Doctrine of Necessity in approving the MOA. Petitioner sought to invalidate the MOA through an application for emergent relief, which was opposed by the Board. A motion to intervene was filed on behalf of the JCEA, and was granted on July 3, 2019. Emergent relief was denied on July 22, 2019. The Board filed a motion for summary decision on August 6, 2019.

The ALJ found, *inter alia*, that: the only disputed facts herein pertain to whether the respondents violated the School Ethics Act, *N.J.S.A.* 18A:12-21 et seq.; there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the threshold issue is whether the Commissioner of Education has jurisdiction to consider the within petition; the Commissioner's jurisdiction is limited to matters that arise under the school laws, *N.J.S.A.* 18A:6-9; petitioner's claims involve alleged violations of the School Ethics Act, *N.J.S.A.* 18A:12-21 et seq., which fall under the jurisdiction of the School Ethics Commission; and there is no incidental jurisdiction pursuant to the Open Public Meetings Act as claimed by petitioner. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

December 3, 2019

317-19

OAL Dkt. No. EDU 08804-19
Agency Dkt. No. 150-6/19

New Jersey Commissioner of Education

Final Decision

Catherine Coyle,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County

Respondent,

and

Jersey City Education Association,

Intervenor.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4 and the replies thereto filed by the Board and the intervenor, Jersey City Education Association (JCEA).

By way of background, the Board and JCEA negotiated a Memorandum of Agreement (MOA) regarding a collective bargaining agreement that took effect on July 1, 2019. Petitioner – a resident of the city of Jersey City – sought to invalidate the MOA in an emergent petition, alleging that members of the Board violated the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*, by participating in the negotiations while having conflicts of interest and that the Doctrine of Necessity was improperly invoked. The Commissioner denied petitioner's emergent application on July 22, 2019. Thereafter, the Administrative Law Judge (ALJ) dismissed the petition, finding that the Commissioner does not have jurisdiction over the claims set forth in the petition, which all involve alleged violations of the School Ethics Act. Instead, the proper venue would be with the School Ethics Commission (SEC).

In her exceptions, petitioner argues that the Commissioner has jurisdiction over her claims because whether a board of education follows proper procedures in the negotiation and ratification of teacher contracts falls under New Jersey School Law, as *N.J.S.A.* 18A:11-1 requires Boards to act in accordance with the law. Otherwise, a finding that the Commissioner lacks jurisdiction would result in the Commissioner having no oversight over a board negotiating a contract with a union. Additionally, petitioner contends that the Commissioner has primary jurisdiction over this matter because he has oversight over the Board due to the transition plan that returns local control to the district, and that the Commissioner also has incidental jurisdiction over violations of the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 *et seq.*

Petitioner further argues that the Commissioner has the authority to issue injunctions and should enjoin the MOA. Petitioner maintains that she is not seeking relief under the School Ethics Act – such as a reprimand, censure, suspension, or removal – so she should not be limited to the remedies available under the Act.

Petitioner also contends that there are genuine issues of material fact that should preclude summary decision. For example, the ALJ makes a finding that a Standing Committee on Labor Negotiations was formed to manage the JCEA, but petitioner maintains that fact-finding is necessary to determine whether the Board members who negotiated with the JCEA had the authority to do so. Additionally, a hearing is necessary to determine if the doctrine of necessity was improperly invoked.[1]

In reply, the Board asks the Commissioner to adopt the Initial Decision because the ALJ properly found that the Commissioner lacks jurisdiction over the allegations outlined in the petition. The Board explains that the petition alleges three counts: "improper negotiations due to conflicts of interest"; "unauthorized independent action by President and Vice President"; and "improper voting based on defective doctrine of necessity." (Petition at 14-19). All of those causes of action involve violations of

[1] Petitioner also argues that the grant of summary decision is improper because the Board has not filed an answer or responsive pleading. It is clear that the Board's motion for summary decision is akin to a motion to dismiss in lieu of an answer, permitted by *N.J.A.C.* 6A:3-1.5(g), and the Board was directed by the ALJ to proceed in this manner following the denial of emergent relief.

the School Ethics Act and do not arise under the school laws, as required by *N.J.S.A.* 18A:6-9 in order to trigger the Commissioner's jurisdiction. Petitioner's argument that her claims arise under *N.J.S.A.* 18A:11-1 does not confer jurisdiction on the Commissioner because even if, arguendo, the claims did arise under this statute, the allegations would still require determinations by the SEC regarding the underlying claims of board member conflict of interest and the doctrine of necessity.

The Board notes the Commissioner lacks jurisdiction over contractual disputes, as the negotiation of a contract between a board of education and a union does not fall under School Law but is instead entered into under the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-5.1 *et seq.* Therefore, as the Commissioner does not have the jurisdiction to adjudicate contractual matters, he also does not have the authority to issue the injunction that petitioner seeks. Additionally, the Board points out that the transition plan does not provide any authority for a private party to bring a claim to enforce its terms, nor does it take away the SEC"s jurisdiction over violations of the School Ethics Act. Furthermore, the Board explains that although petitioner did not include an OPMA claim in her petition, even if she had, the Commissioner's "incidental" jurisdiction over OPMA would not apply in this matter because he does not have jurisdiction over the underlying claim.

Finally, the Board contends that there are no disputes of material fact that preclude the entry of summary decision. The ALJ appropriately found that the Commissioner lacks jurisdiction over the claims made by petitioner; therefore, he does not have jurisdiction to resolve any of the disputed facts.[2]

Upon review, the Commissioner agrees with the ALJ that the he does not have jurisdiction over this matter as the claims set forth in the petition do not arise out of New Jersey School Law as required by *N.J.S.A.* 18A:6-9; instead, they involve alleged violations of the School Ethics Act. Whether Board members were conflicted or took unauthorized independent action – and whether the Board properly invoked the Doctrine of Necessity – falls squarely within the SEC's jurisdiction. *N.J.S.A.*

[2] The arguments made by the JCEA in its reply exceptions are substantially similar to the arguments made by the Board, and therefore will not be addressed in detail.

18A:12-21 *et seq.* The Commissioner does not find petitioner's exceptions to be persuasive as they do not demonstrate that the Commissioner has jurisdiction over this matter. Petitioner cannot attempt to circumvent the SEC's jurisdiction by claiming that her allegations arise under *N.J.S.A.* 18A:11-1, nor does the transition plan confer jurisdiction on the Commissioner instead of the SEC. Additionally, as the ALJ found, petitioner did not allege a violation of the OPMA; nevertheless, the Commissioner would not have incidental jurisdiction over such a claim because the primary allegations fall under the SEC's jurisdiction. With respect to petitioner's argument that there are genuine issues of material fact that should preclude summary decision, it is within the SEC's purview to make factual determinations, as the Commissioner lacks jurisdiction over the petition.

Accordingly, the Initial Decision of the OAL is adopted – for the reasons thoroughly expressed in the Initial Decision – and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/19
Date of Mailing: 12/03/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08804-19
AGY REF NO. 150-6/19

CATHERINE COYLE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent,

and

JERSEY CITY EDUCATION ASSOCIATION,

Intervenor.

Elizabeth M. Andes, Esq., for Petitioner (McAndrew Vuotto, attorneys)

Lawrence Bluestone, Esq., for Respondent (Genova Burns, attorneys)

Michael J. Gross, Esq., for Respondent (Kenney, Gross, Kovats & Parton, attorneys)

Raymond M. Baldino, Esq., for Intervenor (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: August 29, 2019 Decided: September 10, 2019

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a Petition with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on June 28, 2019, to be heard on an emergent basis.

Petitioner requests a ruling declaring a Memorandum of Understanding (MOA) negotiated between the Respondent Board and the Jersey City Education Association (JCEA) was done contrary to law and should be declared null and void. Petitioner seeks on an emergent basis a temporary restraining order and preliminary injunction against the implementation of the MOA.

JCEA submitted a motion to intervene on July 2, 2019. Oral argument on the motion was held on July 3, 2019 prior to oral argument on the request for emergent relief. The motion to intervene was granted on the record on July 3, 2019. A written Order was also entered on July 3, 2019.

The application for emergent relief was heard on July 3, 2019.

Petitioner was given to July 9, 2019 to submit a supplemental brief to address jurisdiction and potential remedies. No reply from Respondent or Intervenor was permitted. Petitioner submitted her supplemental brief on July 9, 2019, whereupon the record was closed on the request for emergent relief.

The undersigned, by order dated July 9, 2019, denied the request for emergent relief, and ordered the matter dismissed on jurisdictional grounds.

The Commissioner, in an Order on Emergent Relief dated July 22, 2019, adopted the undersigned's order denying emergent relief. The Commissioner further ordered that the matter continue at the OAL "with such proceedings as the parties and

the ALJ deem necessary to bring it to closure." The Commissioner noted in a footnote that a dismissal for lack of jurisdiction cannot be made in an Order on Emergent Relief and would require and Initial Decision, citing N.J.A.C. 1:1-18.1.

A telephone conference was held on July 29, 2019. No hearing date was set to afford Respondent, Jersey City Board of Education, the opportunity to submit a motion for summary decision.

Respondent filed its motion for summary decision on August 6, 2019. Petitioner filed her response on August 23, 2019. Intervenor filed a letter brief in support of Respondent's motion on August 26, 2019. Respondent filed a sur reply on August 29, 2019, whereupon the record was closed.

FACTUAL BACKGROUND

The Respondent herein, the Jersey City Board of Education, negotiated a MOA with the JCEA. This collective bargaining agreement took effect on July 1, 2019. Petitioner filed her petition with the Commissioner on June 27, 2019. It was transferred to the OAL on June 28, 2019, to be heard on an emergent basis. Petitioner alleges certain violations of the School Ethics Act in that some members of the Respondent Board had conflicts with the JCEA and should not have been involved in the negotiation process.

Last year the JCEA went on strike. Thereafter the Board created a Standing Committee on Labor Negotiations to manage the same. Labor counsel for the Board conducted a conflict analysis to identify non-conflicted members for participation on the standing committee. Any agreement negotiated by the standing committee is subject to Board ratification.

The Board determined thereafter that a majority of the Board was conflicted from matters involving collective bargaining with the JCEA. The Board determined that it

needed to invoke the Doctrine of Necessity. On three separate occasions the Board read a resolution adopting the doctrine. The resolution was re-adopted by the Board at its meeting on April 29, 2019. The Board then voted to approve the MOA.

The SEC provided an advisory opinion to the Board on June 3, 2019. The SEC, in said advisory opinion, did not invalidate the Board's adoption of the Doctrine of Necessity.

Petitioner, in her petition, alleges three causes of action: Board president Sudhan Thomas and vice president Lorenzo Richardson engaged in improper negotiations in violation of the common law and the School Ethics Act, N.J.S.A. 18A:12-24; the Board's invocation of the Doctrine of Necessity on March 7, March 28 and April 29, 2019 was defective and in violation of N.J.S.A. 18A:12-21; and, the Board violated the School Ethics Act by failing to obtain full Board approval before negotiating with the JCEA.

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

The disputed facts in the instant matter all pertain to questions of whether or not Respondents violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. No facts alleged in the petition, or argued in Petitioner's brief as being disputed, pertain to the School Law. N.J.S.A. 18A:1-1 to 76-4, which would properly lay jurisdiction before the Commissioner.

The threshold question in the instant matter is therefore one of jurisdiction: Does the Commissioner, and therefore the OAL, have jurisdiction to consider the petition herein.

The Commissioner of the Department of Education has jurisdiction over disputes "arising under the school laws." N.J.S.A. 18A:6-9.

Should there be jurisdiction a second question arises: can the remedy of a temporary restraining order on the MOA, and the voiding of the MOA be granted.

The answers to both questions clearly is no. The Commissioner, and therefore the OAL, does not have jurisdiction as the claims set forth in the petition all hinge upon alleged violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. The proper venue for the within matter would be the School Ethics Commission (SEC). N.J.S.A. 18A:12-27.

Further, the SEC has no authority to grant the relief requested in the petition. The SEC may impose the following sanctions pursuant to N.J.S.A. 18A:12-29(c):

Upon completion of the hearing, the commission, by majority vote, shall determine whether the conduct complained of constitutes a violation of this act, or in the

case of a board member, this act or the code of ethics, or whether the complaint should be dismissed. If a violation is found, the commission shall, by majority vote, recommend to the commissioner the reprimand, censure, suspension, or removal of the school official found to have violated this act, or in the case of a board member, this act or the code of ethics. The commission shall state in writing its findings of fact and conclusions of law. The commissioner shall then act on the commission's recommendation regarding the sanction.

Further, should the Commissioner have jurisdiction on some other area of school law, which I cannot determine exists, there is no authority for the Commissioner under any area of school law that permits the issuance of a temporary restraining order or injunctive relief of the MOA, which is a collective bargaining agreement.

Petitioner reargues the points made in her brief in support of the request for emergent relief and the supplemental brief filed on July 9, 2019.

Petitioner again argues that the Respondent Board is formed pursuant the School Law and is only authorized to act under the School Law. Petitioner further argues that much of what the Board does is done pursuant to the School Law. N.J.S.A. 18A:1-1 to 76-4. While this argument rings true, it avoids the real issue herein: the entire petition was brought under alleged violations of the School Ethics Act.

Petitioner then argues again that the Commissioner, and therefore the OAL, has jurisdiction under the Transition Plan. The Transition Plan was issued by the New Jersey Board of Education after it transferred control of the schools of Jersey City back to the local Board of Education.

Nothing contained in the Transition Plan provides jurisdiction to the Commissioner, and therefore the OAL, to hear a petition arising under the School Ethics Act.

Petitioner again claims the Commissioner has incidental jurisdiction as she alleges that the Respondent Board violated the Open Public Meetings Act for not properly noticing all its meetings pursuant to N.J.S.A. 10:4-9, and for not keeping all meetings open to the public at all times in violation of N.J.S.A. 10:4-12. Petitioner cites Gardner v. Board of Education of the City of Hackensack, Bergen County, OAL Dkt. No. EDU 09421-12, 2013 WL 2467918, at *6 (OAL May 1, 2013), citing Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184, 187 (App. Div. 1979).

Again, I note that Petitioner did not make any claim in the petition based upon a violation of the Open Public Meetings Act. To suggest she did assert such a claim is not accurate.

In Gardner the incidental jurisdiction of the Commissioner is based upon a controversy under the school laws. In the instant matter there is a claim of jurisdiction under the School Ethics Act.

As to Petitioner's arguments regarding the remedy requested, an injunction, Petitioner cites Shankar v. Bd. of Educ. of the City of New Brunswick, Middlesex County, et al., 13 N.J.A.R. 566, 576 (Jan. 2, 1990). The holding in Shankar has no bearing on the instant matter. It revolved around a request for an injunction to name petitioner valedictorian. It cannot be read to grant the Commissioner authority to issue an injunction against the MOA where all the facts alleged revolve around violations of the School Ethics Act.

Having determined that there is no jurisdiction of the Commission to hear this matter, and therefore no jurisdiction for the OAL to hear it, the matter should be dismissed.

Based upon the foregoing, I **CONCLUDE** that Respondent's motion for summary decision be **GRANTED**; and that the petition should be **DISMISSED** with prejudice as there is no jurisdiction to hear this matter.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and,

It is further **ORDERED**, as there is no jurisdiction to hear the underlying claim in the petition, that the petition is dismissed with prejudice.

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

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

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

Sept. 10, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: September 10, 2019

Date Mailed to Parties: September 10, 2019

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APPENDIX

List of Moving Papers

For Petitioner:

Brief in Opposition to Motion for Summary Decision

Certification of Elizabeth M. Andes, Esq.

For Respondent:

Notice of Motion for Summary Decision

Brief in Support of Motion for Summary Decision

Letter sur reply brief

For Intervenor:

Letter brief is support of Motion for Summary Decision

319-19

New Jersey Commissioner of Education

Decision

Jamie Sterlacci,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner – a tenured teacher – filed a petition of appeal in 2018 seeking an order that the Board did not have reasonable suspicion to require her to undergo drug testing, despite the fact that she had exhibited signs of use; she further requested that the drug testing agency refuse to provide the results of the screening to the Board. Subsequently, the parties reached an agreement, titled a "Last Chance Agreement" (LCA), to fully resolve the matter in lieu of proceeding with litigation and the ultimate filing of tenure charges by the Board. In June 2019, however, the Board terminated petitioner's employment – without following the process required under the Tenure Employees Hearing Law (TEHL), *N.J.S.A.* 18A:6-10 *et seq.* – after it alleged that she failed a drug test. Petitioner filed the within appeal, claiming that she was terminated in violation of her tenure rights under TEHL. The Board filed a motion to dismiss and a motion to seal the record; petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: this matter arises under the school laws because petitioner alleged in her petition that the Board fired her in violation of her rights under the TEHL; the LCA is a contract between the Board and petitioner, an interpretation of the LCA is not the primary issue herein; the TEHL and *N.J.A.C.* 6A:3-5.1 to 5.7 set forth specific procedural steps that must be followed before a tenured teacher may be dismissed; the LCA did not provide for petitioner's termination without resort and adherence to the procedural requirements of the TEHL; as such, the Board improperly fired petitioner and violated her tenure rights under the TEHL. The ALJ denied the Board's motion to dismiss, granted the petitioner's motion for summary decision, and granted, in part, the Board's request to seal the record. The ALJ concluded that petitioner is entitled to return to the Board's employ in a teaching position for which she is qualified, and is further entitled to back pay, less mitigation, and the benefits and emoluments she would have received had the Board not improperly fired her on June 13, 2019.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, for the reasons thoroughly expressed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. Petitioner is entitled to return to a teaching position with the Board, as set forth in the Initial 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.

December 3, 2019

319-19

OAL Dkt. No. EDU 11503-19
Agency Dkt. No. 145-6/19

New Jersey Commissioner of Education

Final Decision

Jamie Sterlacci,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and the petitioner's reply thereto.[1]

By way of background, on June 6, 2018, the Board ordered petitioner – a tenured teacher – to undergo a drug test; petitioner complied with the order, but refused to permit the testing agency to release the results to the Board. Thereafter, the petitioner filed a petition challenging the Board's authority to require a drug test, and the Board filed a petition to compel petitioner to release the results. While the matters were pending before the Commissioner, petitioner and the Board entered into a Last Chance Agreement (LCA) on November 28, 2018. Under the LCA, the petitioner agreed to submit to random alcohol and drug testing in exchange for her return to work and in lieu of the Board taking more serious action, including the filing tenure charges against her. The LCA also stated that if petitioner was under the influence of

[1] The Board's supplemental exceptions and petitioner's sur-reply were not considered by the Commissioner because such filings are not permitted by *N.J.A.C.* 1:1-18.4.

drugs or alcohol on Board property, it "would constitute 'just cause,' *per se*, for the termination of her tenured employment with the Board." (LCA at ¶6).

On June 13, 2019, the Board terminated petitioner after it alleges that she failed a drug test. Petitioner filed a petition before the Commissioner, claiming that she was terminated from her employment with the Board in violation of her tenure rights under the Tenure Employees Hearing Law (TEHL), *N.J.S.A.* 18A:6-10 *et seq.* The Administrative Law Judge (ALJ) agreed with petitioner, finding that the Board improperly terminated her from her position without certifying tenure charges.[2] The ALJ noted that the terms of the LCA deprived petitioner of her tenure protections, as it did not indicate that petitioner was waiving or relinquishing her tenure rights. The ALJ further explained that the LCA did not force petitioner to resign from her position upon testing positive for drugs or alcohol. As such, the ALJ found that petitioner is entitled to return to her teaching position, along with back pay, benefits and emoluments.[3]

In its exceptions, the Board argues that the ALJ erred in failing to discuss the merits of the case – specifically by failing to include an interpretation of the LCA and the Board's primary argument that the agreement equated to a voluntary relinquishment of petitioner's employment. The Board maintains that common sense would indicate that it would not have entered into the LCA but for petitioner's consent to waive her tenure rights if she tested positive again for alcohol or drugs. The Board would not have bargained for the right to file tenure charges if petitioner failed a drug test, as the Board already has the right to file tenure

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[2] The Commissioner notes that the ALJ inadvertently stated that the State Board of Education certifies tenure charges to the Commissioner, when his statement should have indicated that this is the responsibility of district boards of education. *N.J.S.A.* 18A:6-11; *N.J.A.C.* 6A:3-5.1.

[3] The ALJ also granted the Board's motion to seal the record with respect to: (1) any of petitioner's medical records that the Board provided with its motion to dismiss; and (2) the LCA, to the extent that it includes certain information deemed confidential under the school laws. The Commissioner agrees with the ALJ and orders that those records remain sealed.

charges. As such, the ALJ ignores that the basic principles of contract law require consideration in a valid contract, and the only consideration given to the Board in exchange for allowing petitioner to continue her employment is that it would be able to terminate petitioner without the filing of tenure charges.

In reply, petitioner contends that the ALJ correctly addressed the central issue in this matter – that petitioner did not waive her tenure rights under the TEHL by signing the LCA. Petitioner maintains that – while it was not necessary for the ALJ to reach this issue – a tenured teacher can relinquish a tenured position but cannot waive her tenure rights to a position that she still holds. Therefore, the petitioner contends that the Initial Decision should be adopted as the final decision.

Upon review, the Commissioner agrees with the ALJ that the Board improperly terminated petitioner without certifying tenure charges against her. Petitioner did not waive her tenure rights by virtue of the LCA. The LCA did not reference the TEHL and did not explicitly indicate that petitioner was agreeing to forfeit her tenure rights or resign from her position if she tested positive for drugs or alcohol. The Commissioner does not find the Board's exceptions to be persuasive. The ALJ discussed the LCA to the extent necessary to determine that petitioner had not waived her tenure rights. The LCA indicated that petitioner's presence on school property while under the influence of drugs or alcohol "would constitute 'just cause,' *per* se, for the termination of her tenured employment with the Board." (LCA at ¶6). Such a statement does not provide the Board with the ability to bypass petitioner's tenure rights, nor does it indicate that petitioner would be forced to resign from her position. Further, the LCA stated that it should remain in petitioner's personnel file "and may be used as evidence of progressive discipline in any future proceedings against [petitioner] initiated by the Board or District

Administration." (I.C.A. at ¶7). Contrary to the Board's argument, such a statement indicates that the Board had contemplated the need to initiate future proceedings against petitioner – such as the filing of tenure charges – if she tested positive for drugs or alcohol.

Accordingly, the Initial Decision of the OAL is adopted – for the reasons thoroughly expressed in the Initial Decision. Petitioner is entitled to return to a teaching position with the Board, with back pay, less mitigation, and the benefits and emoluments she would have received had the Board not improperly terminated her on June 13, 2019.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/19
Date of Mailing: 12/04/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11503-19
AGENCY DKT. NO. 145-6/19

JAMIE STERLACCI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,
Respondent.

Edward Cridge, Esquire, for petitioner (Mellk O'Neill, attorneys)

Ari Schneider, Jr., Esquire, for respondent (Busch Law Group, LLC)

Record closed: September 24, 2019 Decided: October 25, 2019

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In 2018, Jamie Sterlacci, (petitioner or Sterlacci), filed a petition of appeal with the Commissioner of the New Jersey Department of Education, seeking an order that the Board did not have reasonable suspicion to require her to undergo drug testing despite exhibiting signs of use. She requested that the testing agency refuse to provide the results of the screening to the Board. The parties were able to reach an agreement to

fully resolve the matter in lieu of proceeding with litigation of the petition and the ultimate filing of tenure charges by the Board. The agreement was titled a "Last Chance Agreement." However, on June 13, 2019, the Board unilaterally and summarily terminated Ms. Sterlacci's employment, without following the process required by the Tenure Employees Hearing Law. She again filed a petition of appeal with the Commissioner of the Department of Education appealing her termination by Woodbridge Board of Education (Board) as a violation of her rights under the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1. As part of this matter, the Board has filed a motion to dismiss in lieu of an answer to Sterlacci's petition and a motion to seal the record, and Sterlacci has filed a motion for summary decision. It was subsequently transmitted to the Office of Administrative Law (OAL) on August 19, 2019.

The questions for me to decide are whether: 1. I should grant the Board's motion to dismiss petitioner's petition for failure to advance a cause of action; 2. whether, I should grant the Board's motion to seal the record, which contains certain sensitive and/or confidential information pertaining to petitioner; and, 3. finally, whether I should grant petitioner's motion for summary decision by finding that the Board violated her rights as a tenured teacher by firing her without following the requirements of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

FACTUAL DISCUSSION

The following facts are not in dispute and as such **I FIND AS FACT** that Sterlacci began her employment as a teacher for the Board in 2001. Schneider Cert., ¶ 2. She subsequently acquired tenure. On June 6, 2018, school officials ordered Sterlacci to take a drug test. Id. at ¶ 3. Although she took the test, she refused to release the results to the Board. Id. at ¶ 4. Instead, Sterlacci filed with the Commissioner of Education (Commissioner) a petition challenging the Board's authority to compel the test. Id. at ¶ 5. In response, the Board answered Sterlacci's petition and simultaneously filed with the Commissioner a cross-petition to compel Sterlacci to provide the Board with the results of the drug test. Id. at ¶¶ 6-7.

The Commissioner subsequently transmitted the matter to the Office of Administrative Law (OAL) as a contested case. However, while the matter was pending at the OAL, Sterlacci and the Board entered a "Last Chance Agreement (LCA)." Id. at Ex. D.

Under the terms of the LCA, which the parties executed on November 28, 2018, Sterlacci agreed to certain conditions for her continued employment "in lieu of the Board taking more serious action against her, up to and including the certification of tenure charges." Ibid. Those conditions included Sterlacci's submission to random alcohol and drug testing upon her return to work on January 2, 2019, and until June 30, 2020. Ibid.

The terms of the LCA further provided that, if in the future, Sterlacci were under the influence of alcohol or drugs while on Board property or if she refused to submit to random testing, such conduct "would constitute 'just cause,' per se, for the termination of her tenured employment with the Board." Ibid.

Over Sterlacci's objections, the Board asserts that Sterlacci failed a drug test after she returned to work and that, "consistent with [the LCA], [the Board] had per se just cause to terminate Ms. Sterlacci." Id. at ¶¶ 15-20. On June 13, 2019, the Board terminated Sterlacci's employment. Id. at ¶ 21.

On June 21, 2019, Sterlacci filed the instant petition with the Commissioner. In her petition, Sterlacci asserts that, "notwithstanding her tenured status," the Board "took action to summarily and unilaterally terminate" her employment, and that such action violates her rights under the TEHL. Petition, ¶¶ 1-4.

As relief, Sterlacci seeks an order from the Commissioner "[d]eclaring and adjudging [the Board's] summary termination of [her] employment to be null and void;" "[r]einstating [her] in her tenured teaching position;" and, "[a]warding [her] all lawful back pay, benefits, and emoluments to which [she] is entitled." Id. at ¶¶ B-D.

On August 1, 2019, the Board filed with the Commissioner a motion to dismiss in lieu of an answer to Sterlacci's petition.[1] In support of its motion, the Board maintains that Sterlacci violated the terms of the LCA by failing a subsequent drug test and that, as a result, the LCA "both permits and requires [her] termination, without the filing of formal tenure charges." Brief, p. 8. The Board argues that "in exchange for her continued employment, [Sterlacci] agreed that, in the event she again tested positive for any controlled dangerous substance and/or alcohol during the school day, the Board would have just cause, per se, to terminate her employment." Id. at pp. 1-2. The Board reasons that "[i]f the [LCA] required [Sterlacci] to forfeit her position and resign in the event of a subsequent positive drug test, surely such a resignation would be deemed lawful" and that "[t]he herein matter, though worded slightly differently, achieves the same result and a result which both parties negotiated for and understood would occur." Id. at p. 2. In essence, the Board asserts that Sterlacci's petition should be dismissed because she has failed to advance a cause of action.

The Board also moves to seal the entire record in this matter due to the sensitive and/or confidential nature of certain documents pertaining to Sterlacci.

On August 19, 2019, the Commissioner transmitted the matter to the OAL as a contested case. On September 9, 2019, Sterlacci filed a brief in opposition to the Board's motion, and in support of a cross-motion for summary decision. Sterlacci argues that the Board violated the TEHL by firing her without filing tenure charges or otherwise following the procedural requirements of that act. According to Sterlacci, "the LCA [does] not empower the Board to unilaterally and summarily determine that the LCA had been violated, and to terminate Ms. Sterlacci," but instead "it merely prescribed the consequence in the event that such a violation was ultimately proven through the appropriate procedural mechanisms, i.e., by way of tenure charges certified and litigated as per the TEHL." Brief, pp. 1-2. Sterlacci further maintains that "[t]he LCA contains no waiver, explicit or implicit, of [her] rights under the [TEHL]." Id. at p. 2. I agree.

[1] The Board characterized its motion as a "motion for summary decision" pursuant to N.J.A.C. 1:1-12.5; however, because the Board never filed an answer to Sterlacci's petition, the Commissioner properly transmitted the motion as a "motion to dismiss in lieu of an answer" pursuant to N.J.A.C. 6A:3-1.5.

LEGAL DISCUSSION

As a threshold jurisdictional matter, it appears that the parties' motions—which involve contractual claims involving the LCA—may be considered in this forum. The Commissioner generally has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws[.]" N.J.S.A. 18A:6-9. Thus, "[a]lthough the Commissioner does not have jurisdiction over disputes which are purely contractual in nature, he does have jurisdiction over contractual claims which are incidental to his obligation to resolve education claims that are the subject of litigation."[2] B.P. ex rel. B.P. v. Bd. of Educ. of the Lenape Reg'l High Sch. Dist., 2003 N.J. AGEN LEXIS 1198, EDU 2782-02, State Bd. of Educ. (December 3, 2003). Indeed, "the Commissioner will not rule on the enforceability of a contract" in cases in which "the interpretation of the contract is the primary issue at hand and not merely implicated in a question of the school laws." Smith v. Bd. of Educ. of the Twp. of Willingboro, 97 N.J.A.R.2d (EDU) 205.

This matter arises under the school laws because Sterlacci alleges in her petition that the Board fired her in violation of her rights under the TEHL. While the LCA is a contract between Sterlacci and the Board, and the parties differ on their respective rights under the terms of the LCA, an interpretation of the LCA is not the primary issue in this matter, but instead the LCA is merely implicated in a question regarding the TEHL. Thus, the parties' claims regarding the LCA may be appropriately considered here in determining whether or not the Board fired Sterlacci in violation of the TEHL.

The purpose of teacher tenure laws is "to aid in the establishment of a competent and efficient school system by affording teachers 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)); N.J.S.A. 18A:28-1 to -18; N.J.S.A. 18A:6-10 to -18.1. As such, a tenured teacher may not be dismissed except for inefficiency, incapacity,

[2] Since, "[f]or example, contract claims against [school] boards do not arise under the school laws but rather from statutory or common law," such claims are "typically and appropriately adjudicated in the courts." Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002) (citations omitted).

unbecoming conduct, or other just cause, and then only after the procedural requirements of the TEHL have been met. N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10.

The TEHL and its implementing regulations, N.J.A.C. 6A:3-5.1 to -5.7, set forth specific procedural steps that must be followed before a tenured teacher may be dismissed. For instance, any charge against a tenured teacher must be filed with the Secretary of the State Board of Education and sworn evidence supporting such charge shall be presented to the State Board. N.J.S.A. 18A:6-11. The "[c]harges shall be stated with specificity as to the action or behavior underlying the charges." N.J.A.C. 6A:3-5.1(b)(1).

If the State Board determines that probable cause exists for dismissal, the State Board shall certify the charges to the Commissioner. N.J.S.A. 18A:6-11; N.J.A.C. 6A:3-5.1. In such case, "the [local] board may suspend the person against whom such charge is made, with or without pay[.]" N.J.S.A. 18A:6-14.

The Commissioner "shall determine whether the charge(s) are sufficient, if true, to warrant dismissal." N.J.A.C. 6A:3-5.5(a); N.J.S.A. 18A:6-16. If the Commissioner disagrees with the board's determination, he shall dismiss the charges; however, if the Commissioner determines that the charges are sufficient to warrant dismissal, "the matter shall be transmitted immediately to an arbitrator for further proceedings." Ibid.

Thus, while a tenured teacher may be involuntarily removed from her position for several reasons, including inefficiency, incapacity, unbecoming conduct, or other just cause, the TEHL guarantees a tenured teacher certain procedural rights and protections, prior to her dismissal.

Of course, notwithstanding the procedural requirements of the TEHL, a tenured teacher may voluntarily relinquish her position, N.J.S.A. 18A:28-8, voluntarily resign in lieu of a school board's filing of tenure charges, see, e.g., Camden City Sch. Dist. v. Pitts, 2019 N.J. Super. Unpub. LEXIS 1686 (App. Div. July 26, 2019) (holding that tenured teacher agreed to resign in exchange for school board's agreement not to pursue tenure

charges for inefficiency), or voluntarily resign prior to adjudication under the TEHL, N.J.A.C. 6A:3-5.6.

Here, Sterlacci did not voluntarily resign from her position under any of these scenarios. The Board concedes as much through its argument that "[i]f the [LCA] required [Sterlacci] to forfeit her position and resign in the event of a subsequent positive drug test, surely such a resignation would be deemed lawful" and that the LCA, "though worded slightly differently, achieves the same result . . . the cessation of [Sterlacci's] employment with the Board." Thus, by the Board's own admission, the LCA did not require Sterlacci to resign upon a subsequent positive drug test. And contrary to the Board's assertion, the LCA did not provide for Sterlacci's termination without resort and adherence to the procedural requirement of the TEHL.

Instead, the LCA simply provided thatifSterlacci failed another drug test, such a circumstance "would constitute 'just cause,' per se, for the termination of her tenured employment with the Board." These terms did not deprive Sterlacci of the TEHL's protections. In fact, the LCA does not even mention the TEHL. As a result, the LCA cannot be interpreted as a relinquishment of Sterlacci's rights under the TEHL or as authority for the Board to terminate Sterlacci without adherence to the requirements of the TEHL. Simply put, the LCA does not trump the TEHL.

The TEHL clearly states that a tenured teacher may not be dismissed "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and 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." N.J.S.A. 18A:6-10. As such, the Board improperly fired Sterlacci from her position and violated her tenure rights by failing to follow the procedural requirements of the TEHL.

In light of the Board's violation, **I CONCLUDE** that Board's motion to dismiss is hereby **DENIED** and Sterlacci's motion for summary decision is **GRANTED**. The Board's

motion to dismiss is denied because Sterlacci has clearly advanced a cause of action for the Board's violation of the TEHL.

Sterlacci's motion for summary decision is **GRANTED** because there are no issues of fact that the Board violated Sterlacci's rights. Under N.J.A.C. 1:1-12.5, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Here, summary decision in favor of Sterlacci is appropriate because there is no genuine issue as to any material fact and Sterlacci is entitled to prevail as a matter of law. The Board violated Sterlacci's tenure rights by firing her without following the requirements of the TEHL. As such, Sterlacci is entitled to return to the Board's employ in a teaching position for which she is qualified and she is further entitled to back pay, less mitigation, and the benefits and emoluments she would have received had the Board not improperly fired her on June 13, 2019.

Finally, the Board's request to seal the record should be granted in part for the following reasons. Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[t]he record of all hearings [and motion proceedings] shall be open to public inspection, but the judge may, for good cause shown, order the sealing of the record or any part thereof." N.J.A.C. 1:1-14.1(a). In deciding whether to seal a record or a part thereof, "the judge shall consider the requirements of due process of law, other constitutional and statutory standards and matters of public policy" and "the need to protect against unwarranted disclosure of sensitive financial information or trade secrets, to protect parties or witnesses from undue embarrassment or deprivations of privacy[.]" N.J.A.C. 1:1-14.1(b). In order to protect Sterlacci from undue deprivation of her privacy, it is appropriate to proceed with caution and Iam partially granting the Board's motion to seal the record by ordering that (1) any of Sterlacci's medical records that the Board provided with its motion to dismiss; and (2) the LCA, to the extent that it includes certain information deemed confidential under the school laws, shall be sealed, except for the purpose of any review of my order on the parties' motions.

Therefore, **I FIND AS FACT** that there are no genuine issues of material fact requiring a hearing. Based on the foregoing, **I CONCLUDE** that the Board's motion to dismiss is hereby **DENIED**. **I FURTHER CONCLUDE** the Board's motion to seal the record is **GRANTED IN PART**. **I FURTHER CONCLUDE** Sterlacci's motion for summary decision is **GRANTED**. Sterlacci is entitled to return to the Board's employ in a teaching position for which she is qualified, and she is further entitled to back pay, less mitigation, and the benefits and emoluments she would have received had the Board not improperly fired her on June 13, 2019.

It is hereby **ORDERED** that the respondent's request for summary decision be **DENIED**. It is **FURTHER ORDERED** that the following records be sealed (1) any of Sterlacci's medical records that the Board provided with its motion to dismiss; and (2) the LCA, to the extent that it includes certain information deemed confidential under the school laws, shall be sealed. It is hereby further **CONCLUDED** that there are no genuine issues of material fact to be determined on petitioner's cross-motion for summary decision, and petitioner is entitled to summary decision, it is hereby **FURTHER ORDERED** that the petitioner's motion be **GRANTED**.

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

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

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

October 25, 2019
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10-25-19

Date Mailed to Parties: 10-25-19

mph

320-19

New Jersey Commissioner of Education

Decision

Lisa Armstead,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner sought reinstatement to her previous title of principal following a transfer to a vice principal position in the respondent Board's school district. Petitioner contended that she had served in the principal position for more than two years, and therefore is entitled to tenure rights as a principal. The Board argued that petitioner did not fill a "true vacancy" during the two years she served as principal and therefore cannot accrue tenure rights as a school principal.

The ALJ found, *inter alia*, that: the issue here is whether petitioner occupied a truly vacant principal position and thus gained tenure rights as a school principal after having served in that position for more than two years; petitioner was appointed to the position of interim principal on March 4, 2015, after the former principal was promoted to the position of Interim Assistant Superintendent of Educational Services – a position that had been vacated the previous school year by a resignation; petitioner served in the position of principal for the uninterrupted period between March 4, 2015 and July 16, 2017; therefore, under *N.J.S.A.* 18A:28-6(b)(3), petitioner obtained tenure rights due to her service as principal for a period of more than two years; the Board's argument that the petitioner never filled a "true vacancy" because she was appointed to an "interim" position is without merit; and the Board's argument that petitioner must prove two favorable evaluations during the requisite two years in order to gain tenure is barred as this contention was never mentioned until the filing of the Board's summative brief. Accordingly, the ALJ ordered that petitioner be reinstated to her position of principal or, in the alternative, that she be placed on the appropriate salary guide step for principal for the 2019-2020 school year; further, the ALJ ordered that petitioner be awarded the difference between what her earnings and benefits for the 2018-2019 school year would have been had she not been wrongfully demoted, and the salary that she actually received.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision, with the modification that petitioner shall be awarded compensation for the difference in salary she is owed beginning from July 17, 2017, the date upon which she was wrongfully demoted. Further, the Commissioner accepted the evaluations submitted by petitioner for purposes of finding that she met the evaluation requirements of *N.J.S.A.* 18A:28-6(b). The Board was ordered to reinstate petitioner to a principal position and to compensate her for any salary and benefits lost since July 17, 2017.

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.

December 3, 2019

320-19

OAL Dkt. No. EDU 14058-17
Agency Dkt. No. 171-8/17

New Jersey Commissioner of Education

Final Decision

Lisa Armstead,

Petitioner,

v.

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

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner and respondent, and petitioner's reply to respondent's exceptions have been reviewed and considered.

This matter involves a school district employee who served in the position of interim principal for more than two years; she was subsequently transferred to a vice principal position and denied tenure as a principal on the basis that she did not fill a "true vacancy." The Administrative Law Judge (ALJ) found that petitioner served for the requisite period of time, and – regardless of the intention of the Board during that period – petitioner was entitled to tenure as a school principal. Accordingly, the ALJ ordered that petitioner be reinstated to her position as principal or, in the alternative, placed on the appropriate salary guide step for principal for the 2019-2020 school year, and awarded the difference in her earnings and benefits for the 2018-2019 school year.

Petitioner filed exceptions to the Initial Decision. First, petitioner notes that the ALJ awarded the difference in her earnings and benefits for the 2018-19 school year and argues

that her award should date from July 17, 2017, when she was wrongfully demoted. Second, petitioner contends that the Initial Decision incorrectly allows the Board the alternative of placing her on the salary guide step for principal. According to petitioner, she must be reinstated to the principal title, because *N.J.S.A.* 18A:28-5 provides that upon earning tenure, she "shall not be dismissed . . . except for inefficiency, incapacity, or unbecoming conduct . . .".

Respondent also filed exceptions to the Initial Decision. First, respondent claims that there is no proof that petitioner was actually filling a true vacancy and that she admitted that she served in an interim position. Second, respondent argues that because there was no testimony or evidence of lost wages or wage entitlement, that issue is foreclosed.

In reply to respondent's exceptions, petitioner argues that the ALJ implicitly found that a true vacancy existed, because tenure rights cannot attach to a position that is not actually vacant. Petitioner also contends that the award of the difference between her wages at the vice principal salary and the principal salary follows from and is commensurate with the legal finding that she earned tenure as a principal, such that no specific testimony about wages or entitlements is required for the ALJ or Commissioner to enter such an order.

Upon a comprehensive review, the Commissioner agrees with the ALJ that the petitioner is entitled to tenure as a principal. The Commissioner does not find the Board's exceptions, which cite no statutes, regulations, or case law, to be persuasive. The Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, "should be liberally construed to achieve its beneficent ends." *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982). Permitting a board of education to avoid tenure rights by using "interim" or "acting" titles for over two years, under the guise of "mulling over" permanent assignments, contravenes the intent of the Tenure Act.

"...(T)he word 'vacancy' is commonly understood to mean an unoccupied position for which an incumbent does not intend to return, as contrasted with a leave of absence that 'connotes continuity of the employment status.'" *Lammers v. Bd. of Educ. of the Borough of Point Pleasant*, 134 *N.J.* 264, 272 (1993), quoting *Bowers v. Am. Bridge Co.*, 43 *N.J. Super.* 48, 57 (App. Div. 1956), *aff'd* 24 *N.J.* 390 (1957). Prior to the events at issue in this case, the position of assistant superintendent was held by Margaret Morales, and it became truly vacant when she left the district. When Shirly Johnson-Tucker assumed the interim superintendent position, a true vacancy was created in her former position of principal. Her assumption of a different position in the district cannot be categorized as a leave of absence. Therefore, when petitioner assumed the interim principal position, she was assuming a truly vacant position. Petitioner filled that position for more than two years, meeting the time requirement to obtain tenure as a principal. Accordingly, she must be reinstated as principal and is entitled to the difference between the salary and benefits she received after her transfer to vice principal and what she would have received as principal. While the Initial Decision orders this payment for the 2018-2019 school year, the Commissioner agrees with the argument set forth in petitioner's exceptions that the award should date from July 17, 2017, when she was wrongfully demoted.

The Initial Decision notes that respondent's closing brief argued that petitioner did not meet her burden to prove that she received two favorable evaluations, as required by *N.J.S.A.* 18A:28-6(b).[1] The ALJ found that the argument was barred because respondent had not raised it at any time prior to its summation brief and had affirmed at the outset of the hearing that the only issue in dispute was whether petitioner had filled a true vacancy. The Commissioner acknowledges that, in order for an individual to receive tenure as a principal, *N.J.S.A.* 18A:28-

[1] Notably, respondent did not argue that petitioner had not received the required favorable evaluations, but rather merely that petitioner did not demonstrate that she had.

6(b) requires two annual summative evaluations of "effective" or "highly effective" within the first three years of employment in that position. In reply to respondent's closing brief, which raised this issue for the first time, petitioner submitted evidence of favorable evaluations from the 2016-2017 and 2017-2018 school years. Respondent did not contest, or even respond to, this evidence in any subsequent filing with the OAL or the Commissioner. As such, the Commissioner accepts the evaluations submitted by petitioner for purposes of finding that she met the evaluation requirements of *N.J.S.A.* 18A:28-6(b).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, as modified herein. The Board is ordered to reinstate petitioner to a principal position and to compensate petitioner for any salary and benefits lost since July 17, 2017.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/19
Date of Mailing: 12/04/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14058-17
AGENCY DKT. NO. 171-8/17

LISA ARMSTEAD,
Petitioner,
v.
CITY OF PLAINFIELD BOARD OF EDUCATION, UNION COUNTY,
Respondent.

Andrew Schwartz, Esq., for petitioner (Schwartz Law Group, attorneys)

Robert M. Tosti, Esq., for respondent (Law Offices of Purcell, Mulcahy and Flanagan, attorneys)

Record Closed: October 15, 2019 Decided: October 23, 2019

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Lisa Armstead, was appointed to serve as an elementary school principal on March 4, 2015, by the City of Plainfield Board of Education (district or board). Petitioner remained in that position until July 16, 2017, at which time she was transferred to the position of vice principal at the Plainfield High School. Petitioner

argues that since she remained in the principal position for more than two years, she gained tenure rights as a principal. The district argues that petitioner did not fill a "true vacancy" during the two years that she served as principal and can therefore not accrue tenure rights as a school principal.

ISSUE

Did petitioner occupy a truly vacant principal position and thus gain tenure rights as a school principal after having served in that position for more than two years?

PROCEDURAL HISTORY

Petitioner filed the instant Petition with the New Jersey Commissioner of Education on or about August 3, 2017. The matter was transmitted as a contested case on September 20, 2017, to the Office of Administrative Law (OAL) where it was received on September 22, 2017. Petitioner filed a Motion for Summary Decision pursuant to N.J.A.C. 1:1-12.5 on or about August 30, 2018. Petitioner's Motion for Summary Decision was denied by Letter Order dated December 20, 2018. A hearing on the merits was set down for July 10, 2019. Final Submissions were received by the undersigned on October 15, 2019, at which point the record was closed.

STATEMENT OF FACTS

The I **FIND** that the following facts to be the **FACTS** of the case:

The District employed Petitioner beginning on or about December 16, 1987, as a science teacher, serving under the required educational certificate until the District promoted her to the position of School Counselor on or about September 1, 2001. Petitioner served in the position of School Counselor under the requisite certificate, attaining tenure in that capacity, and was thereafter, promoted to the position of Acting Vice Principal in or around August 2012. Petitioner held the requisite Principal certificate, which authorized her to serve in, among other roles, the capacity of principal

and vice principal. Thereafter, on November 21, 2012, the District changed Petitioner's title from "Acting Vice Principal" to that of "Vice Principal."

On March 4, 2015, the District appointed petitioner to the position of interim principal of the Woodland Elementary School. Petitioner was appointed to replace Ms. Shirly Johnson-Tucker, who had been promoted to the position of Interim Assistant Superintendent of Educational Services on February 27, 2015. Ms. Johnson-Tucker was promoted to her role as interim Assistant Superintendent of Educational Services in order to fill the position vacated by Ms. Margaret Morales who was no longer employed by the District as of June 30, 2014. Petitioner remained in her position as principal until July 16, 2017, when she was transferred to the position of Vice Principal at the Plainfield High School, effective July 17, 2017.

LEGAL ARGUMENT

PETITIONER OBTAINED TENURE RIGHTS DUE TO HER SERVICE AS PRINCIPAL UNDER N.J.S.A. 18A:28-6(b)(3)

N.J.S.A. 18A:28-6 Tenure upon transfer or promotion

> b. Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after the effective date of P.L. 2012, c. 26 (C.18A:6-117), shall not obtain tenure in the new position until after:
>
> . . .
>
> (3) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years. . . . .

Respondent district does not dispute that petitioner served as principal for the requisite academic years provided for by N.J.S.A. 18A:28-6(b), nor does the district dispute whether such service was under the appropriate certificate. See Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 81 (1982) ("[A]ll teaching staff members who work in

positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure[.]").

Respondent district only argues that petitioner never filled a "true vacancy" as principal, and thus cannot obtain tenure. In their closing brief, respondent fails to site any statute, code, or case law that discusses what constitutes a "true vacancy." Instead, respondent asserts that petitioner was appointed school principal in an "interim" position and states that during the two-plus years petitioner served as principal the district was "mulling over" to whom the position of principal should permanently be assigned. See Board's Summation Brief attached hereto, without attachments, as Exhibit A. The district is apparently asking this tribunal to infer that because the board was still "mulling over" a permanent appointee for the position of school principal that petitioner did not fill a true vacancy and should, therefore, not gain tenure as a principal. I **FIND** petitioner did actually serve as school principal for an uninterrupted period between March 4, 2015, and July16, 2017, and thus, I **FIND** that petitioner fulfilled all requirements of N.J.S.A. 18A:28-6(b), regardless of the mindset or intention of the board during that period, and I **CONCLUDE** that she is entitled to tenure rights as school principal as a matter of law.

It should be noted that in their closing brief, respondent argues that, under N.J.S.A. 18A:28-6(b), petitioner must have received favorable evaluations during the requisite two years in order to receive tenure. Without addressing the merits of this argument, I **CONCLUDE** the argument is barred as respondent at no time prior to the filing of their summation brief ever brought into question petition's evaluations when she served as school principal. Indeed, it should be noted that both parties affirmed at the outset of the hearing that the only issue in dispute before this tribunal was whether or not petitioner filled a true vacancy when she served as principal in order to gain tenure rights as principal.

ORDER

It is hereby **ORDERED** that petitioner Lisa Armstead's petition be **GRANTED** and that she be reinstated to her position of principal or, in the alternative, that she be placed

on the appropriate salary guide step for principal for the 2019-2020 school year. It is further **ORDERED** that Armstead be awarded the difference between what her earnings and benefits for the 2018-2019 school year would have been had she not been wrongfully demoted from her position of principal and what she actually received.

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

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

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

October 23, 2019
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 10/23/19

Date Mailed to Parties: 10-25-19

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Lisa Armstead

For Respondent:

Lisa Armstead

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None referenced in decision

For Respondent:

Exhibit A: Respondent's summation brief

321-19

New Jersey Commissioner of Education

Final Decision

S.B., on behalf of minor child, S.F.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that her child, S.F., was ineligible to receive a free public education in respondent's school district. S.F. divides her time equally between the Morris County School of Technology and the Morristown High School (MHS). The Board contended that S.B. and S.F. moved from Morristown to Boonton early in the 2018-19 school year, and from that point forward was ineligible to receive a free public education in the Morris School District. The Board filed a motion for summary decision, and a counterclaim for tuition.

The ALJ found, *inter alia*, that: there are no material facts at issue herein and the case is ripe for summary decision; pursuant to *N.J.S.A.* 18A:38-1(a), public school is free to a minor who is domiciled within the school district; if a student is not domiciled within the school district, she is not entitled to attend district schools free of charge, and the Commissioner may assess tuition pursuant to *N.J.S.A.* 18A:38-1b; in the instant case, it is uncontroverted that S.B. and S.F. moved from Morristown to Boonton on September 30, 2018, but S.F. continued to attend MHS for the remainder of the 2018-19 school year; S.F. remains a student at MHS for the 2019-20 school year; and the respondent Board is entitled to tuition reimbursement for the period of S.F.'s ineligible attendance. The ALJ concluded that S.B. owes the Board $11,290.05 for the period from October 19, 2018 through June 30, 2019, and an additional amount of $73.70 per day for each school day S.F. attended school in respondent's district during the 2019-20 school year.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. However, in reviewing the tuition calculations in the Initial Decision, the Commissioner found that additional information is necessary in order to accurately calculate the total amount of tuition due to the Board. Accordingly, the Commissioner remanded this matter to the OAL for calculation of total tuition owed for S.F.'s ineligible attendance, and supplementation of the record as warranted.

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.

December 3, 2019

321-19

OAL Dkt. No. EDU 05507-19
Agency Dkt. No. 60-3/19

New Jersey Commissioner of Education

Final Decision

S.B., on behalf of minor child, S.F.,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Morristown for the majority of the 2018-19 school year, as she admitted moving to Boonton on or about September 30, 2018. The Commissioner further concurs with the ALJ that the minor child was, therefore, not entitled to a free public education in the District's schools, or at the Morris County School of Technology, which S.F. attended part time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district. The ALJ noted that the half-time tuition at Morristown High School for the 2018-19 school year was $7,994.50, and the part-time tuition at the Morris County School of Technology for the same period was $4,550. The ALJ prorated the tuition to $11,290.05 for the portion of the school year in which S.F. was ineligible to attend school in the Morris School District, but it

is unclear what time period that calculation represents. The Initial Decision indicates that the $11,290.05 represents the prorated tuition for the time period from October 1, 2018 through June 30, 2019; elsewhere in the decision, however, the time period in question is stated as October 19, 2018 through June 30, 2019. Without the daily tuition rate for the 2018-19 school year and the number of school days in which S.F. was ineligible to attend school in the district during that time, the Commissioner cannot calculate the exact tuition amount.

Additionally, the ALJ ordered that petitioner pay $73.70 per day for each school day since the start of the 2019-20 school year and going forward, but it is unclear whether this daily tuition rate is comprised of the part-time rates from both of the schools S.F. attended, *i.e.*, the Morristown High School and the Morris County School of Technology; further, the ALJ failed to include a calculation for any defined portion of the 2019-20 school year, such as to the date the record closed or the date of the Initial Decision.

In order to calculate the total tuition owed to the Board in this matter, additional information is necessary, such as the number of school days on which the minor child attended school ineligibly during both the 2018-19 and 2019-20 school years in respondent's school district. Accordingly, this matter is remanded to the OAL for calculation of tuition due to the Board, and supplementation of the record as warranted.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 12/03/19
Date of Mailing: 12/04/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05507-19
AGENCY DKT. NO. 60-3/19

S.B. ON BEHALF OF MINOR CHILD S.F.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

S.B., petitioner, pro se

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

Record Closed: October 18, 2019 Decided: October 28, 2019

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

S.F. is a minor and a student in the Morris School District but is domiciled in the Boonton School District. Should public school be free to S.F. in the Morris School District when she is not domiciled there? No. Under N.J.S.A. 18A:38-1(a), public school shall

be free to a minor who is domiciled within the school district, and S.F. meets no exception under this law.

PROCEDURAL HISTORY

Petitioner, S.B., is the mother of S.F. Significantly, S.F. is a minor and a student in the Morris School District who divides her time equally between the Morris County School of Technology (Morris County VoTech) and Morristown High School. On October 19, 2018, the Morris School District discovered that S.B. had moved from Morristown, NJ, to Boonton, NJ. As a result, on November 1, 2018, the Morris School District sent S.B. a Notice of Initial Determination of Ineligibility, which afforded S.B. a hearing before its board of education to determine whether S.F. was entitled to a free, public education by the Morris School District.

On December 10, 2018, respondent, the Morris School District Board of Education (Board), held the hearing. On March 11, 2019, the Board determined that S.B. had failed to prove that S.F. lived within the Morris School District; concluded that S.F. was ineligible to receive a free, public education from it; and, consequently, voted to remove S.F. from the district. On March 14, 2019, the Board issued its Notice of Final Determination of Ineligibility. In its notice, the Board informed S.B. that she may be assessed tuition.

On March 25, 2019, S.B. appealed the determination.

On April 23, 2019, the Department of Education, Office of Controversies and Disputes, transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On April 29, 2019, the case was assigned to me for hearing. On May 3, 2019, I held an initial prehearing conference, during which time the parties advised me that they were negotiating a settlement of the case. As a result, another prehearing conference was scheduled for May 17, 2019.

On May 17, 2019, I held the prehearing conference to learn the status of the settlement negotiations, during which time the parties advised me that they would enter into a settlement agreement within the next thirty days, so I scheduled another prehearing conference for June 19, 2019.

On June 19, 2019, before I convened the prehearing conference, the parties advised me that they could not enter into a settlement agreement and requested an adjournment of the prehearing conference until the following day, June 20, 2019.

At the prehearing conference on June 20, 2019, the parties informed me that they could not settle the case, but agreed that it could be resolved through a motion for summary decision, which the Board represented it would file shortly.

On September 12, 2019, the Board filed its motion for summary decision. On September 25, 2019, more than the ten days N.J.A.C. 1:1-12.2 allows for the filing of opposition, petitioner emailed this tribunal to request a conference call, which was scheduled for October 18, 2019. On October 18, 2019, before the conference call, petitioner emailed her opposition, and during the conference call, the Board advised that it would not submit a response. As a result, I closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motion for summary decision, I **FIND** the following as **FACT** for purposes of this motion only:

Petitioner, S.B., is the mother of S.F. S.F. is a minor and a student in the Morris School District who divides her time equally between the Morris County VoTech and Morristown High School. Before the 2018–19 school year, S.B. and S.F. lived in Morristown, NJ, at 23 D. Place. S.B. and S.F., however, moved for the 2018–19 school year. During the 2018–19 school year, on September 30, 2018, S.B. and S.F. moved to Boonton, NJ, at 81 D. Avenue. Uncontroverted evidence are the fact that on October 19, 2018, mail was returned to the Morris School District from 23 D. Place, Morristown, NJ,

and admissions by S.B. that she and S.F. did, in fact, move to 81 D. Avenue, Boonton, NJ. Indeed, S.B. wrote a letter to the Commissioner of the Department of Education, dated March 20, 2019, listing her home address as 81 D. Avenue, Boonton, NJ, and another letter to the Commissioner dated March 25, 2019, stating that she moved from Morristown to 81 D. Avenue, Boonton, NJ, on September 30, 2018.

Despite having moved from Morristown to Boonton, S.F. continued to attend high school at Morristown High School for the 2018–19 school year, and she continues to attend high school at Morristown High School for the 2019–20 school year to this day.

The half-time tuition for general-education attendance at Morristown High School for the 2018–19 school year is $7,994.50. The part-time tuition for attendance at the Morris County VoTech for the 2018–19 school year is $4,550. Thus, the total and prorated tuition for S.F. to attend Morristown High School and the Morris County VoTech between October 1, 2018, and June 30, 2019, is $11,290.05.

Meanwhile, the per-diem tuition rate for the 2018–19 school year is $69.69, and the per-diem tuition rate for the 2019–20 school year is $73.70.

To date, S.B. has made no payments to the Morris School District.

CONCLUSIONS OF LAW

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. "The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

In this case, no genuine issue of any material fact exists, and the Board is entitled to prevail as a matter of law for the reasons stated below.

Public school shall be free to a minor who is domiciled within the school district, N.J.S.A. 18A:38-1(a); New Jersey has consistently held that the domicile of the child follows the domicile of the parent, Shim v. Rutgers, 191 N.J. 374, 399 (2007); and if a student does not have a right to attend the school district, the Commissioner may assess tuition, N.J.A.C. 6A:22-6.2.

In this case, S.F. is domiciled in Boonton, NJ, and has been domiciled in Boonton, NJ, since October 19, 2018, when she moved with her mother from Morristown to Boonton. Given this circumstance, the Morris School District assessed S.B. tuition for the time her daughter attended school at Morristown High School and the Morris County VoTech while she and her daughter were no longer domiciled in Morristown. Accordingly, I **CONCLUDE** that S.B. owes the Board $11,290.05 for the period of ineligibility, from October 19, 2018, through June 30, 2019, and $73.70 for each school day going forward since the start of the 2019–20 school year.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that S.B. owes the Board $11,290.05 for the period of ineligibility, from October 19, 2018, through June 30, 2019, and $73.70 for each school day going forward since the start of the 2019–20 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 is authorized by law to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

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.

10/28/19
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 10/28/19

Date Mailed to Parties: October 29, 2019

dr

322-19
OAL Dkt. No. EDU 12114-19
Agency Dkt. No. 225-8/19

New Jersey Commissioner of Education

Final Decision

V.S.W., on behalf of minor child P.Q.,

Petitioner,

v.

Board of Education of the Town of Hammonton, Atlantic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed for failure to prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/19
Date of Mailing: 12/09/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - DISMISSAL
OAL DKT. NO. EDU 12114-19
AGENCY DKT. NO. 225-8/19

V.S.W. ON BEHALF OF MINOR CHILD
P.Q.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWN OF HAMMONTON,
ATLANTIC COUNTY,
Respondent.

V.S.W., petitioner, pro se

Camille L. McKnight, Esq., for respondent (Cooper Levenson, P.A., attorneys)

Record Closed: November 14, 2019 Decided: November 15, 2019

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

V.S.W. (petitioner) on behalf of her minor daughter, P.Q. brings an action for emergent relief against the Board of Education of the Town of Hammonton, Atlantic County (respondent), challenging the respondent's refusal to accept P.Q. into the Choice Program.

The respondent opposes the relief requested and asserts that the petitioner's application is legally defective as none of the arguments in her petition provide a basis to grant the requested emergent relief. The respondent argues that the petitioner cannot satisfy any of the mandatory prerequisites outlined in Crowe v. DeGoia, 90 N.J. 126 (1982.)

PROCEDURAL HISTORY

Petitioner filed a request for emergent relief on August 27, 2019, with the New Jersey Department of Education (NJDOE). On August 28, 2019, the NJDOE transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioner. The parties presented oral argument on the emergent relief application on September 9, 2019, at the OAL offices in Atlantic City, New Jersey and the record closed. By Order dated September 9, 2019, the aforementioned emergent relief was denied.

By Order dated September 26, 2019, the Commissioner of Education adopted the recommended Order of the OAL denying petitioner's application for emergent relief. The Commissioner further ordered that the matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring this matter to closure.

On October 4, 2019, proper notice was emailed to the parties for a telephone status conference on November 13, 2019 at 2:00 p.m. The petitioner failed to participate in the status conference. Counsel for the respondent represented that she has had no contact with the petitioner since the September 9, 2019 oral argument. Counsel for the respondent further represented that the district has had no further contact with the petitioner relative to the matter.

To date, the petitioner has not provided a request for an adjournment of the November 13, 2019, status conference or an explanation for her nonappearance at the same. Therefore, I **CONCLUDE** that the petitioner has failed to appear and abandoned her appeal.

ORDER

It is hereby **ORDERED** that this matter is **DISMISSED**.

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

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

November 15, 2019
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

JRW/tat

323-19

OAL Dkt. No. EDU 6853-19
Agency Dkt. No. 48-3/19

New Jersey Commissioner of Education

Final Decision

M.C., on behalf of minor child, K.N.,

Petitioner,

v.

Board of Education of the Borough of Roselle, Union County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled October 22, 2019 OAL hearing, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 12/09/19
Date of Mailing: 12/09/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAILURE TO APPEAR

OAL DKT. NO.: EDU C 6853-19

DATE OF FAILURE TO APPEAR: 10/29/19

PARTY OR PARTIES WHO DID NOT APPEAR Mamie Carr

10/24/19
(Date)

Sharon Jeffers
Sharon Jeffers, Secretary / Gerson

330-19R

OAL DKT. No. EDU 15488-19
(EDU 10717-19 On Remand)
Agency DKT. No. 154-6/19

New Jersey Commissioner of Education

Final Decision

C.W., on behalf of minor child, T.W.,

Petitioner,

v.

Board of Education of the Township of Montclair, Essex County,

Respondent.

The record of this matter, the proposed stipulation of settlement and release (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 – mindful of the Commissioner's October 30, 2019 determination to remand the previous Agreement as it did not comply with the requirements of *N.J.A.C.* 6A:3-1.13. As the deficiencies noted in the Commissioner's prior decision have been addressed, the Commissioner can now approve the within Agreement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/16/19
Date of Mailing: 12/16/19

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

C.W. ON BEHALF OF T.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY.

Respondent.

OAL DKT. NO. EDU 15488-19

AGENCY DKT. NO. 154-6/19

ON REMAND

OAL DKT. NO. EDU 10717-19

C.W., for petitioner, T.W., pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: November 13, 2019 Decided: November 14, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 4, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. [1]

---

[1] This matter was originally transferred to the OAL and filed as a contested matter on August 5, 2019, under docket number EDU 10717-19. The matter settled and on September 25, 2019, an Initial Decision Settlement was filed. Thereafter, on October 30, 2019, the Commissioner of the Department of Education remanded the matter to the OAL because the Stipulation of Settlement was not in compliance with N.J.A.C. 6A:3-1.13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes in this matter.

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 signatures of the parties or their representatives.

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

3. The settlement is in compliance with N.J.A.C. 6A:3-1.13.

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

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

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

November 14, 2019
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: November 18, 2019

Date Mailed to Parties:
lr
Attachment

MACHADO LAW GROUP
1 Cleveland Place
Springfield, New Jersey 07081
Tel: 732-540-8276
Fax: 732-540-8296
Attorneys for Respondent,
Montclair Board of Education

C.W. o/b/o T.W.	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
	:	DOCKET NOS.: EDU 10717-2019
Petitioner,	:	AGENCY REF. NOS.: 154-6/19
	:	EDU 15468-19
vs.	:	
	:	
MONTCLAIR BOARD OF	:	
EDUCATION	:	
Respondent.	:	

STIPULATION OF SETTLEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT (the "Agreement") made by and between the Montclair Board of education, with its principal office located in Montclair, New Jersey (hereinafter referred to as the "Board" or "District" and Chriss Williams ("Parent"), on behalf of Truman Foster Williams (hereinafter "T.W." or "student").

WHEREAS, the Montclair Board of Education is the local educational authority with the responsibility of educating T.W.; and

WHEREAS, on May 1, 2019, Truman was accused of engaging in a fight with another District student on school-grounds;

WHEREAS, as a result of the allegations, T.W. received a one (1) day suspension; and

WHEREAS, on June 24, 2019, Parent filed a Petition of Appeal with the New Jersey Department of Education, Office of Controversies and Disputes, challenging the accuracy of the allegations made against T.W. and requesting that the matter be expunged from his student records; and

WHEREAS, the parties having a desire to settle the above matters in an amicable way so as to avoid a hearing and any further legal proceedings.

NOW THEREFORE, in consideration of the mutual promises the parties hereto agree as follows:

1. Effective with the execution of this Agreement, references to the May 1, 2019 incident, as well as the associated one (1) day suspension, shall be expunged from T.W.'s student records.

2. It is understood and agreed that each Party shall be responsible for their own attorney's fees and that there is no "prevailing party". Petitioner further waives any and all other costs associated with this matter, whether alleged or not, up to the date of the execution of this Agreement.

3. Petitioner shall release the District from any and all claims, rights and liability, including but not limited to any claims or costs for attorney's fees, civil liability, or any other equitable or legal relief at all relevant times, whether known or unknown as of the date of this Agreement.

4. This Agreement contains the entire agreement between the parties hereto and is intended to resolve all disputes and issues between them as of the date of execution of this Agreement.

5. This Agreement shall remain confidential and neither party shall disclose its form or contents to third parties, except as required by law and as necessary for enforcement purposes.

6. This Agreement shall be governed by the laws of the State of New Jersey.

7. 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.

8. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

9. Because short-term discipline is within the discretion of the administration, this agreement is not subject to Board approval, unless otherwise required by the Court.

Date: 9/20/2019

Chriss Williams

Date: 9/20/2019

Witness:

Date: 9-23-19

By: _____

Dr. Nathan Parker
Interim Superintendent
Montclair Board of Education

Date: 10-31-19

_____
Isabel Machado, Esq.
Board Attorney

OAL Dkt. No. EDU 10717-19
Agency Dkt. No. 154-6/19

New Jersey Commissioner of Education

Final Decision

C.W., on behalf of minor child, T.W.,

Petitioner,

v.

Board of Education of the Township of Montclair, Essex County,

Respondent.

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

Upon review, the Commissioner observes that the Interim Superintendent of the Montclair Board of Education signed the agreement on behalf of the Board. Despite the language in paragraph 9 of the proposed stipulation of settlement – which incorrectly states that settlements involving short-term discipline are not subject to Board approval – *N.J.A.C.* 6A:3-1.13 clearly requires that when a district board of education is a party to a contested matter, a proposed settlement agreement must either include a copy of the Board resolution approving the settlement or the signature of the Board's attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Interim Superintendent to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

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.

COMMISSIONER OF EDUCATION

Date of Decision: 10/30/19
Date of Mailing: 10/30/19

MACHADO
LAW GROUP

1 CLEVELAND PLACE SPRINGFIELD, NJ 07081 732.540.8276 FAX 732.540.8296 WWW.MACHADOLAWGROUP.COM

Isabel Machado, Esq.
imachado@machadolawgroup.com

November 1, 2019

Via Electronic Mail
Honorable Julio Morejon
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: C.W. o/b/o T.W. v Montclair Board of Education
OAL Dkt. No.: EDU 10717-19
Agency Ref. No.: 154-6/19

Dear Judge Morejon:

As Your Honor is aware, this firm represents the Montclair Board of Education regarding the above referenced matter. Pursuant to the Commissioner's October 30, 2019 decision, attached, please see the parties revised settlement agreement, which includes my signature as Board attorney pursuant to N.J.A.C. 6A:3-1.13.

Thank you for your courtesies.

Sincerely,
Machado Law Group

Isabel Machado, Esq.

Encl.
er

cc: Dr. Nathan Parker, Interim Superintendent (Email)
Mr. Chriss Williams, ProSe (Email)

329-19E

OAL Dkt. No. EDU 16266-19
Agency Dkt. No. 295-11/19

New Jersey Commissioner of Education

Order on Emergent Relief

J.P. and S.P., on behalf of minor child, F.P.,

Petitioners,

v.

Board of Education of the West Morris Regional High School District, Morris County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 12/16/19
Date of Mailing: 12/16/19

[1] Petitioners submitted exceptions to the Order in a letter dated December 3, 2019. *N.J.A.C.* 1:1-18.4 permits the filing of exceptions to an initial decision, but no provision of the Uniform Administrative Procedure Rules allows for exceptions to an Order Denying Emergent Relief. Accordingly, the petitioners' submission was not considered.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 16266-19
AGENCY DKT. NO. 295-11/19

J.P. AND S.P., ON BEHALF OF
MINOR CHILD, F.P.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
WEST MORRIS REGIONAL HIGH
SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

Steven D. Farsiou, Esq., for petitioners (Trinity & Farsiou, attorneys)

Jodi Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, attorneys)

Record Closed: November 26, 2019 Decided: November 27, 2019

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner filed an application for emergent relief seeking a determination that an alternative placement or school transfer to Pope John XXIII Regional High School is a

proper remedy to the petitioners' complaints that student F.P. was subject to harassment, intimidation and bullying at respondent school district. Petitioner makes this application to permit F.P. to compete immediately on the Pope John XXIII Regional High School's varsity basketball team, rather than "sit out" the first thirty days of the season as required by NJSIAA rules.

PROCEDURAL HISTORY

Petitioner filed a petition seeking emergent relief with the New Jersey Department of Education, Office of Controversies and Disputes on or around November 15, 2019. On November 19, 2019, the matter was filed with the Office of Administrative Law (OAL). Oral argument was held on November 26, 2019, at which time the record was closed.

FACTUAL DISCUSSION

F.P. is currently enrolled as a sophomore at Pope John XXIII Regional High School (Pope John). In the 2018–2019 school year, she was enrolled as a freshman at West Morris Central High School (West Morris), where she was a member of the West Morris Varsity Girls' Basketball Team.

Petitioners assert that F.P. was subject to harassment, intimidation and bullying (HIB) by her coach while on the West Morris Varsity Girls' Basketball Team, and that petitioners complained of the coach's conduct to the West Morris Athletic Director in February 2019. Petitioners allege that although they complained of HIB conduct, the Athletic Director failed to report the complaint and the school never initiated an HIB investigation. Petitioners assert that the Athletic Director's failure to do so constituted a violation of the respondent's HIB Policy and the New Jersey Anti-Bullying Bill of Rights Act (the Act). F.P. completed the basketball season, and respondent did not renew the coach after the season ended.

Petitioners also assert that on May 12, 2019, petitioner S.P. sent an e-mail to the school principal, Principal Rymer, to report an HIB complaint with respect to another student, M.S., who was sharing an inappropriate photograph of a topless female with various boys in the high school alleging that the picture was of F.P. M.S. told other students

that F.P. shared the photograph with him. These statements, according to petitioners, were intentionally false and cause her extreme emotional distress. The school conducted an investigation in response to the May 12 complaint, but it was not conducted pursuant to the District's HIB policy and the Act. Specifically, petitioners contend that the school never provided them with any information concerning the school's investigation or determination in writing, and never advised petitioners of their rights under the HIB Policy and the Act, including their right to a hearing before the Board of Education. In late May 2019, however, Principal Rymer did advise petitioners verbally that M.S. was found not to have violated the HIB Policy but was suspended from school. Despite being verbally informed in late May that M.S. was found not to have violated the HIB Policy, petitioners maintain that they had been aware "that M.S. was determined to not have violated the HIB Policy, petitioners would have sought a hearing as per their statutory right." Respondent maintains that the May complaint was properly handled by the school, and investigated pursuant to the student Code of Conduct after respondent determined that the reported acts of M.S. did not meet the threshold definition of HIB, pursuant to HIB Policy 5131.1, which is in accordance with N.J.A.C. 6A:16-7.7(a)(2)(ix)(1).

In early August 2019, M.S. began again to bully or harass F.P on social media. F.P. no longer felt safe at West Morris and petitioners decided that it was in F.P.'s best interest to transfer to Pope John. Petitioners assert that this decision was "based solely on the fact that respondent failed to properly adhere to its HIB Policy and to take the HIB complaints seriously."

Petitioners allege that M.S.'s harassing conduct against F.P. continued even after F.P. transferred from West Morris Regional High School, and that this resulted in petitioners requesting that respondent conduct another HIB investigation. None of the complaints filed by petitioners in August and September 2019 were investigated.

Petitioners met with the West Morris Superintendent in October 2019 to try to resolve "the outstanding dispute as to the school's failure to adhere to its HIB Policy which was now preventing F.P. from participating in the Pope John basketball program." The superintendent refused to sign a transfer form indicating that F.P.'s transfer was not for athletic advantage.

Petitioners allege that respondent failed to comply with its HIB policy by failing to follow the procedures outlined in the Act, and violated petitioners' due process rights by failing to advise them in writing as to the outcome of their investigation, by failing to advise them of their right to a statutory hearing and by failing to properly punish M.S. in the various HIB complaints against him. Respondent denies that it violated its HIB policy or the Act in its handling of petitioners' allegations, and have moved to dismiss the Petition of Appeal. Respondent asserts that petitioners' appeal of the May 2019 determination is untimely; respondent has no obligation to conduct any investigation in response to the August and September complaints (after F.P. left West Morris); and respondent had no obligation to inform petitioners in writing concerning the status of the M.S. complaint or its disposition of the matter since it was handled as a student Code of Conduct matter. Respondent asserts that the Petition of Appeal and this request for emergent relief is simply petitioners' attempt to circumvent NJSIAA rules concerning the thirty-day waiting period for transfer students.

The basketball season at Pope John begins on December 20, 2019. NJSIAA rules require athletes who switch schools without a "bona fide change of residence" to sit out of competition for thirty days. This applies to student athletes, like F.P., who played at the varsity level at her previous school. In order to permit F.P. to play for the Pope John basketball team immediately and not "sit out" the thirty days, petitioners seek a determination that "based on the background of the case and the current relationship between the respondent and the petitioners, a proper action to remediate the petitioners' complaints is an alternative placement or a school transfer," which would permit F.P. to immediately play for the Pope John basketball team and not "be punished" for transferring to Pope John as a result of the harassment, intimidation and bullying complaints made by petitioners.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 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.

Petitioners must satisfy all four prongs of the Crowe test.

With regard to the first required prong in considering an emergent relief request, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

I agree that petitioners have sufficiently established that F.P. will suffer irreparable harm if required to sit out the first thirty days of the season as this is not the type of harm that can be redressed adequately by monetary damages. If not permitted to play for thirty days, F.P. will lose out on participating in approximately half of her sophomore season, which could have an impact on her recruiting opportunities. Accordingly, I **CONCLUDE** that petitioners have met their burden of demonstrating irreparable harm.

However, with respect to the second and third prongs of the Crowe analysis, petitioners cannot demonstrate that the law is settled in their favor, or that they have a likelihood of succeeding on the merits of their claims. The only law cited by petitioners in their brief are references to the HIB Act, and specifically references relating to the investigatory procedures to be followed by school districts and the district's requirement to

provide certain information to the parents in writing within five days after the results of the investigation are reported to the Board of Education. Petitioners fail to cite to any law supporting their claim that F.P. has any right to a school transfer, or alternative placement, as a remedy to their HIB complaints and the District's alleged failure to follow proper HIB procedure in not providing petitioners with their HIB determination in writing. Petitioners simply cannot demonstrate that the law supports a school transfer where the district may not have followed proper HIB procedures, as petitioners allege, or where there are complaints of HIB as described by petitioners, regardless of the district's findings of HIB. A school transfer is an extraordinary remedy in HIB matters. Even if the District had determined that a violation of HIB did occur in May, F.P. is not legally entitled to a school transfer as there are other, less extraordinary, remedies available.

As stated previously, petitioners failed to demonstrate a likelihood of prevailing on the merits of the underlying claim. In their Petition, petitioners seek, in part, a determination that M.S.'s conduct towards F.P. was in fact a violation of the Act and that the respondent's determination concerning the HIB complaint in May 2019 be overturned. Petitioners, however, have not and cannot demonstrate a likelihood of prevailing on the merits with respect to their claim that M.S.'s conduct constituted a violation of the Act. The fact that local law enforcement may have investigated M.S.'s conduct does not necessarily warrant a determination that the conduct constitutes HIB pursuant to the Act, and based on petitioners' submissions, it is unclear whether the complaint of conduct would meet the definition of HIB.

While petitioners also assert a due process violation because respondent did not provide a written decision concerning their determination of the HIB complaint involving M.S., petitioners concede that they were informed verbally of the determination in late May, six months ago. Respondent makes a compelling argument that the Petition should be dismissed for petitioners' failure to file an appeal of that determination within the ninety-day statute of limitations. There is, therefore, a question as to the timeliness of petitioners' appeal and petitioners cannot show a likelihood of prevailing on the mertis in this regard.

Petitioners also fail to cite to any law that would require the respondent to advise petitioners of their right to a hearing before the Board, as petitioners allege. Petitioners

were advised verbally of respondent's initial determination on the HIB complaint in May and their assertion that they were entitled to receive this determination in writing is not clear since the matter was never presented to the Board as a HIB matter, but was handled as a violation of the student Code of Conduct after a "preliminary analysis" whereby the District determined that the reported acts did not meet the threshold definition of HIB. Instead, the District investigated the conduct in accordance with the District's Code of Conduct and M.S. was suspended. Petitioners did not cite to any Board Policy or law that specifically required the District to inform petitioners in writing that their preliminary analysis of the complaint resulted in a determination that M.S.'s conduct did not meet the threshold definition of HIB. I **CONCLUDE**, therefore, that petitioners have failed to demonstrate that the law is well-settled in their favor or that they have a likelihood of success on the merits.

Finally, in balancing the equities and interests of the parties, the scales tip in favor of the District. While petitioners will suffer irreparable harm if she is forced to sit out the first thirty days of the basketball season, it is worth noting that they have no property interest in playing basketball, as doing so is a privilege. The Board, on the other hand, has a strong and valid interest in the effective and orderly operation of its schools. The Board has the autonomy and discretion, pursuant to NJSIAA bylaws, Article V, Section 4.k.2 (CL 12), to determine whether a student's transfer to another school is a proper action to remediate a HIB complaint. Moreover, I also agree with respondent that should petitioners be granted the requested emergent relief, transferring students may be inspired to make unfounded HIB complaints in an effort to circumvent the NJSIAA thirty-day transfer rule. I **CONCLUDE**, therefore, that when the equities and interests of the parties are balanced, the respondent will suffer greater harm than the petitioners if the requested relief is granted.

Based upon the arguments made and record before the undersigned, I **CONCLUDE** that petitioners have not satisfied all four criteria required for emergent relief. As petitioners have failed to satisfy all four prongs of the Crowe test for emergent relief, and for the foregoing reasons, petitioners' request for emergent relief is **DENIED**.

ORDER

It is hereby **ORDERED** that petitioners' request for emergent relief is **DENIED**.

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

November 27, 2019

DATE

SUSANA E. GUERRERO, ALJ

jb

333-19

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Frank Fuzy, III:

WESTFIELD BOARD OF EDUCATION

Petitioner,

- and -

FRANK FUZY, III

Respondent.

Agency Dkt. No.
4-1/19

OPINION AND AWARD

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Derlys M. Gutierrez, Esq.
Adam S. Herman, Esq.
Adams Gutierrez & Lattiboudere, LLC

For the Respondent:
Ty Hyderally, Esq.
Jennifer Vorih, Esq.
Ty Hyderally & Associates, P.C.

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012*, c. 26 ("TEACHNJ"), the tenure charges brought by the Westfield Board of Education (the "Board" or "Petitioner") against Frank Fuzy ("Fuzy" or "Respondent") on December 27, 2018 and were referred to me by the Director of the Bureau of Controversies and Disputes, Department of Education, on January 24, 2019 for a hearing and decision. On February 15, 2019, I denied in part and granted in part, Mr. Fuzy's Motion to Dismiss the charges. Specifically, Charge Number One, paragraph "e" was dismissed with prejudice. I deferred ruling on Charge Number Six and the remainder of the Motion to Dismiss was denied. After delay due to change in Mr.

Fuzy's counsel, I conducted a pre-hearing conference on May 28, 2019 at the State Board of Mediation in Newark, NJ. I conducted hearings at the State Board of Mediation in Newark, NJ on July 8, July 9; July 15, July 31, August 5, August 13, August 15 and September 13, 2019. Post-hearing briefs were received on November 15, 2019, whereupon the record was closed. Multiple extensions of time to provide Respondent a chance to obtain new counsel, conduct the hearing and issue the award were granted by the Director of Controversies and Disputes, Department of Education with the final extension requiring that the award be issued by December 16, 2019.

At the hearings, the parties argued orally, examined and cross-examined witnesses, and introduced documentary evidence into the record. Testimony was received from Dr. Margaret Dolan, Superintendent of Schools; Lillian Gail Alston, high school teacher and President of the Westfield Education Association (WEA); Lorie Swanson, teacher and WEA representative and negotiating officer; Jennifer Ullrich, disabilities teacher; Eileen DeFabio, paraprofessional; Kathryn Ciullo, paraprofessional; Michael Seiler, retired teacher and former WEA President; David Duelks, Principal of Tamaques School; Marcus DePontes, security/emergency management consulting employee; Maryanne Rodriguez, NJEA Field Representative; Mary Elena Fuzy, third grade teacher and Respondent's wife; Victor Alfonso, friend; Jeanne Jensen, school nurse and health educator; Patricia Doyle, paraprofessional; Jonathan Blitt, parent; A.V., student; B.V., student, Biniaifer Vesuna; parent and Respondent Frank Fuzy.

RELEVANT POLICY

Discipline Board Policy 3150

> The Board of Education directs all teaching staff members to observe statutes of the State of New Jersey, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, and policies will be subject to discipline.
>
> The Superintendent or designee shall deal with disciplinary matters on a case by case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, whenever possible, for progressive penalties for repeated violations. Penalties may include suspension, withholding one or more increments, and dismissal.
>
> In any event disciplinary action is contemplated, notice will be given to the teaching staff member in clear and concise language or the specific acts and omissions upon which the disciplinary action is

based; the text of the statute, policy or rule that the member is alleged to have violated; a date when the member may be heard and the administrator who will hear the matter and the penalty that may be imposed.

The policy cites N.J.S.A. 18A:25-7; N.J.S.A. 18A:27-4; N.J.S.A. 34:13A-1; and N.J.S.A. 34:19-1.

CHARGES

The tenure charges brought against Frank Fuzy on or about December 27, 2018 allege that he engaged in conduct unbecoming a public employee and other just cause. The tenure charges are produced in pertinent part below:

CHARGE NUMBER ONE

b. Mr. Fuzy has frequently commented to other staff members that he owns multiple guns, including an AR-15.
c. Mr. Fuzy has also informed staff members that he keeps a gun in the glove compartment of his car.
d. Mr. Fuzy has stated that he would run out to his car if he needed to use a gun.
e. In 2016, Mr. Fuzy made the following comment to a staff member: "don't be surprised if one day I come back here and take care of some people."
f. Mr. Fuzy frequently posts about guns on social media outlets.
g. Mr. Fuzy also shows pictures of guns to staff members.
h. As such, Mr. Fuzy's comments and actions regarding guns have served to create an atmosphere at the school whereby other staff members ae intimidated and fearful of imminent harm.
i. Indeed, staff members have advised that as a result of Mr. Fuzy's comments and actions, they routinely look over their shoulder when they walk on the school premises.
j. In January 2018, Mr. Fuzy made specific threatening comments to another staff member in connection to a request by the school principal that Mr. Fuzy observe another classroom teacher.
k. Mr. Fuzy expressed anger about being asked to participate in the observation.
l. Mr. Fuzy subsequently refused to cooperate with the observation.
m. When discussing the fact that the principal wanted him to participate in the classroom observation, Mr. Fuzy commented to this staff member that he is "six feet tall, weight 230 pounds and has 26 guns."

n. In his anger towards the school principal and the school, Mr. Fuzy repeated the statement about his height, weight and ownership of guns approximately seven times.
o. About one month after Mr. Fuzy's latest threatening comments about guns, a mass shooting occurred at a high school in Parkland, Florida.
p. Initial reports out of Parkland, Florida indicated that the gunman used an AR-15 style semi-automatic rifle.

CHARGE NUMBER TWO

b. During the Spring of 2017, a live deer was located on the school property
c. In response to seeing the deer within an enclosed section of the school property, Mr. Fuzy turned to another staff member and stated that he wished the deer would escape and injure students, so that his principal would "look bad."
d. Mr. Fuzy subsequently opened the gate and let the deer out.

CHARGE NUMBER THREE

b. Between September 2017 and January 2018, Mr. Fuzy picked up a student, S.G., by her feet.
c. Mr. Fuzy's inappropriate conduct was witnessed by other students and caused embarrassment for S.G.

CHARGE NUMBER FOUR

b. Between September 2017 and January 2018, Mr. Fuzy embarrassed and disparaged S.G. in front of her entire class.
c. Specifically, when S.G. attempted to ask Mr. Fuzy a question during class, Mr. Fuzy turned to the entire class and stated: "if she has to ask questions it must mean that she was not paying attention."

CHARGE NUMBER FIVE

b. Mr. Fuzy has yelled at his students.
c. In addition, Mr. Fuzy has stated the following to his students: "what are you stupid?"
d. Mr. Fuzy's behavior and comments have caused students to cry.
e. Mr. Fuzy's inappropriate conduct was witnessed by other students and staff members.

CHARGE NUMBER SIX

m. The Board's Superintendent stated in her January 24, 2018 letter to Mr. Fuzy that: ". . . During your suspension, you are not permitted on Board property and you should refrain from any contact with staff, students, or the families of students."
n. Mr. Fuzy has repeatedly and consistently contacted staff from the date of the letter to the present time; specifically, he has requested that staff members cooperate with a private investigator and/or that they support him and speak well of him.
o. Moreover, Mr. Fuzy has left voicemails for some staff members telling them not to believe the nonsense that they may have heard about him, then asking them to contact him with what they have heard, and stating, in March and April 2018, that he would be returning to Tamaques School by Mid-May 2018.
p. In April, 2018, Mr. Fuzy contacted at least one staff member, telling that person that he was out because he talked about guns and "taking care of the principal" and the district overreacted. The staff member shared the information from Mr. Fuzy with other members of the staff which heightened their fear and anxiety. Mr. Fuzy has repeatedly contacted parents to ask them to write letters of support and endorsement for him. A number of parents let the principal know that they were extremely uncomfortable with the request, and that the contact made them feel anxious and unsafe.
q. Mr. Fuzy entreated the Superintendent to allow him to attend a district daughter/daddy event, and contacted her multiple times for a response. She did suspend the terms of her restrictions as stated in the January 24, 2018 letter for that one event, but Mr. Fuzy abused the privilege.
r. Specifically, the Superintendent made it clear to the Fuzy family that their daughter, a kindergarten student at Lincoln School which houses all of the district's kindergarteners, would not be attending Tamaques School as a 1st grader (the Superintendent determines placement based on enrollment for all out of district students.) Therefore, there was no reason for the student to attend any events for incoming Tamaquest students and, under no circumstances should Mr. Fuzy have been at Tamaques School; yet, in April, Mr. Fuzy purposely chose Tamaques as the school where he and his daughter attended the incoming Brownies' daughter/Daddy event. While at the event, Mr. Fuzy told a number of students and parents that he would be returning in mid-May. This caused great anxiety and fear in parents, students, and the staff who learned about his statement.
s. When the Superintendent attended a teacher of the year celebration at Tamaques on May 8, 2018, teachers and parents

told her that they were afraid for their safety and the safety of their children if Mr. Fuzy returned.

BACKGROUND

Frank Fuzy is a tenured member of the Westfield School District ("Board"), teaching third grade at the Tamaques School for approximately 23 years. During that time, Mr. Fuzy has enjoyed "effective" or better evaluations and has received commendations including being named New Jersey's Agricultural Teacher of the Year in 2013 for his work in starting a garden at the Tamaques School. In the comments to his summative evaluation for the 2016-2017 school year. Mr. Duelks wrote that Mr. Fuzy's "school year proved to be positive and successful with respect to ... [his] personal and professional growth."

Mr. Fuzy does not have an unblemished disciplinary record having received a four-day suspension and he was placed on a corrective action plan (CAP) to address anger management issues in 2014 after throwing Post-It notes at a student and hitting her in the face. Mr. Fuzy successfully completed the requirement of the CAP including the required counseling.

According to Mr. Fuzy he owns five guns, three handguns and two rifles. Mr. Fuzy has completed background checks and all of the weapons are legally owned and licensed. Mr. Fuzy testified he uses these weapons exclusively at shooting ranges and does not hunt. David Duelks, principal of Tamaques School testified that Mr. Fuzy showed him photographs of guns on his cell phone and asked if Mr. Duelks shot. Mr. Duelks recalled feeling uneasy and asking if Mr. Fuzy had a safe for his guns.

Jennifer Ullrich, was a resource room teacher at the Tamaques School during the 2017-2018 school year. She spent about thirty minutes of each school day in Mr. Fuzy's classroom. She described him as "always really worried that David Duelks, our principal was going to come in and observe him."

In December of 2017, Principal David Duelks completed an observation of Mr. Fuzy teaching a math lesson. Mr. Duelks' observation included several "positive takeaways" as well as the comment that Mr. Fuzy was "making strides in terms of planning, but Mr. Duelks "would like to see more growth with respect to preparation and delivery." Mr. Fuzy responded to this evaluation and both he and Mr. Duelks agreed that it would be a good idea for Mr. Fuzy to observe peers teaching a math lesson. Apparently, Mr. Fuzy believed that Mr. Duelks would make suggestions as to which teachers he should observe and Mr. Duelks was under the impression that Mr. Fuzy would select which peers to observe and report back to him.

As a result, on Friday, January 12, 2018 at 4:47 p.m. at the end of a day when Mr. Fuzy was out sick, Mr. Duelks emailed Mr. Fuzy to see whether he had a chance to conduct peer observations:

> As per your request and my endorsement, have you conducted any peer observations during a full math lesson to date? As recommended, you are to alert me of who and when and what your big takeaways were. If you're having a hard time finding a few teachers in-house, I can certainly arrange for you to visit another school.

When Mr. Fuzy received this email, he was confused because he was waiting for Mr. Duelks to suggest someone for him to observe. Mr. Fuzy testified that he believed Mr. Duelks was insinuating that he had been insubordinate by not observing another teacher when the confusion stemmed from a misunderstanding about who would select the teacher(s) to be observed. After receiving this email, at 6:41 p.m. the same day, Mr. Fuzy forwarded it to Lisa Quackenbush, a member of the WEA who assisted teachers who wished to respond to observations, with the following note:

> I was out today. I went to medi merge last night and was diagnosed with pneumonia. I even submitted a doctor's note and this is what I get. If you remember I asked him who I should go watch and even put it in my rebuttal. If this doesn't show that I am clearly being harassed I don't know what would. I'm ready to either meet with him and the union or a lawyer. The reason I'm getting sick is because of this treatment. Suggestions?

On Monday, January 15, 2018, a school holiday, at 7:41 p.m., Mr. Fuzy sent a second email to Lisa Quackenbush:

> Can you please discuss my response to be written with Gail. I'm only with my phone putting my daughter to sleep. I need to reply to him tomorrow. I'm not concerned that even Gail emailed me that she would call today at 6 but didn't. I'm the one with everything on the line and she couldn't call after saying she would and knowing my situation. Tomorrow will be ...[another] stressful start.

Mr. Fuzy explained that WEA President Lillian (Gail) Alston had said she would call him at 5:00 p.m. and she did not. Later that evening, at 9:13 p.m., Mr. Fuzy forwarded Mr. Duelks' January 12, email to Ms. Alston and Ms. Quackenbush with a long rambling and angry message complaining about Mr. Duelks. The message began:

> I received the below email from David [Duelks] on Friday knowing that I was not in school and had submitted a doctor's note. I had the onset of pneumonia. Not only do I feel that it was uncalled for to email me know[ing] that I was ill, but as discussed with Lisa [Quackenbush] at the time of writing my response the whole write up was unrealistic.... Despite the fact that as a supervisor he should have suggested someone in the first place and never did, I receive[d] the email below questioning if I have observed anyone.
>
> This is just one example that can illustrate that his intentions are not just. Past that, I have walked into my room several times since the PTO email mistake and found him sitting on my windowsill simply staring at us while we walked in.... The entire second floor watches him come and go from my room. No reasons are given, no hellos are exchanged, just enough presence to make me uncomfortable. This all started with the email that accidentally went from venting between colleagues to the PTO. It was followed by a meeting which Dominic attended with me, then turned into a letter sent a week later to yourself and Dr. Dolan which in itself contained tiny threats that were just easy enough to make out but nothing concrete. ....
>
> I have been trying to start each day new. Trying to keep my head up high and the best I can. However, the pressure of his walk ins, silent treatments, and not knowing what he will do next is beginning to wear on my family, my health and my career. It's hard to teach and teach well when you know that someone's intentions are to cause you harm. There is certainly no good that can come out of the way I am being treated.....

Mr. Fuzy continued by complaining that he was being intimidated and harassed and the Association had not given him proper support

The next morning, on January 16, 2018 at 6:44 a.m., when Ms. Alston had not called him back, Mr. Fuzy contacted the New Jersey Education Association (NJEA) via email to complain that he needed "more support and guidance than I am currently receiving." Mr. Fuzy continued, "I feel that I am being harassed and intimidated in my workplace." According to Mr. Fuzy he received a response to his email from the NJEA about two hours later and then he spoke with Ms. Alston that evening.

That same day, Mr. Duelks conducted an additional observation of Mr. Fuzy teaching a math lesson and this observation was more positive.

Also on January 16, 2018, at about 11:30 a.m., Ms. Alston forwarded Mr. Fuzy's January 15 email to Ms. Dolan. Later that evening Mr. Fuzy and Ms. Alston

spoke twice in quick succession, with the first call beginning at 5:37 p.m. and lasting 26 minutes. The call was dropped and the second call began at 6:03 p.m. and lasted 19 minutes.[1] According to Ms. Alston, Ms. Quackenbush spoke with Mr. Fuzy about her suggestions. Mr. Fuzy was not receptive, so Ms. Alston spoke with him.

According to Mr. Fuzy, Ms. Alston asked him why he had contacted the NJEA and he explained that he "reached out to her many times, tried to contact her and she didn't get back to ...[him]" and he wasn't getting the help he needed. Mr. Fuzy noted that Ms. Alston brought up the prior discipline over the post-it note issue and said it labeled him as having anger issues. Mr. Fuzy objected, telling Ms. Alston that he had been evaluated privately by a psychologist and had seen a behavior management doctor and have been "cleared". According to Mr. Fuzy he had done everything the District had asked of him.

During the course of their conversation, they discussed that Mr. Fuzy and Mr. Duelks "didn't see eye to eye". Ms. Alston suggested that perhaps Mr. Fuzy should transfer to another elementary school so that he would have "peace of mind" and wouldn't view Mr. Duelks' coming into his classroom as an "act of harassment." At that point, Ms. Alston described the conversation as going "sideways" and Mr. Fuzy became very angry and asked why he should leave because he's been there 23 years. According to Ms. Alston Mr. Fuzy then told her how tall he was, how much he weighed and how many weapons he owned. Specifically, Mr. Fuzy repeated to Ms. Alston several times that he was five feet, ten inches tall and weighed 220 pounds and had 21 guns. Ms. Alston characterized the conversation as "one-sided" with Mr. Fuzy doing the talking.

Mr. Fuzy acknowledged that he said, "I'm 5-10. I'm 210 pounds. I do own firearms and many people take that the wrong way." Mr. Fuzy acknowledged that he could have repeated himself during the conversation and explained that he was trying to convey that people see him as "threatening or being angry" and in doing so, it's as if he's tough doesn't have feelings. In other words, Mr. Fuzy sought to convey the message that one shouldn't "judge a book by its cover". Mr. Fuzy acknowledged that he assumed Ms. Alston misunderstood him and viewed him negatively because he owns firearms. Mr. Fuzy denied that he was speaking in a threatening fashion. Mr. Fuzy testified that he "was not happy about the way ...[he] was being treated at Tamaques and ...[he] felt that a lot of ...[his] math observations were inaccurate."

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[1] Ms. Alston contradicted herself repeatedly about the timing of these events, and failed to remember whether she spoke to Mr. Fuzy for 45 minutes before or after she sent the January 16 2018 email to Dr. Dolan.

After the conversation, because she was concerned, Ms. Alston called Mike Seiler, who was on medical leave but had been WEA president for 25 years. Mr. Seiler, who described the call as Mr. Fuzy telling Ms. Alston he's bigger and stronger than Mr. Duelks and has guns at home, viewed the comments as a threat and advised her to call the police or speak with Dr. Dolan. Ms. Alston also called Carol Feinstein, then the NJEA field representative for the WEA and Ms. Feinstein also advised her to call the superintendent. Ms. Alston also spoke with Lori Swanson, the WEA building representative for the Tamaques School. Ms. Swanson told her the conversation "needs to be taken very seriously" and reported to Dr. Dolan. After these conversations, Ms. Alston reported her conversation with Mr. Fuzy to Dr. Dolan who listened and replied that she would get back to her. At Ms. Alston's request, Mr. Seiler emailed Dr. Dolan on Sunday, January 21, 2018 urging Dr. Dolan to take some action perhaps including having Mr. Fuzy submit to a psychiatric evaluation.

Dr. Dolan described her concern after Ms. Alston told her about the phone conversation she had with Mr. Fuzy where he was very agitated and repeatedly mentioned his height, weight and ownership of several guns. At this point, Dr. Dolan asked Barbara Ball, the Director of Human Resources to begin an investigation into Mr. Fuzy's conduct.[2] Dr. Dolan also reported the conversation to the police who conducted an investigation and advised her that Mr. Fuzy had four or five legally registered guns.

The next morning, at 7:03 a.m. January 17, 2018, Mr. Fuzy sent a draft email response to Ms. Quackenbush and Ms. Alston for preview before sending it to Mr. Duelks. At 8:02 a.m., Ms. Quackenbush replied, "perfect".

On Thursday, January 18, 2018 at around noontime, Ms. Alston visited Mr. Fuzy in his classroom to discuss his observation with him. During that visit, Ms. Alston commented on how well it was decorated since she doesn't often have the opportunity to visit elementary school classrooms. She also noted that the classroom was furthest from the main office and suggested that Mr. Fuzy stay in his classroom to avoid Mr. Duelks.[3]

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[2] As part of that investigation, the Board received a number of emails from parents that were not supportive of Mr. Fuzy. The Board considered these communications and included allegations in those emails in the formation of the tenure charges. Those emails, are relevant to the extent that the Board considered them in drafting tenure charges. Absent corroborative testimony or other evidence, those emails are not sufficient to prove any of the charges against Mr. Fuzy.

[3] Ms. Alston recalled that this meeting occurred before the 45 minutes of phone conversations, rather than afterwards. Mr. Fuzy's phone records establish that the phone conversations with Ms. Alston occurred on January 16, 2018 and Ms. Alston visited Mr. Fuzy's classroom on Thursday, January 18, 2018. Specifically, Mr. Fuzy sent Ms. Alston an email that evening and thanked her for coming "today" and Mr. Seiler sent an email on to Ms. Dolan on January 21, 2018 referring to Ms. Alston's meeting with Mr. Fuzy on Thursday, which was January 18, 2018.

According to Ms. Alston, Mr. Fuzy was upset with Mr. Duelks because he thought that he should not have to observe a teacher who has been teaching for only five years and who didn't yet have family responsibilities and had time to work early and late in the day. Ms. Alston recalled that Mr. Fuzy said "he didn't have time for that."

When Mr. Duelks learned of Mr. Fuzy's repeated statements to Ms. Alston about his height, weight and guns, he was scared. Mr. Duelks found it nonsensical for Mr. Fuzy to express such hostility towards him. According to Mr. Duelks, a few weeks before Mr. Fuzy's suspension, Ms. Ullrich showed him a text message from Mr. Fuzy accusing Mr. Duelks of "messing with his livelihood.". The combination of Mr. Fuzy's text to Ms. Ullrich and Ms. Alston's conversation heightened Mr. Duelks' concern.

Lori Swanson, then the Tamaques School Building Representative for the Association characterized her professional relationship with Mr. Fuzy as "adversarial" and indicated that he generally did not agree with her advice. Ms. Swanson testified that she was "truly afraid" and explained "if he's that angry, he's not going to just come after my principal. He's going to come after me too." Ms. Swanson was concerned that Mr. Fuzy "hated" her and noted that he had made negative comments about her on Facebook in association with an approved vacation she had scheduled and an email she sent about contract negotiations. According to Ms. Swanson, over the years, Mr. Fuzy boasted about going shooting and owning guns but never had a threatening conversation with her when he mentioned guns. Nonetheless, Ms. Swanson was sufficiently concerned after Ms. Alston's conversation with Mr. Fuzy that she began walking to her car at the end of each workday with Mr. Duelks.

According to Ms. Swanson, some teachers and paraprofessionals at Tamaques, including Ms. Ullrich, Ms. Eileen DiFabio and at least four others told her they were afraid of Mr. Fuzy.

Mr. Fuzy was suspended with pay effective January 24, 2018 which the District continue its investigation.

Superintendent Dolan explained why she determined to file tenure charges against Mr. Fuzy as follows:

> It became very, very apparent in the conversations with staff members both paraprofessionals and teachers that there were a number of teachers who felt unsafe in Tamaques School specifically because of Mr. Fuzy.
>
> They went – some of them went out of their way not to interact with him. Others made sure they did their work at home so they weren't

> in the building outside of school hours. Some were just uncomfortable. And people—there were people who were afraid especially after they had been either – he had spoken to them about guns or – or expressed anger in some way.
>
> That was very evident and we only became aware of that in the investigation after I received the phone call from Gail Alston but it was evident that there were people who... felt intimidated by Mr. Fuzy in that building.
>
> So then Parkland happened in Florida, and people who were already nervous became more nervous.

Dr. Dolan acknowledged that Mr. Fuzy had previously posted statements and pictures about guns on social media and there was no reason to discuss these postings with him because it was his right to make such postings about his hobby regarding guns." Dr. Dolan distinguished between such postings and his comments to Ms. Alston.

In determining to bring tenure charges against Mr. Fuzy, Dr. Dolan focused on Mr. Fuzy "losing his temper and in anger, talking about how many guns he had and then finding out that when we did an investigation that this isn't the first time guns were mentioned and this isn't the first time that ... people felt intimidated in the school..."

Paraprofessional Eileen DeFabio works with Mr. Fuzy at lunch and recess. Mr. Fuzy discussed his guns and where and when he went to the shooting range. Mr. Fuzy would discuss his guns and his attendance at the shooting range when he got a new gun or when he went to the range. On one occasion, Mr. Fuzy told Ms. DeFabio that he kept a gun in the back of his truck. Mr. Fuzy denied ever telling anyone that he kept a gun in his vehicle or on school property. Ms. DeFabio was friends with Mr. Fuzy on Facebook and recalls that he posted photographs of guns either in the case or on a table and posted pictures of the targets he shot at. Mr. Fuzy's conversations about guns made Ms. DeFabio "a little uncomfortable" because she is not a "fan of guns". Also, Ms. DeFabio explained:

> Mr. Fuzy could get very frustrated and aggravated in—with situations and there's always in the back of your mind people that, you know, have a tendency to get aggravated – it's a little fearful; that, you know. There's a gun in the back of the car and they're aggravated so it's—you're a little—you have your guard up. I had my guard up.

Ms. DeFabio continued:

> Well, I was just very concerned that... he would never get frustrated enough where he felt like he needed to use it at Tamaques.

Ms. DeFabio testified that she was afraid of Mr. Fuzy because she has observed him get very agitated, frustrated and defiant. She recalled a few instances that where Mr. Fuzy's comments about guns or that he owned guns, made her afraid.

Paraprofessional Karen Ciullo worked one on one with a student assigned to Mr. Fuzy's class in the 2017-2018 school year. Mr. Fuzy told her he had guns including a handgun.

Ms. Ciullo recalled that Mr. Fuzy would sometimes complain about not sleeping well and on the days when he did not have a good night's sleep he would appear "frazzled" and that would set the tone for the children for the school day. Ms. Ciullo recalled that on one occasion, Mr. Fuzy raised his voice with the class because they didn't get their books out quickly enough.

Ms. Ciullo expressed her discomfort with Mr. Fuzy saying:

> ...it's just disturbing to me sometimes to think that someone who has a hobby of handguns which is fine—hobbies are hobbies—but also is openly taking prescription medications and just, you know, would come in and I would just never really know what kind of personality we were getting, ... it really would concern me a lot that the two were mixing in someone's personal life.[4]

Several members of the staff of the Tamaques School, including Ms. Ciullo, Ms. DeFabio, Special Education teacher and building delegate Sharon Contreras indicated that they would be concerned, afraid or reluctant to continue working at the school if Mr. Fuzy returned.

On one occasion in the spring of 2016, Principal Duelks wanted an outdoor recess while Mr. Fuzy preferred that recess should be indoors that day. Recess was outside and Mr. Fuzy came up to Ms. DeFabio and was very upset that Mr. Duelks had called for an outside recess and there were some deer in front of the building. Mr. Fuzy commented that he "wanted the deer to ... come into the back field and hurt just one student" because it would prove that outdoor recess was the

[4] Ms. Ciullo testified that Mr. Fuzy told her on at least one occasion that he was going to take a Valium because the children stressed him out. During the hearing, counsel for the Board noted that Mr. Fuzy was closing his eyes and asked if he was under any medication that would prevent him from answering her questions. Mr. Fuzy said he was not. Mr. Fuzy acknowledged that he used Diazepam (Valium) and Adderall regularly to treat a health condition.

wrong decision. Mr. Fuzy denied ever wishing a child would be hurt by a deer at Tamaques School.

As recess ended that day, Mr. Fuzy went and put his hand on the gate. Ms. DeFabio believed that Mr. Fuzy was going to open the gate to let the deer into the yard. Ms. DeFabio asked the custodian to lock or shut the gate and then told the gym teacher to keep her eye out because there were deer on the property. Mr. Fuzy denies opening a gate to let a deer in so that it could harm students.

Ms. Ciullo also recalled Mr. Fuzy make comments about a student's ethnicity, saying "I can't believe I have to call this kid's mom. You, know she's Asian.... This shouldn't be happening." Mr. Fuzy also made similar comments to Ms. Ciullo about an Indian student.

Ms. Ullrich described Mr. Fuzy as berating student C.W. saying that "she's Asian. She's supposed to be smart." According to Ms. Ullrich, Mr. Fuzy would embarrass C.W. when she picked her nose instead of simply suggesting she use a tissue.

Ms. Ciullo recalled another incident where something spilled and Mr. Fuzy asked the nearest student to grab some paper towels and the student misunderstood and handed Mr. Fuzy a tee shirt. Mr. Fuzy said to the student, "are you stupid? I need paper towels." The child who brought the tee shirt was crying. Mr. Fuzy did not recall this incident and denied ever calling a student "stupid".

Several witnesses testified to Mr. Fuzy's good character including students A.V. and B.V. A.V. testified that Mr. Fuzy helped her parents arrange for her to keep up with her school work when she was out of the country for a month during the school year. B.V. testified that Mr. Fuzy helped her with spelling and math and that she nominated him for an award. Binaifer Vesuna, a parent of students who had been in Mr. Fuzy's class in past years testified that he helped her younger daughter in her struggle with language arts. Ms. Vesuna also described Mr. Fuzy's quick action while on a field trip to the Liberty Science Center to keep the group together and safe in a large unruly crowd. Jonathan Blitt, is parent of children who attended Tamaques, including a child who was in Mr. Fuzy's class for the 2017-2018 school year. Mr. Blitt found that Mr. Fuzy was supportive and encouraged his child's growth in language arts in particular. On the approximately four or five brief occasions that Mr. Blitt saw Mr. Fuzy interacting with students, it was "with respect and kindness and encouragement." None of these witnesses were in Mr. Fuzy's classroom regularly during the 2017-2018 school year.

Victor Alfanso, who teaches fifth grade at Tamaques, often stopped in Mr. Fuzy's classroom during his prep period for a few minutes to allow Mr. Fuzy to step out to use the rest room if he needed to. Mr. Alfanso referred to Mr. Fuzy as the "recess guy" who addressed security issues, such as a strange adult walking

through the recess area. Jeanne Jensen worked at Tamaques as the school nurse and health educator until 2014. Ms. Jensen described Mr. Fuzy as a good teacher who got down to the students' level to talk to them. Ms. Jensen emphasized the State recognition Tamaques received for the garden Mr. Fuzy started and worked in with children. Mary Elena Fuzy, Mr. Fuzy's wife, testified that Mr. Fuzy was supportive and helpful when she was new to teaching third grade. Patricia Doyle, who worked as a paraprofessional in Mr. Fuzy's classroom several years ago described it as organized and well run. Ms. Doyle also worked in Mr. Fuzy's classroom in the 2017-2018 school year for approximately 15 minutes at the end of the school day, which she described as chaotic in the way most classrooms are at the end of the day.

Marcus DesPontes, of StoneGate Associates, a security/emergency management consulting firm provides emergency planning services, including security assessments, updating the emergency management plan, meeting with the local police department and staff training for the Westfield School District. Staff training provided by StoneGate includes emergency management training for teachers including evacuation, shelter in place and lock-down training based on best practices for active shooter situations.

When Mr. DesPontes conducted teacher training at Tamaques during the 2017-2018 school year, Mr. Fuzy approached him before the training and asked if he was a gun owner. They discussed guns and going to the shooting range. Mr. DesPontes noted that this was unprecedented in his experience.

Maryanne Rodriguez, NJEA Field Representative testified that Mr. Fuzy visited the NJEA's Trenton office. As a matter of practice, Ms. Rodriguez was notified because she is Mr. Fuzy's Field Representative. After Ms. Rodriguez was called, she tried to speak to Mr. Fuzy by telephone but was unable to reach him. Ms. Rodriguez noted that it is unusual for members to visit the NJEA's Trenton office.

DISCUSSION

N.J.S.A. 18A:6-10 provides that no tenured employees of the public school system "shall be dismissed or reduced in compensation ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The District bears the burden to establish that it met this standard.

The New Jersey Supreme Court has defined "unbecoming conduct" as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66 (2010) (quoting Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). The New Jersey Supreme Court further defined "unbecoming conduct" as that which violates "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." Bound Brook Bd. Of Ed. v. Ciripompa, Dkt. No. A-57-15, __ N.J. __ (February 21, 2017) (quoting Karins v. City of Atlantic City).

The Board asserts that it has established by the preponderance of the credible evidence that Mr. Fuzy is guilty of conduct unbecoming and other just cause and his employment should be terminated. Specifically, the Board asserts that Mr. Fuzy engaged in unbecoming conduct when he made repeated threatening comments to his union president about his principal. Emphasizing that the concept of "unbecoming conduct" encompasses a variety of categories of inappropriate behavior by tenured teachers the Board cites the "elastic" standard cited in In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960), as "any conduct that adversely effects the morale or efficiency of the [District] . . . [or] which has the tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." Additionally, the Board points to the concept that unbecoming conduct "may be based primarily on a violation of an implicit standard of good behavior." Newark v. Massey, 93 N.J. Super. 317, 323 (App. Div. 1967).

The Board continues citing several opinions of the Commissioner of Education emphasizing the teacher as a role model. Specifically, the Board cites the Commissioner's reasoning as applied to impressionable elementary school students, pointing out that "they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils." In re Tenure Hearing of Tordo, Jackson School District, 1947 S.L.D. 97, 98-99.

Applying these standards to this matter, the Board asserts that Mr. Fuzy's repeated threatening statements referencing guns in January of 2018 constitute conduct unbecoming and warrants his removal from his tenured position. Specifically, the Board points to the evidentiary record and points out that Mr. Fuzy, in a fit of anger, made threatening comments to Ms. Alston in connection with a request by Principal Duelks that Mr. Fuzy observe another classroom teacher. The Board emphasizes a conversation between Ms. Alston and Mr. Fuzy where he repeatedly told Ms. Alston that he was five foot ten inches, weighed 220 lbs. and had 21 guns. Ms. Alston recalled that she was very "worried and concerned" because Mr. Fuzy kept "repeating the same thing over and over again."

The Board emphasizes Ms. Alston's concern that these threatening comments could result in something being carried out by Mr. Fuzy. The Board cites Ms. Alston's testimony that she was concerned about Mr. Fuzy's anger, his threatening statements and his explicit and repeated reference to his guns. As a result, the Board notes that Ms. Alston determined to set aside her role as president of the local education association including Mr. Fuzy, in order to protect the safety and welfare of the principal and other staff and students by reporting Mr. Fuzy's comments to Principal Duelks and to Dr. Dolan.

The Board notes Ms. Alston initially thought that Mr. Fuzy simply needed to vent but when he kept repeating the same comment over and over again, she became concerned. Specifically, Ms. Alston testified:

> I became concerned because with all the media we've been exposed to with shootings . . . as an educator share that information to me was uncomfortable. Why would he even share that with me.

The Board points out that after Ms. Alston's conversation with Mr. Fuzy, she called Mr. Seiler, Ms. Feinstein, NJEA Representative and Ms. Swanson, all of whom urged her to call Dr. Dolan. The Board continues to cite Ms. Alston's testimony that:

> I can understand him being upset by his evaluation. . . . In the past . . . maybe his evaluations were different and maybe his present administrator was looking to take education in a different way but for him to share that information about his weight, his height, what he possessed, that was none of my business and he made it my business.

The Board also cites Mr. Fuzy's testimony acknowledging that he told Ms. Alston about his height, weight and gun ownership when they were discussing his evaluation. The Board asserts that Mr. Fuzy's explanation for these comments was that he wanted Ms. Alston to:

> Understand that I am a person and that, you know, it's - - - it's not easy that I'm seen this way. Don't judge a book by its cover. So, I just wanted her to get a better perspective of who I was and, you know, that I was not happy about how I was being treated at Tamaques and I felt that a lot of my math observations were inadequate.

The Board asserts that this statement as to why he repeated his height, weight and the number of guns he owned repeatedly during his conversation with Ms. Alston show that he was angry at Principal Duelks about his math evaluation and that his comment to Ms. Alston was intended to be intimidating and threatening. The Board asks rhetorically "what reasonable person would make such a statement in connection with a math lesson observation." The Board asserts that Mr. Fuzy's conversation with Ms. Alston was even more troubling when considered in light of his frequent initiation of conversations about guns.

The Board points to the testimony of its security consultant that before a presentation, Mr. Fuzy approached him and began talking about guns. The security consultant testified, according to the Board, again that this is the first time in his many years of giving presentations to school employees that a participant

approached him to talk about guns. The Board emphasizes that Mr. DePontes indicated that he was sufficiently concerned that he reported the comments to the District's administration.

The Board argues that Mr. Fuzy's comments and actions about guns have created an atmosphere at the Tamaques School where other staff members are intimidated by him and fearful of imminent harm. The Board suggests that Mr. Fuzy's threats in January of 2018 were sufficiently outrageous and raised memories of the tragedy that struck Columbine High School. The Board suggests that Mr. Fuzy's frequent discussion of guns in an angry manner including while describing himself versus the school principal is at minimum deplorable and unbecoming for a teacher. The Board notes the unfortunate reality that school shootings are on the minds of school employees, parents and students every day. The Board cites the testimony of Mr. Blitt that:

> There was a person who was apprehended with a handgun in their lap in – in the parking lot of Tamaques [at] end of last year . . . but school shootings, of course, occurred long prior to that.
>
> * * * * *
>
> We are all quite familiar with the fact that there was a gunman captured recently at Tamaques . . . I am saying school safety has become an issue; that we talk to our children on a regular basis ever since the very first school shootings.

The Board argues that it does not matter whether Mr. Fuzy had any intent to carry out the threat he suggested to Ms. Alston. The Board emphasizes that Mr. Fuzy was angry about his evaluation, made threatening comments to the WEA president in a conversation that had nothing to do with guns, shootings or gun ownership; but instead an observation of a lesson. Specifically, the Board points out the topic of the discussion between Ms. Alston and Mr. Fuzy was the Principal's recommendation that Mr. Fuzy observe another teacher to get ideas about how to teach. The Board emphasizes that Mr. Fuzy interjected into that conversation his height, his weight and his guns.

The Board likens threats of violence in reference to guns to the equivalent of yelling "fire" in a private movie theater. The Board emphasizes that Mr. Fuzy made these threatening remarks to the Association President who was so concerned by these statements that she set aside her obligation to advocate for him so that she could make sure students and staff were safe. The Board asserts that it is clear Mr. Fuzy acted in an inappropriate and unwarranted manner and his threatening comments and references to guns constitute conduct unbecoming. For this reason, the Board asserts Mr. Fuzy cannot be permitted to continue to be a teacher.

The Board asserts that Mr. Fuzy also engaged in conduct unbecoming when he threatened to permit a deer to come onto school property at the risk of injuring a student. Specifically, the Board asserts that in the Spring of 2017, a live deer was located on school property and after seeing the deer within an enclosed section of the school property, Fuzy told Ms. DeFabio that he wished the deer would escape and injure students so that Principal Duelks "would look bad." Citing Ms. DeFabio's testimony when the Tamaques school had a deer on the property and Mr. Fuzy suggested an indoor recess, Principal Duelks called for outdoor recess and in response Mr. Fuzy said to Ms. DeFabio he wanted the deer to come into the back field and "hurt just one student, that's all it would take, just to prove it was the wrong call and that it should have been indoors." The Board asserts that Mr. Fuzy's first priority as a teaching staff member should be to ensure that his students are safe.

The Board would place this conduct in context citing a 2014 incident where Mr. Fuzy threw a pad of Post-It notes at a student. The Board cites this instance and points to Mr. Fuzy's conduct in January of 2018 when he contacted the Union in anger about Mr. Duelks because Mr. Duelks sent Mr. Fuzy an email late on a Friday afternoon. The Board contrasts Mr. Duelks email which it characterizes as "polite, short and to the point" asking a question of Mr. Fuzy in an unthreatening fashion. In response, Mr. Fuzy was sent "into a furor" over a relatively gentle observation and commentary about Mr. Fuzy's teaching. The Board points out that in response to this email, Mr. Fuzy "went into a tirade with various union representatives, even going to the union hierarchy and reaching out to the NJEA, not just to the local union." The Board suggests that if Mr. Duelks recommendation for improvement generated threats of violence, the Board wonders what might happen next. The Board suggests that the administration of the Westfield Public School District could not feel safe making recommendations for any improvement to Mr. Fuzy if he were to return to work. The Board emphasizes that Mr. Fuzy acknowledged his statements to Ms. Alston and does not dispute his comments. For these reasons, the Board asserts that a finding that Mr. Fuzy is not fit to serve as a teacher and must be removed from his tenured teaching position is necessary.

The Board argues strenuously that the proper penalty for Mr. Fuzy's unbecoming conduct is removal of Mr. Fuzy from his tenured position. Citing I/M/O Tenure Hearing of Curtis Robinson, State Operated School District of the City of Paterson, 2008 WL 3819075, July 25, 2008, and I/M/O Tenure Hearing of Jacque L. Sammons, School District of Blackhorse Pike Regional, 1972 S.L.D. 302, 321, the Board quotes from the Blackhorse Pike Regional decision as follows:

> [teachers] are professional employees to whom 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.

The Board also cites several other tenure decisions where teachers engaged in unbecoming conduct involving threats. Those decision include I/M/O Tenure Hearing of Theresa Lucarelli, Board of Education of the Borough of Brielle, Monmouth County, 1997 N.J. AGEN LEXUS 258; I/M/O Tenure Hearing of Demetrio Surace, Comm'r. #387-13 (November 1, 2013); I/M/O Tenure Hearing of Lisa Radzik, School District of the Township of Woodbridge, Middlesex County, #321-14 (August 4, 2014).

In each of these instances, the Board emphasizes the teacher failed to meet their obligation as a teacher and a public employee to set an example for students. In this instance, the Board contends Mr. Fuzy's actions are sufficiently flagrant and egregious to warrant termination. The Board emphasizes that Mr. Fuzy displayed inexcusable anger after being asked to observe another teacher, a common occurrence at the Tamaques School. Further, the Board emphasizes that Mr. Fuzy's anger was again apparent in his conversation with Ms. Alston where he made repeated comments about his stature and guns with respect to his principal. The Board argues strenuously that Mr. Fuzy's threatening statements created a fearful work environment. The Board maintains that no public school district should be required to employ a teacher who callously threatens another person with firearms particularly at this time where school shootings are almost ordinary.

Further, the Board argues that Mr. Fuzy is guilty of conduct unbecoming by making inappropriate comments to students. The Board cites testimony during the hearing that Mr. Fuzy berated students in an inappropriate reference to their ethnicity including telling a student that since she is Asian, she is "suppose to be smart." The Board also cites evidence presented showing that a student brought Mr. Fuzy a t-shirt to clean up a spill and he replied, "this is a t-shirt. Are you stupid? I need paper towels." The Board points out that Mr. Fuzy made these comments and statements after having been put on notice that he would be subject to discipline up to and including termination if he had further inappropriate interaction with students.

Respondent Frank Fuzy asserts that the tenure charges against him should be dismissed. First, Mr. Fuzy argues strenuously that the record shows a lack of substantial credible evidence in support of the charges. Respondent asserts that the Board relied substantially on hearsay and flawed testimony and with respect to several of the charges presented no testimony in its efforts to impugn Mr. Fuzy's name and reputation. Respondent asserts that the Board's actions have required him to be out of work for almost two years and derailed his career.

Respondent would apply the factors articulated by the Appellate Division in In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Those

factors include: (1) "the nature and gravity of the offenses under all of the circumstances involved," (2) "any evidence as to provocation, extenuation or aggravation," (3) "any harm or injurious effect which the teachers conduct may have had on the maintenance of discipline and proper administration of the school," (4) "the teaching record and the ability of the teacher," (5) "the teacher's disciplinary record," (6) "consideration as to the impact of the penalty on [the teachers] teaching career, including the difficulty which would confront him if the teacher dismissed for unbecoming conduct in obtaining a teaching position in this State." Id. at 421-422.

Turning first to the "nature and gravity of the offenses under all of the circumstances involved" Respondent emphasizes that he lawfully purchased and owns firearms which he uses in his hobby. Citing the testimony of Ms. Swanson and Ms. Ciullo, both witnesses described Mr. Fuzy's mention of guns as casual conversation.

Respondent emphasizes that the tenure charges don't actually mention a direct threat against Principal Duelks or that Respondent spoke with or interacted with Mr. Duelks in a threatening manner. Additionally, Respondent asserts that the Board has failed to meet its burden on proof. Respondent cites Ms. Alston's testimony which changed frequently as well as the timeline which establishes that Ms. Alston spoke with Mr. Fuzy after she forwarded the email to Superintendent Dolan. According to Respondent, this timeline impeaches Ms. Alston's testimony as to her reason for forwarding the email and supports Mr. Fuzy's suggestion that Ms. Alston forwarded the email after he contacted the NJEA. Further, Respondent points out that Ms. Alston's one-on-one visit to Mr. Fuzy's classroom occurred after the telephone call and suggests that Ms. Alston would not have visited Mr. Fuzy's classroom by herself if she had been afraid of Mr. Fuzy.

According to Respondent, the remaining charges are either not proven or have only flawed proof or present only hearsay testimony.

Turning to the factor of provocation, extenuation or aggravation, Respondent asserts that Ms. Alston forwarded Mr. Fuzy's January 15, 2018 email to Superintendent Dolan a few hours after learning that Mr. Fuzy had filed a complaint with the NJEA. Respondent contends that Ms. Alston forward Mr. Fuzy's email to Ms. Dolan in retaliation for his complaint to the NJEA. In support of this theory, Respondent points to Ms. Alston's question to Mr. Fuzy wanting to know why he went over her head to the NJEA and contacted them. Further, Respondent points out that after speaking with him on the phone Ms. Alston phoned Superintendent Dolan to inform her of her conversation with the union member. For this reason, Respondent asserts that both Ms. Alston's email and telephone call to Superintendent Dolan which led to these tenure charges were in retaliation for Mr. Fuzy's having "gone over her head" to the NJEA. Respondent maintains that the animus of the WEA against Mr. Fuzy can also be found in the email from

former President Mike Seiler to Superintendent Dolan which led to the Board suspending Mr. Fuzy.

Addressing the harm or "injury effect," Respondent's conduct "may have had on the maintenance of discipline and proper administration of the school," Respondent highlights the distinction between Mr. Fuzy's reference to his height, weight and gun ownership in his conversation with Ms. Alston and any direct threat of harm to Mr. Duelks. Respondent emphasizes that there is no allegation that Mr. Fuzy ever directly threatened Mr. Duelks or approached Mr. Duelks and did something threatening to him.

Addressing the teaching record and ability of the teacher, Respondent contends this factor weighs heavily in favor of dismissal of the charges. To that end, Respondent cites testimony of many staff members, students and parents reflecting that Mr. Fuzy is a dedicated teacher, that he cares for his students and that he goes above and beyond. Respondent also cites Mr. Fuzy's teaching record as well as positive feedback for his performance including being named New Jersey Agricultural Society's Teacher of the Year in 2013 for his work developing the school garden. Respondent would also cite Mr. Fuzy's 22 years of work as a third-grade teacher at the Tamaques School and his consistent, positive performance evaluations.

Addressing Mr. Fuzy's disciplinary record, Respondent acknowledges his discipline in November of 2014 which resulted in a corrective action plan (CAP). Respondent notes that Mr. Fuzy completed and fulfilled all terms of the CAP and successfully participated in counseling. Respondent notes Mr. Fuzy has received no discipline and was not investigated for any of the allegations included in the tenure charges. Respondent also asserts that these allegations should be stricken because the Board did not comply with its own mandatory disciplinary policy with respect to any of the allegations included in the tenure charges.

Respondent notes the obvious impact of upholding the tenure charges on Mr. Fuzy's teaching career in that it would cause irreparable harm to his professional future. Respondent also notes that in addition to making it difficult if not impossible for Mr. Fuzy to continue his teaching career, upholding tenure charges can result in removal of his teacher license. Based upon this and the other Fulcomer factors, Respondent urges dismissal of the tenure charges.

Relying on previous tenure cases, Respondent points out that Mr. Fuzy's actions were not subject to progressive discipline and notes that progressive discipline should be imposed before bringing tenure charges. Citing In re Tenure Charges of Leonard Yarborough, State Operated School District of the City of Newark, Essex County, New Jersey, DOE Docket No. 259-9/15-12/14 at pg. 15 (May 24, 2016), Respondent points out that "[u]nfitness to remain a teacher can be demonstrated by a single incident if it is serious enough while less serious

matters could be subject to progressive discipline." Respondent also cites In re Tenure Hearing of John Vingara, Somerset County Vocational Technical School District, Somerset County, DOE Docket No. 121-4/16 at 56 (January 17, 2017); In Re Tenure Hearing of William Carr, School District of Carlstadt-East Rutherford Regional High School, Bergen County, DOE Docket No. 142-6/15 (February 1, 2016); In Re Tenure Hearing of Kimble Wright, State Operated School District of Newark, Essex County, DOE Docket No. 328-10/15 (January 28, 2016).

Respondent asserts that comparison of Mr. Fuzy's situation to other tenure cases shows that the tenure charges should not have been initiated against Mr. Fuzy. To that end, Respondent cites numerous tenure cases where tenure charges were not substantiated or where the penalty was found not to be found proportional to the discipline imposed when compared to similar offenses for other public employees. Also citing numerous New Jersey tenure cases where the charges were upheld but removal of tenure was not found to be the appropriate penalty Respondent alleges that removing Mr. Fuzy is too severe a penalty. IMO Tenure Hearing of Edith Craft, School District of the Twp. Of Franklin, Somerset County, Comm. Of Ed. Dec. No. 366-11 (2011); IMO Tenure Hearing of George Mamunes, Pascack Valley Regional High School District, Bergen County, Comm. Of Ed. Dec. No. 208-00 (2000); In re Tenure Hearing of Gilda Nicole Harris, State Operated School District of the City of Jersey City, DOE Docket No. 342-11/14 & 379-12/14 (Oct. 2, 2015); IMO Tenure Hearing of Adelphia Poston, School District of the City of Orange Twp. Essex County, Comm. Of Ed. Dec. No. 362-06 (2006); IMO Tenure Hearing of Richard Vincenti, State Operated School District of the City of Paterson, DOE Dkt. No. 255-14 (2014); In re Tenure Hearing of Mark Boyle, Pittsgrove Township Board of Education, Salem County, DOE Docket No. 208-9/13 (Dec. 23, 2013); In re Tenure Hearing of Maryellen Lechelt, Edison Township Board of Education, DOE Docket No. 360-12/14 (June 30, 2015); In re Tenure Hearing of Leslie Ann Ramos, School District of the City of Elizabeth, Union County, DOE Docket No. 261-9/14 at 18 (Jan. 5 2015); and In re Tenure Hearing of Penny Keough, School District of the City of Burlington, Burlington County, DOE Docket No. 119-4/16 (Dec. 15, 2016). Respondent contrasts these situations with those where the Board met its burden of proving instances of corporal punishment against numerous students, slapping a handicapped child with an open hand and other abusive behavior against students including violating laws, cursing at children in the classroom and unacceptable instances of sexual interaction with students where removal of tenure in an appropriate penalty. Respondent points out that Mr. Fuzy's conduct does not come close to that of teachers in those cases and suggests bearing in mind that "many educational employees make decisions that in retrospect could have been wiser. This is not the standard for stripping tenure and terminating employment." In re Tenure Hearing of Penny Keough, School District of the City of Burlington, Burlington County, DOE Docket No. 119-4/16 (Dec. 15, 2016). As a result, Respondent urges that the tenure charges be dismissed and that Mr. Fuzy be returned to the classroom and made whole for losses in seniority, benefits and that

his record be expunged of all disciplinary actions related to this matter. Finally, Respondent asserts that the charges evidences such an egregious effort to "smear" Mr. Fuzy that exemplary damages including but not limited to the reimbursement of Mr. Fuzy's legal expenses should be awarded.

Initially, Respondent asserts that all of the charges should be dismissed in their entirety because the District did not follow the procedural requirements of its disciplinary policy in that it did not provide notice that discipline was contemplated and the resulting due process that is detailed in Board Policy 3150. It is not disputed that the District did not apply the provisions of its Policy prior to filing these tenure charges. However, the provisions of TEACH NJ, including N.J.S.A. 18A:6-11 and 18A:6-16, as amended by *P.L. 2012*, c. 26, provide for written notice of charges, and thereafter, written statement of the charges, the opportunity to provide a written response followed by a *de novo* hearing before a member of the panel of arbitrators maintained by the Commissioner of Education pursuant to N.J.S.A. 18A:6-17.1. These statutory requirements provide sufficient due process and procedural protections in excess of those included in Board Policy 3150. The failure to follow the requirements of the School District's disciplinary policy is not cause to dismiss tenure charges. I now turn to the specific charges.

CHARGE NUMBER ONE

The first charge focuses on Mr. Fuzy's ownership of guns coupled with his comments to various teachers and paraprofessionals about his guns including his repeated comments to Ms. Alston about his stature and his gun ownership that led to these proceedings.

Turning first to the allegation in charge 1b that Mr. Fuzy has frequently commented to other staff members that he owns "multiple guns, including an AR-15," there is no dispute that Mr. Fuzy owns firearms. It is undisputed that Mr. Fuzy has commented to staff members that he owns multiple guns, though the record does not establish that he owns an AR-15. Ms. DeFabio, Ms. Ciullo, Ms. Ullrich and Ms. Swanson all testified that Mr. Fuzy told them he owned guns. Mr. Fuzy has acknowledged owning rifles, but has not specifically acknowledged owning an AR-15 assault rifle. The record does not otherwise reflect that Mr. Fuzy owns an AR-15, but does establish that he owns multiple guns.

Charge 1(c) alleges that, "Mr. Fuzy has also informed staff members that he keeps a gun in the glove compartment of his car." Ms. DeFabio testified that Mr. Fuzy once told her he kept a gun in the back of his truck. Mr. Fuzy denied ever telling anyone that he kept a gun in his vehicle or on school property.

Although Ms. DeFabio could not recall when in the past three years Mr. Fuzy told her that he kept a gun in his vehicle, the comment made her uncomfortable and it stuck with her. I credit Ms. DeFabio's testimony that Mr. Fuzy told her kept a gun in his truck or SUV. While the specific allegations of the charge are not substantiated, but I find that Mr. Fuzy made a statement about keeping a gun in his vehicle. Such a statement by itself does not establish misconduct, but has some relevance to the record as a whole.

The allegation in charge 1(d) that "Mr. Fuzy has stated that he would run out to his car if he needed to use a gun" is not supported by the record.[5] The allegations in charge 1(f) that. Mr. Fuzy frequently posts about guns on social media outlets and in 1(g) that "Mr. Fuzy also shows pictures of guns to staff members."

Ms. DeFabio was friends with Mr. Fuzy on Facebook and recalls that he posted photographs of guns either in a case or on a table and posted pictures of the targets he shot. Mr. Duelks recalled that Mr. Fuzy showed him a photo of a firearm on his cellphone.

Dr. Dolan acknowledged that Mr. Fuzy had previously posted statements and pictures about guns on social media and there was no reason to discuss these postings with him because it was his right to make such postings about his hobby regarding guns.

The record does not establish that Mr. Fuzy used social media or photographs of firearms to issue any threat including a threat of violence to any member of the school community. While this charge is substantiated, it does not, on its own establish any misconduct.

Charges 1(h) through 1(p) alleged that Mr. Fuzy, though his comments and actions, has created an atmosphere where "other staff members are intimidated and fearful of imminent harm" including by making angry and threatening comments about his stature in connection with guns and gun ownership.

These allegations are at the heart of the tenure charges. The record establishes that Mr. Fuzy had two phone calls with Ms. Alston, with the second call resulting from the first call being dropped. The record further establishes that during these calls Mr. Fuzy made repeated comments about his height, weight and gun ownership. Mr. Fuzy acknowledged these repeated comments, though there are differences in his reported, height, weight and the number of guns he owns. At issue is whether these comments should be construed as threatening or, as Mr. Fuzy would have it, as his effort to explain that his physical appearance and seeming toughness mask his feelings.

[5] Charge 1(e) was dismissed on February 15, 2019.

Because the Board replied in large part upon Ms. Alston's account of these phone calls in its determination to bring tenure charges, the Respondent argues strenuously that Ms. Alston's changing testimony with regard to the date when this conversation occurred and the chronology of events undermines the credibility of her testimony regarding the content of the phone conversation. Specifically, Ms. Alston initially testified that she met with Mr. Fuzy in his classroom on January 15, which was a school holiday. Ms. Alston later testified that it must have been on January 12, which was a day when Mr. Fuzy was out sick. Ms. Alston also testified that she met with Mr. Fuzy in his classroom before their phone conversations and before she read and forwarded his January 15, 2018 email to Dr. Dolan. The documentary record establishes that Ms. Alston received Mr. Fuzy's angry and inflammatory email on January 15, 2018 which was sent at 9:13 p.m. either later that night or early on January 16 and forwarded it to Dr. Dolan at 11:30 a.m. on January 16, 2018. The record also establishes that Mr. Fuzy emailed the NJEA at approximately 6:41 a.m. that same day. Ms. Alston and Mr. Fuzy spoke in the evening on January 16, 2018 and Ms. Alston visited his classroom on Thursday, January 18, 2018.

Ms. Alston did not recall the chronology of events accurately, but this is not sufficient to establish that Ms. Alston's entire recollection of the phone calls is inaccurate. In this instance, the statements that concerned Ms. Alston, Mr. Fuzy's repeated statements about his height, weight and ownership of multiple guns are corroborated by Mr. Fuzy, even though Ms. Alston apparently did not accurately recall Mr. Fuzy's height, weight or how many guns he owned.

This dispute did not begin with the phone calls between Mr. Fuzy and Ms. Alston. Rather, this dispute began when Mr. Fuzy was upset that Mr. Duelks emailed him after the end of the January 12, 2018 school day, when Mr. Fuzy was out sick, in follow up to their discussion about his observing other math teachers. It is apparent that this email was a simple follow up by Mr. Duelks that included a misunderstanding about who would select the teacher(s) who Mr. Fuzy would observe. The email asked, "[a]s per your request and my endorsement, have you conducted any peer observations during a full math lesson to date?" Mr. Duelks continued offering to arrange the peer observation if Mr. Fuzy preferred. Mr. Fuzy testified that he believed Mr. Duelks was insinuating that he had been insubordinate by not observing another teacher. Later that evening at 6:41 p.m., when he forwarded the email to Ms. Quackenbush from the WEA, he stated "[i]f this doesn't show that I am clearly being harassed I don't know what would." Mr. Fuzy continued, "I'm ready to either meet with him and the union or a lawyer. Plainly, Mr. Fuzy perceived Mr. Duelks' simple straight-forward, non-accusatory follow up email as harassment.

January 12, 2018 was the beginning of a three-day weekend as Monday, January 15, 2018 was a school holiday. The record does not reflect what occurred

over that weekend, until the evening of January 15 when Mr. Fuzy emailed Ms. Quackenbush at 7:41 p.m. complaining that Ms. Alston had not called him when she said she would and stating, "I'm the one with everything on the line and she couldn't call after saying she would and knowing my situation." The record does not reflect that Mr. Fuzy needed to take any action other than to clear up the misunderstanding about who would suggest teacher(s) for his peer observation.

The record does not reflect whether Mr. Fuzy received any response in the next few hours, but at 9:13 p.m., Mr. Fuzy forwarded Mr. Duelks' email to both Ms. Quackenbush and Ms. Alston with a long, rambling and angry email complaining about Mr. Duelks. In that email, Mr. Fuzy stated that Mr. Duelks' intentions were "not just" and were designed to cause him "harm". Mr. Fuzy accused Mr. Duelks of making "tiny threats" and staring at him when Mr. Duelks was in his classroom.

The next morning at 6:44 a.m., when Ms. Alston had not called him back, Mr. Fuzy emailed the NJEA complaining that he was "being harassed and intimidated in my workplace". Based upon the record to this point, Mr. Fuzy's reaction to Mr. Duelks' January 12, 2018 email shows agitation, anger and impatience that he had not received a response over the three-day weekend. Later that morning, Ms. Alston forwarded Mr. Fuzy's January 15, 2018 email to Dr. Dolan.

The subsequent phone calls between Mr. Fuzy and Ms. Alston took place with this background of an escalating series of emails over the weekend suggesting that Mr. Duelks' routine follow up email constituted harassment and intimidation. During this phone call, Ms. Alston raised the incident with the Post-It notes and told Mr. Fuzy that he had been "labeled...as having anger issues." Ms. Alston also testified that when she suggested that Mr. Fuzy consider transferring to another school where he would not need to be concerned about Mr. Duelks, he became very angry and asked why he should leave. In response to this, Mr. Fuzy began reciting his height, weight and the number of guns he owned. While the testimony about his exact height, weight and the number of guns he claims to own has varied, both Ms. Alston and Mr. Fuzy testified that he mentioned his height, weight and gun ownership multiple times. After consulting with various Association officials, Ms. Alston reported this conversation to Dr. Dolan.

Respondent makes much of Ms. Alston's failure to accurately recall the dates and chronology of her conversations with Mr. Fuzy and her visit to his classroom and suggests that her report of the conversation is retaliatory and should be discounted in its entirety. Ms. Alston, however, reported her conversation to Dr. Dolan, the crux of which has been substantiated to the extent that Mr. Fuzy has acknowledged repeating his height, weight and gun ownership multiple times. Dr. Dolan proceeded to direct that an investigation be conducted. Dr. Dolan described her concern after Ms. Alston told her about the phone conversation she had with Mr. Fuzy where he was very agitated and repeatedly

mentioned his height, weight and ownership of several guns.

The conversation between Ms. Alston and Mr. Fuzy, together with Mr. Fuzy's emails, particularly on January 15, 2018, illustrate a teacher who is angry at his principal and in expressing his anger, referred multiple times to both his stature and his gun ownership. That Mr. Fuzy passed a background check and his gun ownership is licensed and sanctioned is beside the point. Dr. Dolan and the School District are responsible to maintain a safe and secure environment for students, staff and parents in its schools. Ms. Alston, the colleagues she consulted and Dr. Dolan all considered Mr. Fuzy's repeated statements about his stature and gun ownership in response to a discussion of an in-class observation that included an agreement that Mr. Fuzy observe another math teacher to be a threat. This, coupled with his increasingly angry and agitated emails asserting that Mr. Duelks was harassing him raised cause for concern.

Ms. Swanson who was the Association's building representative at Tamaques testified that she felt "truly afraid because [she] felt like if this is something – if he's that angry, he's not going to just come after my principal. He's going to come after me too."

Ms. Swanson testified:

> . . . there just had been things in the news and—and I think that this whole idea of school shootings was becoming more—I don't want to say common but common, and I just—I felt like if I didn't say something and do something that it would be on my shoulders ... I said to her – I felt I was afraid to go into that building when he was there and I remained afraid even when he was out of the building.

Mr. Duelks testified that when he learned of Mr. Fuzy's repeated statements about his height, weight and guns, he was scared. According to Ms. Swanson, after she learned of Ms. Alston's phone conversation, she and Mr. Duelks would leave school at the same time and walk out together as a precaution.

Several members of the staff of the Tamaques School, including Ms. Ciullo, Ms. DeFabio, Special Education teacher and building delegate Sharon Contreras indicated that they would be concerned, afraid or reluctant to continue working at the school if Mr. Fuzy returned.

Ms. DeFabio testified that she feared Mr. Fuzy because:

> Mr. Fuzy could get very frustrated and aggravated in—with situations and there's always in the back of your mind people that, you know, have a tendency to get aggravated – it's a little fearful; that, you know. There's a gun in the back of the car and they're

> aggravated so it's—you're a little—you have your guard up. I had my guard up.

Ms. DeFabio continued stating that she was "very concerned that...he would get frustrated enough" to use his guns at Tamaques.

Ms. Ciullo expressed her discomfort with Mr. Fuzy saying:

> ...it's just disturbing to me sometimes to think that someone who has a hobby of handguns which is fine—hobbies are hobbies—but also is openly taking prescription medications and just, you know, would come in and I would just never really know what kind of personality we were getting, ... it really would concern me a lot that the two were mixing in someone's personal life.

In determining to bring tenure charges against Mr. Fuzy, Dr. Dolan focused on Mr. Fuzy "losing his temper and in anger, talking about how many guns he had and then finding out that when we did an investigation that this isn't the first time guns were mentioned and this isn't the first time that ... people felt intimidated in the school..."

Mr. Fuzy's repeated statement to Ms. Alston about his height, weight and gun ownership must be viewed in the context that Mr. Fuzy exhibited signs of anger and unpredictability that, when coupled with repeated mention of guns, gave many staff members at Tamaques cause for concern. When Mr. Fuzy's repeated statement about his height weight and gun ownership are viewed in light of the increasingly angry and disproportionate emails he sent over the weekend of January 12-15, 2018, it becomes more difficult to view this repeated statement as anything but a generalized threat. Even if Mr. Fuzy believed that Ms. Alston was neglecting her responsibilities to him as an Association member with a potential concern for his livelihood, there was no basis to bring a repeated statement about his stature and his gun ownership into the discussion of his concerns about Mr. Duelks and an agreement between the two that he would observe another teacher's class.

The allegations in Charge Number One are substantiated to the extent that Mr. Fuzy made generalized threatening comments to another staff member in connection to a request for an update on an agreement between the school principal and Mr. Fuzy that he would observe another a math class. When discussing the principal's January 12, 2018 email about Mr. Fuzy's participation in a classroom observation, Mr. Fuzy commented repeatedly to Ms. Alston detailing his height, weight and gun ownership. Further, Mr. Fuzy's comments and actions regarding guns have served to create an atmosphere at the school where several other staff members are intimidated and fearful of imminent harm.

Mr. Fuzy's threatening comments in association with Mr. Duelks cannot be taken lightly in an era when school shootings and active shooter drills are all too common.[6] Under such circumstances, any threat, whether actual or implied, that could lead to harm of anyone in the school community and "breaches the obligation of a teacher to be a role model to students and to comply with the implicit standard of good behavior" required of a teacher. See, Bound Brook, supra.; Karins v. City of Atlantic City, supra.

CHARGE NUMBER TWO

In Charge Number Two, a deer was located on school property and Mr. Fuzy turned to another staff member and stated that he wished the deer would escape and injure students, so that his principal would "look bad."

In this charge, the Board refers to an incident when, in the spring of 2016, Mr. Fuzy wanted recess to be indoors, but Mr. Duelks determined that it would be outside that day. Many deer live in and frequent the area near the Tamaques School and that day there were some deer in front of the building. According to Ms. DeFabio, Mr. Fuzy was upset that recess was outside and commented to her that he "wanted the deer to ... come into the back field and hurt just one student" because it would prove that outdoor recess was the wrong decision.

As recess ended that day, Ms. DeFabio observed Mr. Fuzy put his hand on the gate and she believed that Mr. Fuzy was going to open the gate to let the deer into the yard.

Mr. Fuzy denied ever wishing a child would be hurt by a deer at Tamaques School. Mr. Fuzy denies opening a gate to let a deer in so that it could harm students.

The record does not reflect that Mr. Fuzy took any action to let deer in the same area with children. Ms. DeFabio was a credible witness and it is possible that Mr. Fuzy has forgotten that he made a comment suggesting that he wished to prove Mr. Duelks made the wrong decision in determining that recess would be outside that day. Such a comment is further evidence of his animosity towards Mr. Duelks, and on its own, might warrant discipline short of dismissal. Charge Number Two is substantiated to the extent that it further establishes Mr. Fuzy's animosity towards Mr. Duelks.

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[6] While discussing his conversations with his children about security in school, Mr. Blitt, a parent, recounted an incident that occurred during the pendency of these tenure charges where a man was found sitting in a car with a handgun in his lap at the Tamaques School.

CHARGE NUMBER THREE

In this charge, the Board alleges, that "between September 2017 and January 2018, Mr. Fuzy picked up a student, S.G., by her feet". Although Dr. Dolan testified that this allegation was brought to her attention, the record does not include testimonial or other direct evidence establishing that that this alleged incident occurred. Charge Number Three has not been substantiated and is dismissed in its entirety.

CHARGE NUMBERS FOUR AND FIVE

In Charge Number Four, the Board alleges that between September 2017 and January 2018, Mr. Fuzy embarrassed and disparaged S.G. in front of her entire class. The charge alleges specifically that, "when S.G. attempted to ask Mr. Fuzy a question during class, Mr. Fuzy turned to the entire class and stated: 'if she has to ask questions it must mean that she was not paying attention.'"

In Charge Number Five, the Board alleges that Mr. Fuzy as stated to his students, "what are you stupid?" Further the Board alleges that this conduct and comments have caused students to cry.

Ms. Ciullo and Ms. Ullrich both worked in Mr. Fuzy's classroom for portions of the school day in the 2017-2018 school year. Ms. Cuillo recalled Mr. Fuzy make comments about a student's ethnicity, saying "I can't believe I have to call this kid's mom. You, know she's Asian.... This shouldn't be happening." Mr. Fuzy also made similar comments to Ms. Ciullo about an Indian student. Similarly, Ms. Ullrich described Mr. Fuzy as berating student C.W. saying that "she's Asian. She's supposed to be smart." According to Ms. Ullrich, Mr. Fuzy also embarrassed C.W. when she picked her nose instead of simply suggesting she use a tissue.

Ms. Ciullo recalled another incident where something spilled and Mr. Fuzy asked the nearest student to grab some paper towels and the student misunderstood and handed Mr. Fuzy a tee shirt. Mr. Fuzy said to the student, "are you stupid? I need paper towels." This caused the child who brought the tee shirt to cry. Mr. Fuzy did not recall this incident and denied ever calling a student "stupid".

The testimony of Ms. Ciullo and Ms. Ullrich is consistent and establishes that Mr. Fuzy did not always exercise the restraint necessary for a teacher and, on at least one occasion called a student "stupid" and engaged in stereotyping a child with Asian ethnicity. Mr. Fuzy may not recall these instances, but, the testimony of Ms. Ciullo and Ms. Ullrich is consistent and similar. I credit their testimony. I

find the specific allegation in Charge Number Four is not substantiated by the testimony, but the allegations in Charge Number Five are proven. While Mr. Fuzy's conduct in calling a student "stupid" is serious and warrants discipline, it is not, by itself, sufficient to warrant tenure charges. Charge Number Five lends support to the allegations that Mr. Fuzy does not engage in the self-restraint necessary for a teacher of elementary school students.

CHARGE NUMBER SIX

In this charge, the Board alleges that the Superintendent advised Mr. Fuzy in his January 24, 2018 letter of suspension that, [d]uring your suspension, you are not permitted on Board property and you should refrain from any contact with staff, students, or the families of students." The Board alleges that in April, 2018, Mr. Fuzy "contacted at least one staff member, telling that person that he was out because he talked about guns and 'taking care of the principal' and the district overreacted." The Board asserts that Mr. Fuzy has consistently contacted staff and suggested that he would be returning to Tamaques School by Mid-May 2018 and made statements to staff that increased fear and anxiety. Further, the Board alleged that Mr. Fuzy was given permission to attend the daughter/daddy dance at Tamaques and Mr. Fuzy abused the privilege by again telling those present that he would be back in May. Additionally, the charges provide that "[w]hen the Superintendent attended a teacher of the year celebration at Tamaques on May 8, 2018, teachers and parents told her that they were afraid for their safety and the safety of their children if Mr. Fuzy returned."

In response to Respondent's Motion to Dismiss Charge Number Six, I declined to rule on that portion of the Motion and determined that the issues raised by both parties "must be determined based upon the factual record."

None of the several allegations in Charge Number Six are supported by direct evidence. There is no testimony supporting the allegation that Mr. Fuzy "contacted at least one staff member, telling that person that he was out because he talked about guns and 'taking care of the principal' and the district overreacted." Nor is there direct testimony asserts that Mr. Fuzy has consistently contacted staff and suggested that he would be returning to Tamaques School by mid-May 2018. Likewise, there is insufficient evidence that Mr. Fuzy attended the daughter/daddy dance at Tamaques and told those in attendance that would be back in May. Dr. Dolan did not attend that event and has no first-hand knowledge of what occurred. With respect to Dr. Dolan's testimony that at the teacher of the year celebration at Tamaques on May 8, 2018, teachers and parents told her that they were afraid for their safety and the safety of their children if Mr. Fuzy returned, no parents testified as to their concern if Mr. Fuzy returned to the classroom. Nor is there evidence that parents wrote letters expressing their concern if Mr. Fuzy returned to the District. There is insufficient evidence to support the allegations in Charge Number Six and it is dismissed in its entirety.

In sum, I find that Charge Number One is sustained to the extent that Mr. Fuzy made repeated threatening statements about his height, weight and gun ownership in association with his concerns that he was being harassed by Principal Duelks. I find Charge Number Two is sustained to the extent that it establishes animosity toward Mr. Duelks, but does not, by itself, support tenure charges. I find Charge Number Five is sustained to the extent that Mr. Fuzy called a student stupid and caused that child to cry.

I find that there is insufficient evidence supporting the allegations in Charges Number Three, Number Four and Charge Number Six and they are dismissed in their entirety.

Respondent asserts that the penalty of removal is not supported by the record and principles of progressive discipline should be applied if any discipline is warranted. Mr. Fuzy has already received progressive discipline. In 2014, Mr. Fuzy received a four-day suspension, was placed on a CAP and sent for anger management counseling after throwing Post-It notes and hitting a child in the face. While Mr. Fuzy successfully completed the CAP and the anger management counseling, this record establishes that Mr. Fuzy has not been fully successful at controlling his temper with students, teachers and other staff. As a result, Mr. Fuzy's conduct has led to calling students "stupid", inappropriately reducing students to tears; and most importantly discussing his height, weight and guns in a threatening manner in a conversation where he was stressed and angry.

That threat was in response to a routine follow up email from Mr. Duelks. Mr. Fuzy's conversation with Ms. DeFabio about deer on school grounds reinforces Mr. Fuzy's animosity towards Mr. Duelks. This conduct, when taken together, is not conduct that can be condoned and continued in an elementary school environment.

After the Post-It note incident, Mr. Fuzy was on notice that he needed to exercise self-restraint and control his anger in the school setting and provided with counseling to help him do so. Despite completing the requirements of the CAP, Mr. Fuzy has been unable to exercise sufficient self-control to the point where he has, in an angry and agitated state, made repeated generalized threatening statements about his stature and gun ownership in a conversation about a routine follow-up email from Mr. Duelks. Mr. Fuzy's inability to restrain his comments such as calling a student stupid and embarrassing another student, would not, on their own support the penalty of removal, but serve to reinforce that Mr. Fuzy's current lack of self-restraint when under stress is not appropriate in the position of a teacher and role model for elementary school students.

There is no doubt that Mr. Fuzy has been an effective teacher. Mr. Fuzy has a uniform record of good achievement for his approximately 23 years at the

Tamaques School. Parents and former students attested to the gains students made in his classes. Colleagues have attested to his teaching abilities, care for the Tamaques School, establishment of the garden and supervision of recess and other achievements. Nor is there doubt that Mr. Fuzy has many supporters within the school district.

None of these achievements can outweigh or mitigate the impact of Mr. Fuzy's threatening statements regarding his stature and his firearms. These statements, whether made as threats or for more benign reasons, were justly viewed as threatening. Repeated statements about stature and gun ownership made by a school teacher in anger during a conversation about his principal at a time when schools, including those in the Westfield School District, have regular security training that includes active shooter training cannot be discounted or ignored.

The Westfield School District properly considered its obligations and responsibility to Mr. Fuzy and to the safety and security of the school community including Mr. Duelks, teachers, staff, students and parents at the Tamaques School. The Westfield School District had good cause to determine that it cannot expose the staff, students and parents at the Tamaques School to the risk posed by Mr. Fuzy's repeated and angry threatening statements. Mr. Fuzy's threatening statements referencing guns, coupled with is repeated expressions of anger disproportionate to the situation, constitute unbecoming conduct warranting Mr. Fuzy's dismissal.

Accordingly, I find that the Board has established that Respondent Frank Fuzy has engaged in unbecoming conduct that supports his dismissal from his position as a tenured teacher for the Westfield School District.

AWARD

The Westfield Board of Education had just cause to dismiss Frank Fuzy from employment.

Dated: December 16, 2019
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 16th day of December, 2019, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

DEBORAH A. JACOBSON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 22, 2023

Joyce M. Klein

Arbitrator & Mediator

VIA ELECTRONIC AND U.S. MAIL

December 16, 2019

Jennifer Killough-Herrera, Acting Director
Bureau of Controversies & Disputes
State of New Jersey
Department of Education
PO Box 500
Trenton, NJ 08625-0500

Re: IMO the Tenure Charges of Frank Fuzy, III,
Westfield Board of Education, Agency Dkt No. 4-1/19

Ms. Killough Herrera:

Enclosed please find a copy of the Opinion and Award in the above case. I have also enclosed a copy of my invoice. By this letter, I am sending copy of the Award to counsel for both parties. The file has been returned under separate cover to the Bureau of Controversies and Disputes via U.S. Mail.

Sincerely,

Joyce M. Klein

JMK/glb

Enclosures

c. Derlys M. Gutierrez, Esq. (Letter only / Via Electronic Mail only)
Adam S. Herman, Esq. (Letter only / Via Electronic Mail only)
Adams Gutierrez & Lattiboudere, LLC

Ty Hyderally, Esq. (Letter only / Via Electronic Mail only)
Jennifer Vorih, Esq. (Letter only / Via Electronic Mail only)
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4871 28th Street South, Arlington, VA 22206

334-19

New Jersey Commissioner of Education

Decision

Mark Santeramo,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Pro se petitioner appealed the decision of the Office of Student Protection (OSP) to permanently disqualify him from serving in any institution under the supervision of the Department of Education (DOE) following his arrest and entry into a plea agreement. Petitioner pleaded guilty to assault by auto while driving intoxicated resulting in serious bodily injury, in violation of *N.J.S.A.* 2C:12-1(c)(2) – a crime of the third degree. Petitioner contended that he did not intend to harm anyone and that his conviction should be considered a crime of the fourth degree, and therefore not disqualifying. He further argued that the accident was brought on by a seizure and that he had been coerced into a plea agreement. The respondent filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found, *inter alia*, that: petitioner was arrested on August 4, 2018 by the Nutley Police Department; he thereafter entered into a plea agreement wherein he pleaded guilty to a violation of *N.J.S.A.* 2C:12-1(c)(2) in the third degree; petitioner was notified via letter from OSP dated June 18, 2019 that he was permanently disqualified from serving in any capacity with an educational institution under the supervision of the DOE; petitioner alleged that the accident was caused by him having a seizure; further, petitioner claimed that he was coerced into a plea agreement but felt it was in his best interests to avoid taking the case to trial; however, reckless behavior is all that is required for a conviction for assault by auto, and petitioner had to lay a factual basis under oath when he entered his guilty plea. The ALJ concluded that a third-degree conviction of assault by auto under these circumstances does warrant a disqualification of petitioner's employment in public education; further, this tribunal is not the appropriate forum to address petitioner's complaints regarding the prosecution of the criminal charges against him. Accordingly, the respondent's motion to dismiss was granted, and the appeal was dismissed with prejudice.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, for the reasons thoroughly expressed in the Initial Decision. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed with prejudice.

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

December 17, 2019

334-19

OAL Dkt. No. EDU 13088-19
Agency Dkt. No. 177-7/19

New Jersey Commissioner of Education

Final Decision

Mark Santeramo,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the petitioner's guilty plea to assault by auto while driving intoxicated and resulting in serious bodily injury in violation of *N.J.S.A.* 2C:12-1(c)(2) – a crime of the third degree – warrants his disqualification from employment in public education, pursuant to *N.J.S.A.* 18A:6-7.1(c)(1). The Commissioner further concurs with the ALJ that whether petitioner was coerced into a plea agreement is not within the Commissioner's jurisdiction and cannot be addressed in this forum.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons thoroughly expressed therein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19
Date of Mailing: 12/18/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13088-19
AGENCY DKT. NO. 177-7/19

MARK SANTERAMO,
Petitioner,

vs.

NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,
Respondent.

Mark Santeramo, Petitioner, pro se

Jaclyn M. Frey, Deputy Attorney General, (Gurbir S. Grewal, Attorney General of New Jersey, attorneys)

Record Closed: October 28, 2019 Decided: November 4, 2019

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a pro se Petition of Appeal with the New Jersey Department of Education's Office of Controversies and Disputes appealing the decision of the Office of Student Protection to permanently disqualify him from serving in any institution under the supervision of the Department of Education.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on September 17, 2019, as a contested case.

A prehearing conference was held on September 27, 2019. A prehearing order was entered on September 30, 2019.

Respondent filed a Motion to Dismiss in lieu of an Answer to the Petition with the Commissioner of the Department of Education, dated September 10, 2019. This occurred prior to the transmittal of the matter to the OAL.

The prehearing order set forth a briefing schedule for the motion. Petitioner filed his response to the motion, titled "Opening Statement"[1] on October 9, 2019. Respondent filed a reply thereto on October 28, 2019.

The record closed on October 28, 2019.

FACTUAL BACKGROUND

Petitioner was arrested on August 4, 2018, by the Nutley Police Department. That arrest led to Petitioner entering into a plea agreement wherein he entered a plea of guilty to the charge of a violation of N.J.S.A. 2C:12-1(c)(2) in the third degree.

[1] Petitioner appears pro se. I accept his "Opening Statement" as his certification as he sets forth certain facts therein.

By letter dated June 18, 2019, OSP informed petitioner that he was permanently disqualified from serving in any position with an educational institution under the supervision of the Department of Education. Petitioner then filed the instant appeal.

LEGAL ANALYSIS AND CONCLUSION

Respondent seeks an order of dismissal as petitioner does not dispute he was convicted of a crime of the third degree in violation of N.J.S.A. 2C:1(c)(2). Rather, it is petitioner's contention that the conviction should be treated as a fourth degree offense.

N.J.A.C. 6A:3-1.10 provides as follows:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

It is clear herein that petitioner has not advanced a cause of action. Petitioner does not dispute his conviction, by way of plea bargain, to a crime of the third degree in violation of N.J.S.A. 2C:12-1(c)2. That crime is assault by auto while in violation of N.J.S.A. 4-50, Driving While Intoxicated, which results in serious bodily injury.

Rather, petitioner argues that he did not intend to harm anyone and that his conviction should be considered a crime of the fourth degree and therefore not disqualifying. Petitioner cites Parshelunis v. N.J. State Dep't of Educ., Office of Crim. Hist. Rev., OAL Dkt. No. EDU 10282-07, Initial Decision (August 28, 2008), adopted Comm'r Final Decision (November 25, 2008). In that matter the petitioner pled guilty to a fourth degree offense that did not involve serious bodily injury.

Parshelunis is distinguishable from the instant matter. In Markakis v. N.J. Dep't of Educ., Office of Crim. Hist. Rev., OAL Dkt. No. EDU 13275-10, Initial Decision (June

10, 2011), adopted Comm'r Final Decision (September 1, 2011), the petitioner was found guilty of the same offense as petitioner herein. In Markakis the decision disqualifying the petitioner from school employment was affirmed.

Petitioner alleges in his Opening Statement that the accident was caused by him having a seizure. He states that the criminal charges against him were "unscrupulous". He further states he was coerced into a plea agreement, but felt it was in his best interests to avoid taking the case to trial. This tribunal is not the forum to address what happened during the course of the prosecution of the criminal charges against petitioner. That is a matter to be addressed at the Superior Court level via perhaps a motion for post-conviction relief. It cannot be addressed here.

While petitioner may not have intended to cause the injury and harm that he caused, a mens rea of intent to harm is not a requirement of the statute. Reckless behavior is all that is required for a conviction for assault by auto, and petitioner had to lay a factual basis under oath when he entered his guilty plea. Reckless behavior can also form the basis for a conviction of aggravated assault and manslaughter, crimes listed as disqualifiers under N.J.S.A. 18A:6-7.1(c)(1). Petitioner caused serious bodily injury by the use of force upon another. I **CONCLUDE** that a third degree conviction of assault by auto under these circumstances does warrant a disqualification of petitioner's employment in public education.

ORDER

It is hereby **ORDERED** that Respondent's motion to dismiss is **GRANTED**; and it is further **ORDERED** that petitioner's appeal is **DISMISSED** with prejudice.

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

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

Nov. 4, 2019
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: November 4, 2019

Date Mailed to Parties: November 7, 2019

db

APPENDIX

List of Moving Papers

For Petitioner:

Opening Statement

For Respondent:

Notice of Motion to Dismiss

Letter Brief in Support of Motion to Dismiss with Exhibits A and B

Letter reply brief

For Intervenor:

Letter brief is support of Motion for Summary Decision

Pleadings:

Pro se Petition of Appeal

New Jersey Commissioner of Education

Decision

Courtney Hambrecht,

Petitioner,

v.

Board of Education of the City of Atlantic City, Atlantic County,

Respondent.

Synopsis

Petitioner – formerly employed as a lifeguard in the respondent Board's school district – sought summary decision requiring the respondent Board to correct her personnel file to reflect her voluntary resignation as of January 29, 2019 and remove any references to a termination of her employment. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner argued that her resignation was effective on January 29, 2019 as she submitted her letter of resignation, the Superintendent recommended her resignation, and the Board approved the resignation; consequently, the Board's subsequent action to rescind its acceptance of her resignation was not valid because her employment relationship had already ended; further, without a recommendation of termination from the Superintendent, the Board had no authority to terminate her; the Board contended that it acted immediately after learning of compelling reasons to rescind its acceptance of petitioner's resignation and terminated her employment the same day; therefore, the Board opines that petitioner's personnel file correctly reflects that the Board terminated her; however, pursuant to *N.J.S.A.* 18A:27-4.1(a), a personnel action to remove an employee may only be taken upon the recommendation of the Superintendent; in this case, the Superintendent accepted petitioner's letter of resignation and there is no evidence to show that the Superintendent made a subsequent recommendation to terminate petitioner based on new information. The ALJ concluded that petitioner's resignation was effective January 29, 2019. Accordingly, the ALJ granted petitioner's motion for summary decision, denied the Board's cross motion, and ordered the Board to correct petitioner's personnel file to reflect her resignation.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision is this matter. The Board was ordered to correct petitioner's personnel file to indicate that she resigned effective January 29, 2019.

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.

December 17, 2019

336-19

OAL Dkt. No. EDU 05627-19
Agency Dkt. No. 83-4/19

New Jersey Commissioner of Education

Final Decision

Courtney Hambrecht,

Petitioner,

v.

Board of Education of the City of Atlantic City, Atlantic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In this matter, petitioner – a lifeguard for the Board – was on duty during a near-fatal drowning incident on January 14, 2019. After an attorney for the family informed the Board of potential legal action, petitioner submitted her letter of resignation on January 29, 2019. Approximately five hours later at the Board's scheduled meeting that evening, the Superintendent recommended acceptance of petitioner's resignation, and the Board voted to accept it. Thereafter, the Board went into executive session and, upon emerging, voted to rescind its earlier approval of petitioner's resignation and terminate petitioner instead. Petitioner filed the within appeal challenging her termination.

Pursuant *N.J.S.A.* 18A:27-4.1(a),[1] a personnel action to remove an employee may only be taken upon the recommendation of the Superintendent. The Administrative Law Judge (ALJ) found that the Superintendent recommended the acceptance of petitioner's resignation,

[1] The ALJ inadvertently cited this statute as *N.J.S.A.* 18A:24.4.1(a) in several places in the Initial Decision. It is clear that the correct statute is *N.J.S.A.* 18A:27-4.1(a).

and there is no evidence in the record that the Superintendent made a new recommendation during executive session. The ALJ also noted that the Board was aware of the incident and the potential for litigation before it voted to accept petitioner's resignation. As such, petitioner's personnel files should be corrected to reflect that she resigned from her position on January 29, 2019.

Upon review, the Commissioner agrees with the ALJ that petitioner's resignation was accepted by the Board following the Superintendent's recommendation, in accordance with *N.J.S.A.* 18A:27-4.1(a). Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. The Board shall correct petitioner's personnel files to indicate that she resigned from her position of employment on January 29, 2019.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19
Date of Mailing: 12/18/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05627-19
AGENCY DKT. NO. 83-4/19

COURTNEY HAMBRECHT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Michael A. Armstrong, Esq., appearing for petitioner (Michael A. Armstrong & Associates, LLC, attorneys)

Tracy L. Riley, Esq., appearing for respondent (Riley & Riley, attorneys)

Record Closed: November 6, 2019 Decided: November 6, 2019

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

The petitioner Courtney Hambrecht (Hambrecht) seeks summary decision requiring respondent, Board of Education of the City of Atlantic City (Board), to correct

her personnel file and any other files to reflect her voluntary resignation as of January 29, 2019, and remove any and all references to a termination from employment.

The Board seeks summary decision upholding its decision to terminate Hambrecht effective January 29, 2019.

PROCEDURAL HISTORY

On April 26, 2019, the petitioner filed a notice of motion for emergent relief that was denied by Order dated May 10, 2019. Petitioner advised this tribunal that she intended to continue to pursue her claim through a due process hearing. On August 9, 2019, petitioner filed a motion for summary decision and a supporting certification of counsel with supporting exhibits[1]. By letter dated August 23, 2019, petitioner supplemented her statement of undisputed material facts by including respondent's answers to request for admissions. On September 3, 2019, respondent filed its opposition and cross-motion to dismiss. On September 13, 2019, petitioner filed her response to respondent's cross-motion and her reply to respondent's opposition. On October 22, 2019, respondent supplemented its cross motion with petitioner's answers to its request for admissions.

ISSUE

Both parties are seeking summary decision. Petitioner maintains that her resignation was effective on January 29, 2019, because she submitted her letter of resignation, the Superintendent of Schools recommended her resignation, and the Board approved the recommendation. (P-1, Exhibits 2 and 3.) Consequently, the Board's subsequent action to rescind its acceptance of her resignation must fail because her employment relationship had ended and without a recommendation of termination by the superintendent, the Board had no authority to terminate her.

[1] Petitioner is also seeking to compel discovery as alternative relief. The parties agreed that the motion for summary decision would be decided first on its own merits without consideration of the alternative relief request.

Respondent maintains that although the Board voted to accept Hambrecht's resignation during the public session of the meeting, the information divulged during the closed session provided compelling reasons to overturn that vote. The Board acted immediately to rescind its acceptance and voted to terminate her employment. Therefore, respondent's personnel file pertaining to petitioner correctly shows that the Board terminated her employment.

STATEMENT OF FACTS

The following facts taken directly from the admissions in the moving papers of both parties are undisputed, and I **FIND** them to be the **FACTS** of the case:

1. Hambrecht received and signed an offer of employment to work as a lifeguard for the Board on June 15, 2019, with employment to commence on September 1, 2019. (P-1, Exhibit 1.)

2. On January 14, 2019, a near fatal drowning incident occurred involving a student attending gym class at the pool located in the Atlantic City High School facility. (R-1, Exhibit A.)

3. On January 21, 2019, the attorney for the parents of the student sent a letter to the Atlantic City High School and the Board informing them of the student's intention to pursue a potential claim against the entities and individuals involved pending an investigation of the near fatal drowning incident. Id.

4. On January 29, 2019, Hambrecht submitted her letter of resignation to the Office of the Superintendent where it was stamped received at 1:17 p.m. (P-1, Exhibit 2.)

5. The Board held its regularly scheduled meeting on January 29, 2019, at 6:00 p.m. (P-1, Exhibit 3.)

6. As reflected in the minutes from the January 29, 2019, Board meeting, Barry S. Caldwell, Superintendent of Schools recommended the acceptance of Hambrecht's resignation from her position as lifeguard at the Atlantic City High School, effective January 29, 2019. Id.

7. As further reflected in the minutes from the January 29, 2019, Board meeting, the Board moved to approve Caldwell's recommendation of Hambrecht's resignation and voted to accept it. Id.

8. At approximately 6:27 p.m. on January 29, 2019, the Board went into executive session. Id.

9. The Board emerged from executive session two hours later, and after a motion, voted to rescind it earlier approval of Hambrecht's resignation. Id.

10. Following the vote to rescind, the Board by motion, voted to terminate Hambrecht's employment. Id.

11. By letter dated January 30, 2019, Diane M. Saunders, Director of Human Resources for the Atlantic City School District, sent Hambrecht a letter notifying her that at the January 29, 2019, regular oard meeting, the Board voted to terminate her employment effective January 29, 2019. (P-1, Exhibit 4.)

LEGAL ANALYSIS AND CONCLUSION

Both parties contend that there are no disputed facts requiring a hearing, and that the matter is appropriate for summary decision.

Summary decision may be granted when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The rule further provides that an adverse party must respond

by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The rule is patterned on the New Jersey Supreme Court's rules concerning summary judgment. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Here, I **CONCLUDE** that there are no material facts in dispute and the matter is appropriate for summary decision.

In support of its motion, petitioner relies on N.J.S.A. 18A:27-4.1(a) which provides that a board of education can only remove an employee upon the recommendation of the chief school administrator. Hambrecht maintains that Superintendent Caldwell recommended her resignation as reflected in the minutes of the January 29, 2019, Board meeting. After the Board voted to approve her resignation, Hambrecht's employment ended at that moment.

Petitioner's legal argument is two-fold. Her first argument is that after her resignation, her employment ceased, and the Board could no longer take any action regarding her employment. Stated differently, the Board could not reinstate her employment to terminate her. Her second argument is that the Superintendent's recommendation of her resignation was formalized in the minutes of the January 29, 2019 Board meeting. Respondent had not submitted any competent evidential materials to show that during the closed session, the Superintendent changed his public recommendation for resignation to a recommendation of termination. Without the chief

school administrator's recommendation, the Board would be in violation of N.J.S.A. 18A:24-4.1(a) if it acted to terminate her. Therefore, whatever happened in the closed session is irrelevant to the outcome of this matter and her resignation must stand.

Respondent's argument is that it did not have ample time to evaluate the situation involving Hambrecht's resignation when it voted to approve the Superintendent's recommendation. It was not until certain information was divulged during the closed session that the Board decided to rescind its acceptance and voted to terminate Hambrecht.

This is a unique situation with little support in existing case law. However, the controlling statute, N.J.S.A. 18A:24-4.1(a), provides clear guidance. In accordance with the statute, the key figure is Superintendent Caldwell. Respondent argues that there was insufficient time for Caldwell and the Board to consider all the facts before accepting Hambrecht's resignation. This argument is not supported by the time-line of events. The incident occurred on January 14, 2019. Hambrecht provided an incident report, but no immediate action was taken against Hambrecht. (P-1, Exhibit 6.) The attorney letter, putting the District and the Board on notice of potential litigation, was dated January 21, 2019. (R-1, Exhibit A.) Hambrecht submitted her letter of resignation on the afternoon of January 29, 2019. (P-1, Exhibit 2.) The minutes of the January 29, 2019, Board meeting reflected Caldwell's recommendation of Hambrecht's resignation and the Board's vote approving same. (P-1, Exhibit 3.) While it is not known what occurred during the closed session, the January 21, 2019, letter is proof that both Caldwell and the Board were aware of possible litigation involving the incident that directly affected Hambrecht before they voted to accept her resignation. By asserting that the attorney/client privilege applies to everything that was discussed during the executive session, respondent refused to answer whether Caldwell recommended termination during the executive session. Respondent did not provide a certification from Caldwell in support of its cross-motion. Without addressing the merits of respondent's attorney/client privilege claim, respondent's decision to assert the privilege hinders its ability to effectively defend petitioner's claim. As Caldwell's recommendation is required by statute, the only recommendation in the record before me is Caldwell's recommendation to the Board to accept Hambrecht's resignation.

Respondent's equity argument falls short because it is clear from the record that the parties were aware of the incident and the potential for litigation before the Superintendent recommended resignation and the Board voted to accept the Superintendent's recommendation. Respondent did not maintain that Caldwell was totally unaware of the severity of the situation when he recommended Hambrecht's resignation to the Board.

Therefore, I **CONCLUDE** that based on the undisputed material facts and in accordance with N.J.S.A. 18A:24-4.1(a), petitioner's resignation was effective January 29, 2019, based upon the recommendation of Superintendent Caldwell and the vote of the Board.

ORDER

Petitioner's motion for summary decision is **GRANTED**. Respondent's cross-motion for summary decision is **DENIED**. In accordance with this **Order**, respondent will correct its personnel files on petitioner to reflect that she resigned her position of employment effective January 29, 2019.

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

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

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

November 6, 2019
DATE

Kathleen M Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: November 7, 2019

Date Mailed to Parties: November 7, 2019

KMC/tat

APPENDIX

LIST OF EXHIBITS

For petitioner:

P-1 Exhibits:

1. Offer of employment;
2. January 29, 2019, resignation letter;
3. January 29, 2019, minutes from Board meeting;
4. January 30, 2019, termination letter;
5. Discovery demands;
6. Caldwell's answers to interrogatories;
7. July 5, 2019, letter regarding deficiencies with answers to interrogatories;
8. July 16, 2019, letter requesting conference call;
9. Answers to interrogatories from Business Administrator Ricketts;
10. Cohen v. Board of Education of the Borough of Middlesex, OAL DKT. NO. EDU 6787-02; and
11. Lippincott v. Riverton Borough Board of Education, OAL DKT. NO. EDU 5062-89.

P-2 Respondent's answers to request for admissions

P-3 Exhibits:

1. Job description for superintendent

For respondent:

R-1 Exhibit A – January 21, 2019, letter to Atlantic City High School and Board regarding January 14, 2019, incident

Exhibit B – Cutro v. Board of Education of the Township of Hazlet – State Board of Education Decision – EDU #7806-92

335-19

New Jersey Commissioner of Education

Final Decision

J.B. on behalf of minor child R.B.,

Petitioner,

v.

Board of Education of the Bergen County Vocational Technical School District, Bergen County,

Respondent.

Synopsis

In July 2019, J.B. filed a petition on behalf of his daughter, R.B., against the respondent Board, alleging, *inter alia*, that R.B.'s religious observance prevented her from competing academically with classmates, and also alleged that the Board failed to make accommodations for his daughter's religious observance in violation of Board policy; further, petitioner claimed that a 2017 response from R.B.'s guidance counselor in which he allegedly asked "what's more important to you, your religion or your schoolwork," constituted an act of harassment, intimidation, or bullying (HIB) in violation of the New Jersey Anti-Bullying Bill of Rights Act (ABRA), *N.J.S.A.* 18A:37-13 et seq. Petitioner asserted that he was notified by petitioner on August 6, 2018 that the Board did not investigate petitioner's claims under the ABRA. The Board filed a motion to dismiss in lieu of an answer, arguing, *inter alia*, that the petition was filed outside of the time limit for filing an appeal, which is set forth in *N.J.A.C.* 6A:3-1.3(i). The matter was transmitted to the OAL on August 7, 2019 as a contested case.

The ALJ found, *inter alia*, that: J.B. is the father of R.B., who is now nineteen years old and a full-time, out of state college student; the incidents that petitioner alleges violate Board policy and State law occurred during the 2016-17 school year; the date on which J.B. was notified that the Board did not investigate his HIB complaint was August 6, 2018; petitioner did not file his petition until July 16, 2019, more than a year after R.B. graduated from the school district; pursuant to *N.J.A.C.* 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of a final order, ruling, or other action by the district board of education that is the subject of the case; and petitioner's argument that negotiations with the Board after R.B.'s graduation toll the 90-day limitation period is without merit. The ALJ concluded that the case was untimely filed. Accordingly, the ALJ granted the Board's motion to dismiss the case.

Upon review, the Commissioner concluded that the record of this matter does not contain sufficient information to render a decision; accordingly, the case was remanded the case to the OAL for supplementation of the record and further proceedings consistent with the Commissioner's decision.

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

December 17, 2019

335-19

OAL Dkt. No. EDU 10790-19
Agency Dkt. No. 169-7/19

New Jersey Commissioner of Education

Final Decision

J.B. on behalf of minor child R.B.,

Petitioner,

v.

Board of Education of the Bergen County Vocational Technical School District, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the respondent have been reviewed.

This matter involves a harassment, intimidation, and bullying (HIB) complaint made by a parent. The Administrative Law Judge (ALJ) granted the respondent's motion to dismiss on the basis that the petition was untimely, as it was filed more than 90 days after the notification to the petitioner that the Board of Education did not investigate his complaint. The ALJ further found that subsequent communications between the parties were in the nature of negotiations that did not toll the limitations period. The ALJ did not reach the other issues raised by the respondent in its motion to dismiss, including standing and mootness.

In his exceptions, petitioner argues that the final order of the board of education was not the letter dated August 6, 2018, which he characterizes as the superintendent's "initial position" concerning his allegations. He contends that an investigation occurred, at the

superintendent's direction, sometime after December 10, 2018. He states that the petition included allegations regarding incidents that took place in February and March 2019, which could not have been addressed by the August 2018 letter. Finally, he argues that he could not have filed his petition until he pursued his rights at the lower level, which included an appearance at a Board meeting on March 26, 2019 to appeal the superintendent's determination, and the Board's subsequent decision dated April 16, 2019. According to petitioner, the April 16, 2019 letter is the final order of the Board that triggered the 90-day deadline.

In reply, the Board argues that it was reasonable for the ALJ to rely on the petition, in which petitioner admitted that he was on notice on August 6, 2018 that the investigation had been completed. The Board further contends that the April 16, 2019 letter should be disregarded because it was not submitted in evidence and, even if it is considered, the letter was an attempt to resolve the petitioner's concerns through negotiation, which does not toll limitations period.

Upon review, the Commissioner concludes that the record does not contain sufficient information to render a decision. Neither the August 6, 2018 nor the April 16, 2019 letter is part of the record, and the representations made in the filings regarding the content of the letters and the identity of the parties making any decisions outlined in those letters are inconsistent and unclear. The Anti-Bullying Bill of Rights provides that a superintendent's decision shall be reported to and affirmed, rejected, or modified by the board of education, with the board's decision being appealable to the Commissioner. *N.J.S.A.* 18A:35-17. While the petitioner admits to having received the August 6, 2018 letter, the petition indicates that the letter

was sent by the superintendent, a fact that the Board does not appear to contest. Therefore, it is not clear from the current record when, if at all, the Board issued its decision.[1]

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19
Date of Mailing: 12/18/19

[1] Furthermore, there are insufficient facts in the record for the Commissioner to reach a decision regarding the remaining issues raised in respondent's motion to dismiss. For example, it is unclear what violations of the Anti-Bullying Bill of Rights, if any, petitioner is asserting on his own behalf.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10790-19
AGENCY DKT. NO. 169-7/19

J.B. ON BEHALF OF MINOR CHILD R.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT OF BERGEN COUNTY.
Respondent.

J.B., petitioner, pro se

William C. Soukas, Esq., for respondent (Nowell, P.A., attorneys)

Record Closed: October 28, 2019 Decided: November 12, 2019

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On August 6, 2018, respondent notified petitioner that it would not investigate his complaint for "harassment, intimidation, and bullying" (HIB) under the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13, et seq. On July 16, 2019, petitioner filed a petition appealing that determination. Should this case be dismissed? Yes. Under

N.J.A.C. 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education that is the subject of the case.

PROCEDURAL HISTORY

On July 16, 2019, petitioner, J.B. filed a petition with the Department of Education, Office of Controversies and Disputes, on behalf of his daughter R.B., against respondent, the Board of Education of the Bergen County Vocational Technical School, Bergen County, New Jersey. In his petition of appeal, petitioner alleges that his daughter's religious observance prevented her from competing academically with her classmates, and that respondent failed to make an accommodation for his daughter's religious observance in violation of Board policy. Petitioner also alleges two specific instances in which an accommodation was not made for two specific assignments. Finally, petitioner alleges that the response by his daughter's guidance counselor, a Mr. Natelli, around October 11, 2017, namely, "what's more important to you, your religion or your schoolwork," constitutes a violation of the New Jersey Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13, et seq., which respondent notified petitioner on August 6, 2018, that it did not investigate.

On August 5, 2019, respondent filed a motion to dismiss instead of an answer under N.J.A.C. 6A:3-1.5.

On August 7, 2019, the Office of Controversies and Disputes transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On August 19, 2019, petitioner filed his opposition to the motion; on October 18, 2019, a prehearing telephone conference was held; and on October 28, 2019, respondent advised that it would not file a response.

Neither party requested oral argument.

FINDINGS OF FACT

Based upon the documents submitted in support of and opposition to the motion, I **FIND** the following as **FACT** for purposes of this motion to dismiss:

J.B. is the father of R.B. R.B. was born on January 16, 2000, and is now nineteen years old. R.B. is enrolled as a full-time student at the University of Pittsburgh. The incidents petitioner alleges violate Board policy and State law occurred during the 2016–17 school year, and the date on which J.B. was notified that the Board of Education did not investigate his complaint for HIB was August 6, 2018. Finally, J.B. is not a lawyer licensed to practice law in this state, and no evidence exists that R.B. authorized him to represent her in any capacity in this case.

CONCLUSIONS OF LAW

Respondent argues that this case should be dismissed for three reasons. First, respondent argues that petitioner, J.B., lacks standing because his daughter, R.B., is no longer a minor, and that the administrative rules of procedure do not allow a non-lawyer, such as J.B., to represent a litigant in this case. Second, respondent argues that the case is moot. Third, respondent argues that petitioner filed his petition out of time.

Petitioner argues in opposition that he has standing to file the petition as a parent, that he and his daughter continue to be adversely affected by the alleged incidents, and that the issues in this case are too important to be dismissed.

Under N.J.A.C. 6A:3-1.3(i), a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency that is the subject of the case. As case law makes clear, such a time limitation confers due process, is both meaningful and reasonable, and provides finality in education matters, which negotiations do not toll. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 583–88 (1983). As such, this

time limitation has long withstood challenge. See, e.g., Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 381–82 (App. Div. 1994), certif. denied, 137 N.J. 315 (1994) (where the court stated that the time limitation is not inherently arbitrary or capricious, and to rule otherwise would deprive district boards of education the security of the rule). Moreover, negotiations do not toll this time limitation. See, e.g., Giannetta et al. v. Bd. of Educ. of Egg Harbor, No. #147-05, Comm'r Decision (April 25, 2005), https://www.nj.gov/education/legal/commissioner/ (where the Commissioner of Education explicitly stated, citing Kaprow, 131 N.J. at 588, that attempts to resolve a claim through negotiation with a board of education do not negate receipt of adequate notice or toll the running of the time limitation).

In this case, the incidents petitioner alleges violate Board policy and State law occurred during the 2016–17 school year, and the date on which J.B. was notified that the Board of Education did not investigate his complaint for HIB was August 6, 2018, but petitioner did not file his petition until July 16, 2019, more than a year after his daughter graduated from the school district. Petitioner argues that respondent's negotiations after graduation somehow toll the 90-day time limitation, but as case law explains, such negotiations do not toll this time limitation and would otherwise thwart the purpose of the rule. Accordingly, the law required petitioner to have filed his claim on time, within 90 days from August 6, 2018, and negotiate its resolution later, not on July 16, 2019, nearly a full year later when R.B. is no longer in school. Therefore, I **CONCLUDE** that this case is out of time, that the motion to dismiss should be granted, and that this case should be dismissed.

Since I have concluded that this case is out of time and should be dismissed, I need not address the other two arguments respondent presented in support of its motion to dismiss.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the motion to dismiss is hereby **GRANTED** and that this case 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 under N.J.S.A. 52:14B-10.

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

November 12, 2019
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: November 12, 2019

Date Mailed to Parties:

dr

337-19

New Jersey Commissioner of Education

Final Decision

Joel Schwartz and Corrine O'Hara,

Petitioners,

v.

Board of Education of the Town of Princeton, Mercer County and Board of Education of the Township of Cranbury, Middlesex County,

Respondents.

Synopsis

Petitioners – residents of Princeton – filed the within action to seek a review of the Town of Princeton Board of Education's (Princeton) decision to renew its send-receive relationship with the Township of Cranbury Board of Education (Cranbury). Cranbury has for approximately thirty years sent its high school students to Princeton under a send-receive agreement. In 2018, an extension of the existing agreement was discussed at an open public meeting, and thereafter Princeton's board voted unanimously to approve the extended agreement. Princeton filed a motion for summary decision, which was joined by Cranbury; petitioners opposed the motion.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; local boards of education have broad discretionary authority and their actions are entitled to a presumption of correctness; the decision to renew a send-receive agreement is entirely discretionary as there is no statute, regulation, or policy that require a board of education to consider certain information or make specific findings prior to voting on the matter; in the instant case, Princeton made its discretionary determination after consulting with the Board attorney and a demographics expert, holding a public meeting on the issue, and listening to public comment; and Princeton did not act in an arbitrary, capricious or unreasonable manner in extending the send-receive agreement with Cranbury. The ALJ concluded that Princeton did not abuse its discretion in approving the send-receive relationship with Cranbury. Accordingly, summary decision was granted and the petition was dismissed.

Upon review, 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.

December 17, 2019

337-19

OAL Dkt. No. EDU 14403-18
Agency Dkt. No. 231-9/18

New Jersey Commissioner of Education

Final Decision

Joel Schwartz and Corrine O'Hara,

Petitioners,

v.

Board of Education of the Town of Princeton, Mercer County and Board of Education of the Township of Cranbury, Middlesex County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto filed by the Princeton Board of Education (Princeton) and Cranbury Board of Education (Cranbury).[1]

In this matter, petitioners – residents of the Town of Princeton – challenge Princeton's decision to extend its send-receive relationship with Cranbury. Cranbury has been sending its high school students to Princeton for approximately 30 years pursuant to a sending-receiving agreement. Discussion on whether to continue the relationship was held at the Princeton Board Meeting on April 24, 2018, and the Board voted on June 12, 2018 to approve the agreement. The Administrative Law Judge (ALJ) found that Princeton did not act in an arbitrary, capricious, or unreasonable manner in extending the agreement because, in making the discretionary determination, the Board consulted with its attorney and a demographer, held

[1] Cranbury's reply exceptions consist of a letter joining in on the reply filed by Princeton.

public discussion, and listened to public comment. Additionally, the ALJ concluded that the Cranbury Board member who serves as a representative on Princeton's Board had a right under *N.J.S.A.* 18A:38-8.1 to vote on whether to renew the agreement, including the terms of the agreement. However, the ALJ found that even assuming, *arguendo*, that it was improper for the Cranbury representative to vote, there was no harm in the error because the agreement would have passed regardless of whether the Cranbury representative voted. Finally, the ALJ found that there is no authority or reason for the Commissioner to compel Princeton to conduct a feasibility study.

In their exceptions, petitioners argue that summary decision should have been denied because the Initial Decision was based on many disputed facts. Petitioners allege that Princeton's decision was not based on reports or analysis; instead, the Board presented limited documents purporting to provide financial, legal and demographic impacts that in actuality provided skewed information that was not based on verifiable facts. Petitioners maintain that the ALJ erred in relying on the facts presented by respondents, which were only made by certification of counsel and not by anyone with first-hand knowledge, including the fact that severance would have been contested by Cranbury, that there were financial incentives to continue the agreement, or that litigation would result in excessive costs.

Petitioners further argue that the ALJ mischaracterized their argument as asserting that Princeton's actions were arbitrary and capricious, when they actually argued that the Board and its members breached their fiduciary obligations to citizens of the Town of Princeton. Petitioners maintain that Princeton breached its fiduciary obligations by: relying on unexplained economic and enrollment assumptions; failing to consider the overcrowding caused by Cranbury's students and the consequence that Princeton residents will have to pay for expansion

of the schools to remedy the problem; and by overlooking other schools located immediately adjacent to Cranbury that would be a better solution than sending their students to Princeton. Considering economics, petitioners maintain that the Board only considered the fact that 280 Cranbury students generated around $4.8 million in gross tuition payments. Petitioners argue that Princeton's assumption that it only costs about $1 million per year to educate those students was not based on any supporting data, and that it is inaccurate, given that it costs nearly five times that amount to educate Princeton residents. Further, the Board failed to conduct a current demographic study, and instead relied on former reports which were contradictory. With respect to legal considerations, petitioners also contend that Princeton relied on misinformation about the costs and risks of severance, and that Princeton ignored at least five instances where sending-receiving agreements have been successfully terminated, including the termination of Cranbury's sending-receiving agreement with Lawrence Township in order to initiate the current sending-receiving relationship with Princeton nearly 30 years ago.

Petitioners contend that the ALJ erred in finding that the "only sensible reason not to renew the agreement, then, is if the Board wanted to sever the relationship." (Petitioners' exceptions at 19). The ALJ failed to consider that Princeton would have had an alternative to severance – *i.e.*, deferring any action until it had the information to make a reasoned decision. Additionally, petitioners argue that the Cranbury representative had an inherent conflict of interest when she voted at both Princeton's and Cranbury's board meetings in favor of the agreement, and that nothing in *N.J.S.A.* 18A:38-8.1 allows her to vote on a sending-receiving agreement. As such, petitioners seek for the Commissioner to reject the Initial Decision so that a plenary hearing may be held.

In reply, Princeton argues that contrary to petitioners' argument, its summary decision motion was not based on uncertified facts. Princeton submitted the certification of the Board's Business Administrator and Board Secretary who had direct knowledge of the events at the relevant meetings, and also incorporated video recordings of those meetings. Furthermore, Princeton maintains that the ALJ did not resolve any disputed facts. Whether or not petitioners claim that the underlying information was incorrect or that additional information was necessary, there is no dispute as to what information was presented at the Board meetings and what the Board considered in reaching its determination, including presentations from the Board attorney, public comment, and debate among Board members. Although petitioners contend that Princeton's decision was not based on actual and verifiable financial, demographic, and educational facts, Princeton points out that these issues – with the exception of the annual tuition amount – are based on estimates and projections, so they cannot be truly verified.

Princeton further contends that the ALJ applied the appropriate, long-settled standard of review of discretionary determinations made by boards of education – whether the action was arbitrary, capricious, or unreasonable. Nevertheless, Princeton maintains that it did not breach a fiduciary duty, as there is no evidence of any fraud or corruption in its decision making. Finally, Princeton argues that the ALJ properly concluded that the Cranbury representative was authorized to vote on the agreement, as *N.J.S.A.* 18A:38-8.1 allows sending district representatives to vote on tuition or on "any matter" which directly involves the sending district's students, or the programs and services they use. Therefore, Princeton requests that the Commissioner adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that Princeton did not act in an arbitrary, capricious or unreasonable manner in voting to extend the sending-receiving

relationship with Cranbury. Such determination was based on information provided by the Board attorney and following public discussion and comment. The Commissioner further concurs with the ALJ that there is no basis by which Princeton should be compelled to conduct a feasibility study when both Princeton and Cranbury wish to continue the sending-receiving relationship. With respect to the sending district representative, the Commissioner notes that regardless of whether the Cranbury representative was permitted by *N.J.S.A.* 18A:38-8.1 to vote on the renewal of the sending-receiving agreement, the result would still be the same. When a Board member's improper vote does not change the ultimate result, and his or her participation was not prejudicial to the cause, the error is harmless. *Scardigli v. Borough of Haddonfield Zoning Board of Adjustment*, 300 *N.J. Super.* 314, 324 (App. Div. 1997). As the ALJ found, excluding the Cranbury representative's vote, six of ten Board members voted in favor of the agreement, so a majority remained in favor of renewing the agreement. As such, the Commissioner need not make a determination regarding whether *N.J.S.A.* 18A:38-8.1 permits sending district representatives to vote on the renewal of a sending-receiving agreement, as any error in this circumstance was harmless.

The Commissioner does not find petitioners' exceptions to be persuasive. The ALJ applied the correct standard for discretionary Board determinations. "It is well established that any 'action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.'" *M.S., on behalf of minor child, J.S. v. Board of Education of the Township of Hainesport, Burlington County*, Commissioner's Decision No. 155-19, dated June 18, 2019, at 2 (quoting *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960)). It is clear that Princeton had a rational basis for its decision to extend the sending-receiving relationship with

Cranbury. Additionally, whether petitioners believe that the Board should have considered additional information or done additional research, there is no doubt that Princeton made an informed determination based on information provided by the Board attorney and following public comment and discussion. Further, the Initial Decision was not based on disputed facts. While petitioners seem to challenge the accuracy of the information presented to the Board, there is no dispute regarding what Princeton reviewed and considered in rendering its determination.

Accordingly, the Initial Decision of the OAL is adopted – as modified herein – as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19
Date of Mailing: 12/19/19

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISON
OAL DKT. NO. EDU 14403-18
AGENCY DKT. NO. 231-9/18

JOEL SCHWARTZ AND CORRINE O'HARA,
Petitioners,
v.
TOWN OF PRINCETON BOARD OF EDUCATION, MERCER COUNTY AND TOWNSHIP OF CRANBURY BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondents.

Steve J. Edelstein, Esq., for petitioners (Weiner Law Group, LLP, attorneys)

Vittorio S. LaPira, Esq., for respondent, Town of Princeton Board of Education (Fogarty & O'Hara, attorneys)

Joseph D. Castellucci, Jr., Esq., for respondent, Township of Cranbury Board of Education (Methfessel and Werbel, attorneys)

Record Closed: August 30, 2019 Decided: October 3, 2019

BEFORE **SARAH G. CROWLEY**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The petitioners filed this action seeking a review of the Town of Princeton Board of Education's (Princeton) decision to renew its send-receive relationship with the Township of Cranbury Board of Education (Cranbury). The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on October 3, 2018. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14f-1 to -13. A motion for summary decision was filed by Princeton on March 1, 2019. By letter dated March 12, 2019, Cranbury joined in the Motion. Opposition to the motion was filed by the petitioners on July 23, 2019, and a Reply brief was filed by Princeton on August 30, 2019.

Petitioners are residents of Princeton. Cranbury is a K-8 public body organized pursuant to N.J.S.A. 18A:10-1 et seq. Pursuant to a send-receive relationship, Cranbury sends its high school students to Princeton. This send-receive relationship has existed for approximately thirty years since Cranbury petitioned to sever its relationship with Lawrence Township in 1985. On April 24, 2018, the extension of this agreement was discussed at an open public meeting of the Princeton BOE.

Presentations were made by the Board attorney, and interested parties were given an opportunity to discuss the matter. The petitioners were present as were other members of the public, who were permitted the opportunity to speak and ask questions. The Board presented information from a demographer as well as detailed financial information. The attorney for the Board provided a discussion of what would be required for severance to occur, including a feasibility study, approval from the Commissioner of the Department of Education, as well as potential litigation from Cranbury. Thereafter, on June 12, 2018, the Board voted unanimously to approve the agreement.

Petitioners argue that the Board acted arbitrary, capricious or unreasonably in approving the send-receive relationship with Cranbury. The petitioners also argue that the Cranbury BOE member should not have been permitted to vote on the issue, and

her vote vitiates or nullifies the vote. And finally, the petitioners seek an order from the undersigned requiring the Princeton BOE to conduct a feasibility study on the severance of the relationship with Cranbury.

LEGAL ANALYSIS

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. 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 a prompt resolution by trial. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court encouraged trial-level courts not to refrain from granting summary judgment when the proper circumstances present themselves. Brill v. Guardian Life Ins. Co. of Am., 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, the trial court should not hesitate to grant summary judgment. Id. at 540. Appellate courts recognize that "[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

Standard for Board Decisions

Under the familiar and deferential standard of review, local boards of education "have broad discretionary authority and their actions are entitled to a presumption of

correctness absent a showing of bad faith, illegal motive or a lack of rational basis." L.S. o/b/o E.S. v. Westfield Twp. Bd. of Educ., EDU 7387-09, Final Decision (December 20, 2009), https://njlaw.rutgers.edu/collections/oal/. The decision whether to renew a send-receive agreement is entirely discretionary—meaning, the Princeton Board is not required by statute, regulation, or board policy to consider certain information or make particular findings before voting on the matter. Individual board members must decide for themselves what information is needed to make an informed decision.

In the instant case, before voting on whether to renew the agreement, the Princeton Board consulted its attorney and a demographer, presented information to the community, and listened to public comments. During this deliberative period, petitioners raised concerns to the Board about its decision-making process. First, even if it did not renew the agreement, by operation of settled law, the relationship would nonetheless continue on the same terms. The only sensible reason not to renew the agreement, then, is if the Board wanted to sever the relationship. The Board had a rational basis to avoid initiating the severance process, which its attorney advised is both uncertain and expensive—two propositions petitioners do not dispute. Assuming the respondents wanted severance, they would have to conduct a costly feasibility study and petition the Commissioner of Education for permission to sever. Moreover, it was known to the board that any such application would have been contested by Cranbury. The feasibility study alone—which Princeton would have to fully finance—could cost tens of thousands of dollars. And the unavoidable litigation costs and expert fees could easily exceed that amount. Measured against the prospect of success, the Board's decision to avoid these costs was not arbitrary, capricious or unreasonable. The Board also had sound financial incentives to continue the relationship. Tuition paid by Cranbury—$17,191 per-student, totaling about $5 million annually, which represents the second largest source of revenue for the operating budget.

The petitioners' main complaint is that the net loss estimates kept fluctuating, from a high of $3.8 million to a low of $1 million. This illustrates why, in their view, the Board needed to provide "verifiable facts or evidence" to substantiate the cost of educating Cranbury students and the cost savings if those students no longer attended

Princeton High School. The fact that Princeton High School was over-capacity and projected to remain that way for the foreseeable future, does not render the Board's decision irrational. Moreover, the Board estimated, based on demographic reports, that even without Cranbury students, Princeton High School would remain over-capacity for all but one of the next eight school years. Thus, to accommodate the growing student population, Princeton High School nonetheless needed to be renovated, using funds raised by the then-proposed bond referendum. Petitioners question the accuracy of the demographic reports and thus, the Board's reliance on them. They argue that the five reports were flawed in that they produced contradictory results and failed to consider important information—for example, how recent housing developments in Princeton or Cranbury's affordable housing obligation would affect enrollment at the high school. They also allege that the Board ignored a relevant 2015 demographic report prepared by Cranbury. Yet there is no evidence that the reports were inaccurate or would have been more accurate had they considered the information petitioners suggest. Moreover, the petitioners did not present an expert of their own or an expert report from their own demographer.

Petitioners' also argue that the Board should have deliberated longer before voting; the Board's interactions with the community were merely "public relations events." It is undisputed that the Princeton Board did have a significant amount of data before them, had the law presented by their attorney, and listed to the public at an open public meeting. It is evident that the petitioners desired a different conclusion from the Board. However, the law only requires that the Board not act in an arbitrary, capricious or unreasonable manner. In this case, it did not.

Sending District's Representative

The petitioners argue that Evelynn Spann, the Cranbury Board member should not have been permitted to vote on the extension of the agreement. The law permits Cranbury to appoint one representative to sit on the Princeton Board. N.J.S.A. 18A:38-8.2(a)(2). That representative, Evelynn Spann, voted with six of her colleagues to renew the send-receive agreement. The issue is whether she had the statutory

authority to vote on that matter, as a sending district's representative is only eligible to vote on those matters listed from N.J.S.A. 18A:38-8.1(a)-(i). There is also no dispute that the statute does not explicitly authorize voting on renewing a send-receive agreement. The disagreement concerns whether voting on that subject is authorized by the right to vote on ("tuition to be charged the sending district by the receiving district") and ("any matter directly involving the sending district pupils or programs and services utilized by those pupils"). N.J.S.A. 18A:38-8.1(a) and (e).

The intent of the statute is that the sending district member voting rights be limited to those matters that affect the sending district students. The Legislature must have known that send-receive relationships are governed by written agreements. So, petitioners are correct that the Legislature could have (and maybe should have) been clearer if it intended to authorize voting on whether to renew such an agreement. However, if we begin from the premise that any good send-receive agreement would include, among other terms, tuition costs—as this agreement did—subsection (a) raises difficult questions. On the one hand, authorizing the representative to vote on one term in the agreement (tuition costs) is a clumsy way for the Legislature to authorize voting on the entire agreement. On the other hand, the Princeton Board is correct that unless the agreement is voted on in parts—which is an unusual way to conduct business—the representative would be deprived of their right to vote on tuition costs.

When subsections (a) and (e) are read together, it is only logical that the representative can vote on whether to renew the agreement. Subsection (e) authorizes voting on "any matter directly involving the sending district pupils or programs and services utilized by those pupils." N.J.S.A. 18A:38-8.1(e). This broad language seemingly covers other provisions in a typical send-receive agreement, for example, transportation costs and special education responsibility. Because these provisions concern the terms under which the sending district's students are educated, they fit comfortably within the language of subsection (e). For this reason, Ms. Spann was authorized to vote on the matter.

The petitioners also allege a conflict of interest on the part of the Cranbury board member. This particular conflict of interest statute, however, is found in the School Ethics Act, N.J.S.A. 18A:12-21 et seq., over which the School Ethics Commission has primary jurisdiction. N.J.S.A. 18A:12-29; N.J.A.C. 6A:28-1.4. Thus, this matter is not properly before the Commissioner of Education. See e.g., Gardner v. Hackensack Bd. of Educ., EDU 09421-12, Initial Decision (May 1, 2013), adopted, Comm'r (June 7, 2013), https://njlaw.rutgers.edu/collections/oal/. Accordingly, I **CONCLUDE** that the Cranbury Board member had a right under the statute to vote on whether to renew the agreement and the terms of the agreement.

Finally, even assuming Ms. Spann voted improperly, that error was harmless. See Scardigli v. Borough of Haddonfield Zoning Bd. of Adjustment, 300 N.J. Super. 314, 324 (App. Div. 1997) ("[The board member's] improper vote does not change the ultimate result, and plaintiff has not claimed that [the board member's] participation . . . was prejudicial to plaintiff's cause. While it was erroneous to permit [the board member] to vote under the circumstances, we conclude the error is harmless.") Excluding her vote, six of ten board members voted to renew the agreement. That satisfied both the common law rule (requiring majority vote of those present) and the enhanced voting rule (requiring majority vote of the full board). See Negron v. South Plainfield Bd. of Educ., EDU 11522-10, Final Decision (March 28, 2011), https://njlaw.rutgers.edu/collections/oal/.

Feasibility Study

The petitioners do not dispute that the statute requires a feasibility study before severance of an existing send-receive relationship can occur. However, the Commissioner of Education cannot compel the Princeton Board to prepare a feasibility study. The Commissioner has supervisory authority over send-receive relationships. See Merchantville Bd. of Educ. v. Pennsauken Bd. of Educ., 204 N.J. Super. 508, 511 (App. Div. 1985). Once established, such a relationship may not be severed "except upon application made to and approved by the commissioner." N.J.S.A. 18A:38-13. It is not enough, in other words, for two districts to agree to end their relationship. The

district(s) seeking severance, as a pre-condition for filing an application to the Commissioner, must "prepare and submit a feasibility study," which considers the financial, educational, and racial implications of ending the relationship. Ibid; N.J.A.C. 6A:3-6.1(a). This study helps the Commissioner determine whether granting the application would have a "substantial negative impact." N.J.S.A. 18A:38-13. If the Commissioner finds that it would not, the application must be granted. Ibid. There is no apparent reason, let alone a requirement, for a district to commission a feasibility study if it wants to continue the relationship—which is true for Princeton and Cranbury.

Petitioners seek to order the Commissioner to initiate the severance process for Princeton by ordering it to prepare a feasibility study. The Commissioner has no authority and no reason to disrupt a harmonious send-receive relationship. Local boards of education must decide whether to *enter* into such a relationship. But see N.J.S.A. 18A:38-8 (districts may be required to receive students). Likewise, the decision whether to initiate the process to *end* that relationship should also be left to their sound discretion. The absence of a governing standard is the clearest sign that the Legislature did not intend for the Commissioner to have this power. Cf. N.J.S.A. 18A:38-13 (standard for when severance application must be granted). Petitioners do not suggest under what circumstances it would be appropriate for the Commissioner to compel a board of education to prepare a feasibility study. Under their logic, if a taxpayer petitions for this relief, the Commissioner should grant it.
Decisions of this kind, however, are reserved for the democratic process. If taxpayers believe a feasibility study should be prepared, they must convince their local board members, who can vote to have the study conducted.

CONCLUSION

Respondent has filed a Motion for Summary Decision alleging that there are no factual issues in dispute, and they are entitled to judgment as a matter of law. The undisputed evidence demonstrate that the Board's decision was not arbitrary, unreasonable or capricious. Moreover, the petitioners have no right to demand a feasibility study or the dissolution of the send/receive agreement as a matter of law, as

there is no private right to such a claim. Finally, the Cranbury Board member had a right to vote and even if their vote was excluded, the majority vote from the Board approved the send-receive relationship. Accordingly, I **CONCLUDE** that the Board did not abuse its discretion in approving the send-receive relationship with Cranbury. I therefore **CONCLUDE** that the petition is hereby **DISMISSED**.

ORDER

I hereby **ORDER** that the District's Motion for Summary Decision is hereby **GRANTED** and the Petition is hereby **DISMISSED**.

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

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

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

October 3, 2019
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: October 3, 2019

Date Mailed to Parties: October 3, 2019

SGC/cb

New Jersey Commissioner of Education

Final Decision

B.J., on behalf of minor child, L.J.,

Petitioner,

v.

Board of Education of the Borough of Carteret, Middlesex County, and James Bevere,

Respondents.

Synopsis

Pro se petitioner filed an appeal in July 2016 challenging the disciplinary action taken by the respondent Board against her daughter, L.J.; L.J. received a four-day out-of-school suspension as consequence for her involvement in an altercation with another student in the school cafeteria on March 24, 2016. Both students received the same suspension for their involvement in the fight.

The ALJ found, *inter alia*, that: it is widely recognized that local school boards are charged with the orderly conduct of the public schools, and are vested with broad discretion in matters involving pupil discipline; a school board's actions carry a presumption of validity and will not generally be disturbed absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable; the scope of the Commissioner's review here is limited to a determination regarding whether the Board had a reasonable basis for the actions taken; in the instant matter, it is undisputed that L.J. was involved in a fight on March 24, 2019 and remained physically and verbally aggressive after the fight was over; both students received a four-day suspension; there was video documenting the altercation at issue here, which L.J. has viewed, and petitioner's due process rights were not violated. The ALJ concluded that the Board's decision to suspend L.J. for her conduct on March 24, 2019 was not arbitrary, capricious or unreasonable and the Board followed its procedures for dealing with the situation.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

December 17, 2019

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 14210-18
AGENCY DKT. NO. 182-7/16
ON REMAND
OAL DKT. NO. EDU 12095-16

B.J. ON BEHALF OF MINOR CHILD L.J.,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY, AND JAMES BEVERE,
Respondents.

B.J. on behalf of **L.J.**, appearing pro se

Gabrielle Pettineo, Esq., for Respondents (Kenny, Gross, Kovats, & Parton attorneys)

Record Closed: June 7, 2019 Decided: November 15, 2019

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 7, 2016, Petitioner filed a Petition of Appeal with the Department of Education, Bureau of Controversies and Disputes (BCD), challenging disciplinary action

taken by Respondents against her daughter, L.J. On June 14, 2016, BCD issued a notice to Petitioner advising that the Petition was deficient. On July 6, 2016, Petitioner filed a second Petition of Appeal with BCD which was accepted and on August 8, 2016, Respondents filed an Answer to the Petition. On August 10, 2016, the BCD transmitted the matter to the Office of Administrative Law as a contested case and the matter was assigned to the Honorable Leland McGee, ALJ. Prehearing Conferences were held on October 5, 2016, November 30, 2016, and December 14, 2016. Hearings were scheduled for May 1, 8, and 10, 2017.

On October 17, 2016, Petitioner filed a Request for Due Process Hearing with the Department of Education, Office of Special Education Programs, which was forwarded to the OAL bearing Docket No. EDS-18509-16. On November 3, 2016, Respondent filed an Answer to the Due Process Petition. A Prehearing Conference was held on December 15, 2016, and a Prehearing Order was issued thereafter. Hearings in this matter were scheduled for September 20, 22, 25, and 27, 2017.

On January 30, 2017, Respondents filed a Motion for Partial Dismissal of the Petition for Due Process. On February 21, 2017, Respondents filed an Amended Motion for Partial Dismissal of the Petition for Due Process. On February 28, 2017, Petitioner filed an Answer to the Motion and on March 16, 2017, Respondents filed a Reply to the Answer.

On February 20, 2017, Petitioner filed a Motion to Consolidate the Petition of Appeal and the Petition for Due Process proceedings. On February 28, 2017, Respondents filed its Answer to the Motion for Consolidation and on March 10, 2017, Petitioner filed a Reply to the Answer. The two matters were never consolidated.

On April 17, 2017, Respondents filed a Motion to Dismiss the Petition of Appeal for Docket No. EDU 12095-16. On April 21, 2017, and again on April 25, 2017, counsel for Petitioner submitted a letter requesting to be relieved as Counsel. Following a series of telephone calls from both parties' attorneys and Petitioner herself, the undersigned converted the Hearing scheduled for May 1, 2017, to an in-person conference. The matter was then scheduled for a Hearing on May 8, 2017, which was adjourned.

On May 10, 2017, a hearing was held on the Motion to Dismiss the Petition of Appeal. Since Petitioner's counsel withdrew as counsel; she proceeded pro se at the hearing. The hearing was held solely for the purpose of addressing when Petitioner received notice of the adverse action taken against her daughter, L.J. The parties were given thirty days after receipt of the transcripts to submit post-hearing briefs.

On April 23, 2018, this matter regarding the Motion to Dismiss the Appeal bearing Docket No. EDU 12095-16, was reassigned to Honorable Elissa Testa, ALJ, due to the retirement of Judge McGee, ALJ. The matter of the Due Process petition bearing Docket No. EDS 18509-16 was transferred to the Honorable Jude Tiscornia, ALJ.

A decision on the Motion to Dismiss the Appeal had not yet been made because the recording of the hearing on May 10, 2017, before Judge McGee, could not be located. On May 1, 2018, the recording of the hearing from May 10, 2017, was located and a telephone conference was held by Judge Testa, counsel for Respondents and the Petitioner, pro se. It was decided that the parties would request a copy of the transcript and post-hearing briefs would be submitted by July 2, 2018. It was further decided that in the interest of judicial economy, Judge Testa would review the initial Motion papers and any response to same; listen to the May 10, 2017, hearing; consider the post-hearing briefs; and render a decision on the Motion to Dismiss the Appeal. There was no objection by the parties.

The time to file the post-hearing briefs was extended to July 27, 2018, due to continuing problems with obtaining the transcript. On July 27, 2018, the last of the post-hearing briefs were received, and the record was closed. It should be noted that the post-hearing briefs submitted by Petitioner on July 27, 2018, included additional Exhibits that did not address the testimony introduced before Judge McGee on May 10, 2017; nor were the Exhibits presented at the Hearing. Rather, they related to the Due Process Petition which is pending before Judge Tiscornia bearing Docket No. EDS 18509-16. Thus, the additional Exhibits were not considered.

On August 13, 2018, Judge Testa, granted Respondents' Motion to Dismiss. A copy of Judge Testa's decision was mailed to the parties on August 14, 2018. On September 20, 2018, Commissioner of Education remanded Judge Testa's ruling granting Respondent's Motion to Dismiss under OAL DKT. No. EDU 14210-18.

On December 18, 2018, Petitioner filed a Motion for Recusal of Judge Testa. On January 15, 2019, the case was reassigned from Judge Testa to Judge McGee and a Notice of the Hearing was issued on January 16, 2019, scheduling a hearing for February 14, 2019.

A hearing was held on February 14, 2019, limited to the issue involving the March 24, 2016, incident. On or about May 28, 2019, Petitioner filed a document called "closing arguments." On June 5, 2019, Respondents submitted a letter brief requesting the Petition of Appeal be dismissed in full with prejudice.

FINDINGS OF FACT

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case:

L.J. was born on August 23, 2002, and was initially classified as eligible for special education and related services on or about March 14, 2007. Specifically, she was classified under the category of "specific learning disability." On or about December 11, 2015, Petitioner withdrew her consent for special education and related services.

On March 24, 2016, L.J. was a fourteen-year-old student involved in an altercation in the Carteret Middle School cafeteria with another student. Security guards restrained L.J. while the other student was removed from the cafeteria. Respondents determined that it was necessary to summon the local police to diffuse the situation. The officers who arrived determined that L.J. would be placed under arrest and she was removed from the school building.

B.J. (hereinafter Petitioner) filed a pro se Petition of Appeal, on behalf of L.J., against the Carteret Board of Education in July 2016 based on the four-day suspension L.J. received because of the March 24, 2016, incident. On February 14, 2019, a hearing took place at the Office of Administrative Law.

TESTIMONY

Testimony of L.J.

L.J. testified on her behalf. She has attended the Carteret school district since kindergarten. L.J. had qualified for special education and related services on or about March 14, 2007. On or about December 11, 2015, Petitioner withdrew her consent for special education and Related Services. When questioned by the Court, L.J. stated that she felt like she was learning more after being removed from special education services. However, she expressed that she was being treated differently by the administration after being removed from special education classes, pointing to specific examples where she was called to the principal's office for different disciplinary matters. Although she was suspended once while still receiving special education services, she received about four to five detentions while out of special education services, along with two suspensions.

L.J testified that she got into a fight with another student in the cafeteria of Carteret Middle School on March 24, 2016. L.J. testified that she was being bullied by the other student. She testified that she told her mother about the bullying, and her mother reported the bullying to Tara Romero, the Assistant Principal, via email correspondence. When questioned by the Court, L.J. stated that she did not report the bullying incidences to the school directly for fear that the situation would worsen. She testified that the student was a lot bigger than her. Additionally, she testified that Vice Principal James Bevere called the police after the fight was over.

Upon cross-examination, L.J. testified that she hit the other student during the March 24, 2016, incident in the cafeteria.

Testimony of Mary Spiga

Mary Spiga (Spiga) testified on behalf of Respondents. In March of 2016, Spiga was employed by the Carteret Board of Education as the Principal of Carteret Middle School. As Principal, she oversaw multiple facets of Carteret Middle School, including enforcement of school policies and writing budgets. She has since retired, effective January 1, 2019.

Upon direct examination, Spiga referred to a log entry in Power School, a student information system created by the District. The log contained a record of L.J.'s discipline while attending Carteret Middle School. Spiga read the following from an entry in L.J.'s discipline log from March 24, 2016:

> [L.J.] and another student, [T.P.] were involved in an altercation in the cafeteria and it continued into the hallway. [L.J.] was pushing staff out of her way. Police were contacted and [L.J.] was taken to Carteret Police Department. Four Days OSS (out-of-school-suspension) on 4/4/16, 4/5/16, 4/6/16, 4/7/16. Mandatory re-entry meeting.

Spiga testified that she was not present in the cafeteria when the fight occurred, but she was notified through security radio in her office. She also saw video footage of the fight. Spiga testified that the video showed a verbal altercation between L.J. and T.P., and then L.J. proceeded to hit T.P. T.P. then hit L.J. back and a fight ensued.

When Spiga arrived at the cafeteria, L.J. appeared agitated. As Spiga and a security guard were escorting L.J. to the in-school-suspension room, in accordance with procedure, L.J. broke away and started cursing, and stated that she was going to "fuck up" T.P. When L.J. was ushered into the in-school-suspension room, she continued to threaten T.P. Ms. Heim, the school guidance counselor, was in the room with L.J. and concluded, along with Mr. Bevere, that the police should be called. Spiga credibly testified that in this situation, calling the police was justified. Spiga testified that typically, the police are called when a student cannot be calmed down and the situation has the potential to affect the safety of other student and staff in the building. Spiga

testified that the police then come to the school to assess the situation to see if the student needs to be taken into custody. When the police arrived at the school on March 24, 2016, they were informed that there was a fight and that both parties were in separate rooms. The police took L.J. into custody. Spiga testified that she did not request that L.J. be taken into custody or handcuffed. She testified that she does not have the ability to make a demand on a police officer to arrest a student.

Spiga then testified regarding Carteret's Policy on Pupil Discipline and Code of Conduct (R-2). The policy reflected that "physical assault upon another student" was a behavior that may result in suspension or expulsion.

Spiga testified concerning the Carteret Middle School Code of Conduct (R-3), which lists various student infractions and their consequences. The consequences for fighting include "an out of school suspension and a parent conference upon return. Administration may file a police complaint with Carteret Police Department on the third offense. Recommendation for outside counseling services." As a result of the March 24, 2016, incident in the cafeteria, both L.J. and T.P. were given a four-day suspension.

After L.J. served her four-day suspension, Spiga and the Superintendent met with her parents prior to returning to school for "re-entry" purposes.

Spiga testified that besides the March 24, 2016, incident, L.J.'s discipline record was "substantial." The dates of discipline ranged from October 10, 2008, to June 1, 2016.

On cross-examination, Spiga testified that the other student involved in the incident, T.P., was not arrested. She also testified that she was not sure if the March 2016 incident was L.J.'s second or third code of conduct offense. Upon questioning from the Court, Spiga testified about the investigative procedure in the normal course of a fight. She stated that the administration talks to witnesses and looks at videotape if possible. There was no question as to whether there was a fight that day or who was engaged in that fight.

Testimony of James Bevere

James Bevere (Bevere) testified on behalf of the Respondents. Bevere is employed by Carteret Public Schools as the Vice Principal of Carteret Middle School. As Vice Principal, Bevere's role included disciplining students.

Bevere was at the middle school on the day of the March 24, 2016, incident. He was made aware of the incident via his security radio and entered the cafeteria after the fight was already broken up. A security guard was restraining L.J. When he got to the cafeteria, he was unable to calm L.J. down after repeated attempts. He left the cafeteria and went to his office, where T.P. was being placed. While in his office with T.P., Bevere testified that he could hear L.J. in the in-school-suspension room. She was yelling that she wanted to continue to fight. She said she wanted to "fucking kill" T.P.

Allison Heim (Heim), the school guidance counselor, asked Bevere whether she should call the police. Bevere testified that he advised Heim that the police should be called if L.J. was out of control. Bevere did not call the police or speak to them when they arrived. He testified that the police were not called because of the fight in the cafeteria, but because of L.J.'s behavior after the fight.

Bevere was able to subsequently review the incident on tape via the school security footage. He testified that L.J. hit T.P., and T.P. hit L.J. in return. He testified that both students received a four-day suspension as a result of the incident. Bevere also testified that there is typically no discretion in terms of punishment when students put their hands on each other, no matter who started it. Bevere signed a complaint by the Carteret Police Department outlining the incident and the charges.

On cross-examination, Bevere testified that Spiga was responsible for trying to diffuse the situation with L.J. He testified that he was limited in his contact with L.J. because he handled a lot of her discipline matters earlier in the year, and it would be

best for other administrators to handle L.J. He testified that Spiga was the best option to diffuse the situation.

Testimony of Donald Dekolf

Donald Dekolf (Dekolf) testified on behalf of the Respondents. Dekolf has been employed by the Carteret Board of Education as the Manager of Information Technology for fifteen years. Specifically, he handles servers and security cameras for the District. The District uses Aimetis security cameras. This system was used in March 2016.

The security cameras are motion activated. Cameras are located throughout the district and the recorded footage is saved onto a server on a hard drive. The hard drive typically fills after thirty days and overwrites the previous data on the drive. If there is an incident, a copy of the tape is requested, but that request must be made within a specific time frame. That footage is then put on a disc. If the request is not made, the footage just gets continuously overwritten on the hard drive. He testified that recordings from 2016 would not currently be on the server.

Dekolf testified that he has seen the video footage of the March 2016 incident. It shows "two ladies getting into a fight" in the cafeteria. He testified that to his knowledge, that is the only video that exists from March 24, 2016.

Upon cross-examination, Dekolf testified that there was no request made for a tape of footage from the hallway. Upon questioning from the Court, he testified that parents do not have the authority to request a tape because it is not district policy.

DISCUSSION

The issue to be determined is whether the respondent school board's decision was arbitrary, capricious and/or unreasonable. It is widely recognized that local school boards 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. ex rel.

R.H. v. Edison Twp. Bd. of Educ., , 276. 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., , 332 (App. Div. 1965), aff'd, (1966). 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/her judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for making the conclusions and decisions they made.

FINDINGS

I **FIND** that Respondents' determination to suspend L.J. was appropriate. L.J. engaged in a physical altercation in the Carteret Middle School cafeteria on March 24, 2016. There is no dispute as to whether the fight occurred. L.J. continued to be physically and verbally aggressive after the fight was over and the police were called. Both students were given the same discipline of a four-day suspension.

I further **FIND** that Petitioner's due process rights were not violated regarding the video footage in the hallway. L.J. was suspended for the physical altercation in the cafeteria, of which Petitioner has seen the video footage. Carteret followed procedure, confirmed by the testimony of Donald Dekolf, in making a physical copy of the incident in the cafeteria from the security camera hard drive. A tape was made to allow the Petitioner to view the actions for which she was suspended.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that Respondents' action was supported by evidence properly adduced and presented and was not arbitrary, capricious or unreasonable.

ORDER

It is hereby **ORDERED** that Respondents' Motion to Dismiss be **GRANTED** and Petitioner's claim be, and hereby is dismissed.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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.

November 15, 2019
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: November 15, 2019

Date Mailed to Parties: December 15, 2019
lr

OAL Dkt. No. EDU 14210-18
(EDU 12095-16 On Remand)
Agency Dkt. No. 182-7/16

New Jersey Commissioner of Education
Final Decision on Remand

B.J., on behalf of minor child, L.J.,

Petitioner,

v.

Board of Education of the Borough of Carteret, Middlesex County, and James Bevere,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner when it imposed a four-day suspension on L.J. following a physical altercation in the cafeteria with another student on March 24, 2016. The Commissioner notes that both students involved received the same discipline, despite the fact that L.J. remained physically and verbally aggressive after the fight was over. Additionally, the Commissioner further concurs with the ALJ that petitioner's due process rights were not violated as she was permitted to view the video footage of the fight in the cafeteria, which is the only video of the incident.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19
Date of Mailing: 12/19/19

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

Agency Dkt. No. 5-6/19A
State Board of Examiners Dkt. No. 1718-188

New Jersey Commissioner of Education

Final Decision

In the Matter of the Revocation of the Certificates of Michael Ettz, State Board of Examiners, New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, May 17, 2019

For the Respondent-Appellant, Edward W. Cillick, Esq.

For the Petitioner-Respondent State Board of Examiners, Jaclyn M. Frey, Deputy Attorney General (Gurbir S. Grewal, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with the appellant Michael Ettz's appeal of the Order of the State Board of Examiners, dated May 17, 2019, revoking his Teacher of Mathematics Certificate of Eligibility with Advanced Standing and Teacher of Mathematics and Supervisor Certificates. On appeal, the appellant maintains that the Board's decision to revoke his certificates was based solely on the fact that the Board believed his conviction to be a disqualifying offense. Specifically, the appellant argues that the record contains no evidence that the Board conducted any analysis or considered the underlying circumstances concerning the nature of the conduct at issue here. Rather, the Board based its determination solely on what appellant describes as the "wrongful ruling" that his conviction was a disqualifying offense pursuant to *N.J.S.A.* 18A:6-7.1. The appellant contends that his offense was not a crime of the first or second degree, and therefore his conviction was not of the nature

that mandated permanent disqualification. Accordingly, appellant argues that his conviction was not a disqualifying offense, and therefore the decision to revoke his certificates must be overturned.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct and that the revocation of the appellant's certificates was the appropriate penalty. It is undisputed that on January 5, 2018, the appellant was driving while intoxicated when he struck a police officer's car, injuring the police officer. As a result of the incident, on September 22, 2017, the appellant pled guilty to Assault by Auto and was sentenced to a four-year prison term. Despite the appellant's assertions on appeal, he was in fact permanently disqualified from public school employment, pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.*, because of his criminal conviction.[1] Moreover, it was not unreasonable for the Board to consider the appellant's disqualification in reaching the appropriate penalty for his unbecoming conduct. There is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable and, as a result, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

[1] The appellant maintains that his conviction for 3rd Degree Assault by Auto did not constitute a disqualifying crime under *N.J.S.A.* 18A:6-7.1 *et seq.* However, as of the date of this decision, the March 2, 2018 decision of the Criminal History Review Unit has not been overturned.

Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19

Date of Mailing: 12/19/19

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

340-19

New Jersey Commissioner of Education

Decision

Cynthia Adams-Buffaloe, Gay Brown, Robert Atwell, Jerry Brown, Leon Mashore, and Hope Edwards-Perry,

Petitioners,

v.

State-Operated School District of the City of Camden,

Respondent.

Synopsis

Petitioners were tenured vice principals employed by the State-Operated School District of Camden when their positions were eliminated as part of a reduction in force (RIF) in July 2016; they were subsequently reassigned as classroom teachers. Petitioners appealed their reassignment based on the contention that their status as tenured vice principals entitled them to the lead educator positions that were created by the District to replace the vice principal role. Respondent asserted that petitioners are not entitled to the positions by virtue of tenure rights, contending that the positions were not substantially similar.

The ALJ found, *inter alia*, that: petitioners claim in this matter arises from the tenure rights that accrued to their abolished positions as vice principals; a district-wide reorganization and RIF in 2016 resulted in the abolishment of all vice principal positions and the creation of new leadership roles, including the position of lead educator; none of the within petitioners were hired for this new role, but non-tenured staff were hired as lead educators; the security of tenure and the ensuing rights of teaching staff members resulting from the abolishment of positions is set forth in *N.J.S.A.* 18A:28-1 et seq.; regulations set forth categories of prior employment to which a tenured employee may assert an entitlement if faced with a RIF, and case law recognizes that a tenured staff member is entitled to retention over non-tenured staff; in this case, the lead educator and vice principal roles are substantially similar, both dealing with instruction that endeavors to improve students' academic success; and the majority of the witnesses at hearing testified that there is no difference between the role of the vice principal and the role of the lead educator, as both are utilized in the same way. As such, the ALJ concluded that petitioners' tenure rights extend to the newly-created position of lead educator.

Upon review, the Commissioner agreed with the ALJ's conclusion that, given the facts in this matter, the roles of vice principal and lead educator are substantially similar. Accordingly, the Commissioner determined, *inter alia*, that the petitioners are entitled to appointment as "lead educators" retroactive to July 1, 2016, with all salary, benefits, and emoluments of that position, subject to mitigation. Further, the Commissioner directed the Board to review the tenure and seniority rights, if applicable, of petitioners and all individuals appointed as lead educators in the district as of the beginning of the 2016-17 school year and noted that if a dispute arises following the Board's review, a new petition should be filed.

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.

December 17, 2019

OAL Dkt. No. EDU 13906-16
Agency Dkt. No. 180-6/16

New Jersey Commissioner of Education

Final Decision

Cynthia Adams-Buffaloe, Gay Brown, Robert Atwell, Jerry Brown, Leon Mashore, and Hope Edwards-Perry,

Petitioners,

v.

State-Operated School District of the City of Camden,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioners, respondent, and intervenors, and the replies thereto by respondent and petitioners, have been reviewed and considered.

This matter involves six tenured vice principals whose positions were abolished, and now claim tenure entitlement to "lead educator" titles. The Administrative Law Judge (ALJ) found that the lead educator and vice principal roles are substantially similar, both dealing with instruction that endeavors to improve students' academic success. The majority of the witnesses testified that there is no difference between the role of the vice principal and the role of the lead educator, as both are utilized in the same way. As such, the ALJ concluded that petitioners' tenure rights extend to the newly-created position of lead educator.

Petitioners filed exceptions to the Initial Decision, arguing that their reassignment to the lead educator title should be retroactive to July 1, 2016, when the vice principal title was abolished, and that the award should include a retroactive adjustment in salary.

In reply, respondent argued that the ALJ did not address the issue of monetary relief or whether it should be retroactive to the date when the vice principal positions were abolished. Respondent further asserts that, even if affirmed, the Initial Decision provides insufficient information as to a potential remedy because the district has several types of lead educator positions, including positions that are district-wide rather than specific to a single school and positions that require additional qualifications and certifications. Furthermore, respondent contends that there has been no evidence presented as to the application of tenure and seniority rights of petitioners to any of the specific lead educator titles, and requests that if the Initial Decision is affirmed, the order be limited and determined after further hearing or submissions.

Respondent also filed exceptions, arguing that the ALJ neglected to consider the testimony of respondent's witnesses or documentary evidence demonstrating that the roles of vice principal and lead educator are not substantially similar. Respondent maintains that the lead educator position has a more expansive role in instructional coaching and data analysis while eliminating the duties related to school climate and building operations, making the two positions dissimilar. According to respondent, the Initial Decision erroneously relied on the generic and hearsay testimony of petitioners, none of whom have served as lead educators and thus cannot speak to the similarities and differences of the positions; the only other witness to speak to this issue was a single principal who interchanged the roles of lead educator and vice principal in her building despite district directives. Furthermore, respondent contends that tenure accrued as vice principal does not extend to any other administrative or supervisory position, and the fact that petitioners hold the appropriate certification for the lead educator position is not dispositive

when the actual duties of the jobs are distinguishable, since a mere overlap in duties is not sufficient to deem them equivalent for tenure purposes.

Exceptions were also filed by intervenors, who are individuals currently employed in lead educator positions.[1] They argue that vice principal is a position enumerated in the tenure statute and that tenure acquired as a vice principal does not extend to any other administrative or supervisory position. According to intervenors, because petitioners were never employed as lead educators, they have no tenure entitlement to that position.

Petitioners replied to the exceptions filed by respondent, substantially reiterating arguments made in their briefs below. Petitioners contend that respondent did not have the approval of the executive county superintendent to use the unrecognized title of lead educator. They point to case law holding, generally, that tenure is to be liberally construed and, specifically, that tenured staff members should be given preference over non-tenured staff members in unenumerated titles requiring the same certificate. Petitioners further argue that they are not required to show that the two titles are substantially similar as they would need to in a seniority case; rather, they are only required to show that the certification of vice principals and lead educators are the same, and that the functions of both titles "boil down to the fact that each contains duties that are instructional, that encompass supervising and evaluating staff and that each are intended to assist the principal in the management of the instructional component of the school." (Petitioners' Reply Exceptions at 8). After recounting the testimony of the witnesses at length, petitioners note that they all testified from their personal knowledge, not hearsay as alleged by the respondent in its exceptions. Further, both respondent's and petitioners' witnesses testified that both titles were involved in supervising teachers and the instructional component of

[1] Intervenors and respondents also joined in each other's exceptions. Respondent further replied to intervenors' exceptions by making substantially the same arguments made by intervenors and in respondent's own exceptions and briefs below.

the school; ultimately, the duties given to the lead educators were duties previously performed by vice principals.

Initially, the Commissioner notes that "lead educator" is an unrecognized position title and is, therefore, subject to the requirements of *N.J.A.C.* 6A:9-5.5. That regulation provides that the district must submit to the county superintendent a written request for permission to use the proposed title, together with a detailed job description, prior to appointing a candidate. *N.J.A.C.* 6A:9-5.5(b)1. The county superintendent is then required to approve or disapprove the use of the title and, if approved, to specify the appropriate certification and identify the actual title under which the teaching staff member will accrue tenure and seniority rights. Here, there was a gap in the county superintendent's approval of the lead educator title for the 2016-2017 school year and, even in the years before and after the title was approved, the approval lacked specifics regarding the appropriate certification. However, the ultimate authority to determine the appropriate certification and title rests with the Commissioner. *See Nicholas Duva v. State-operated School District of the City of Jersey City, Hudson County*, State Board Decision No. 56-99, decided March 6, 2002, and *Jack A. Perna v. State-Operated School District of the City of Paterson, Passaic County*, Commissioner's Decision No. 2-12, decided January 4, 2012. The Commissioner hereby approves the district's request to use the unrecognized title of "lead educator," requiring an administrative certificate with a principal endorsement.[2]

This matter presents the question of whether tenure accrued through service in one of the positions specifically enumerated in the tenure statute can extend to an unenumerated position. *N.J.S.A.* 18A:28-5(c) provides that tenure in any of the administrative or supervisory positions enumerated in the statute – principal, other than administrative principal, assistant

[2] The county superintendent shall continue to review annually the use of the lead educator title and determine whether it will be continued for the next school year, pursuant to *N.J.A.C.* 6A:9B-5.5(c).

principal, vice principal, and assistant superintendent – shall accrue only by employment in that position. Here, petitioners are not seeking to transfer their tenure from the enumerated position of vice principal to any other enumerated position, but rather to the unenumerated position of lead educator. For this reason, respondent's and intervenors' reliance on *Nelson v. Bd. of Educ. of the Twp. of Old Bridge, Middlesex County*, 148 *N.J.* 358 (Mar. 1997) is misplaced. *Nelson* involved an individual seeking to transfer tenure accrued in an unenumerated position to an enumerated one. The Supreme Court, consistent with the then-recently amended tenure statute, held that enumerated positions are separately tenurable and require service in that specific position in order for tenure to accrue.[3] The Court's decision did not address the reverse situation, such as that presented by petitioners herein, although it did note that tenure rights decisions have recognized the distinction between separately-tenurable enumerated positions and unenumerated ones. *Id.* at 365.

The tenure statute further states, "Tenure so accrued shall not extend to any other administrative or supervisory position. . .". *N.J.S.A.* 18A:28-5(c). Respondent and intervenors suggest that this language precludes petitioners from transferring their tenure from vice principal to any other position of an administrative or supervisory nature, such as lead educator. This language is located in a subsection of the statute that specifically addresses the accrual of tenure in enumerated positions, enacted to rectify case law holding that tenure could be transferred into

[3] Similarly, respondent and intervenors rely on *Taylor v. Bd. of Educ. of the Twp. of Hardyston, Sussex County*, Commissioner Decision 36-98 (Jan. 30, 1998) for the proposition that employment in a position with broad duties does not confer tenure rights in a position with some of the same, but narrower, duties. In *Taylor*, a principal whose position had been eliminated claimed that he was entitled to a position as vice principal because he had performed all of the duties of that position. His claim was rejected, but the basis for the decision was that both the principal and vice principal positions were separately enumerated in the tenure statute. Accordingly, the analysis does not apply to petitioners' circumstances.

an enumerated position in which an individual had not served.[4] Accordingly, the Commissioner concludes that this language applies only to prevent the assertion of tenure in an enumerated position in which an individual had not served for the requisite period of time. This portion of the statute does not override the long-standing principle that a district may not abolish a title – even an unenumerated one – and rename it in order to circumvent tenure rights. *Viemeister v. Board of Ed. of the Borough of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949).

Because petitioners are seeking to transfer their tenure to an unenumerated position, the analysis is governed by *Duva, supra.* The starting point for determining the scope of tenure protection is the certification that was required to serve in the employee's former position. *Id.* at 11. Here, an administrative certificate with a principal endorsement was required to serve as vice principal, *N.J.A.C.* 9B-12.3(b), which is also required for the lead educator position.

Next, the Commissioner must examine the duties and responsibilities of both positions. As the ALJ indicated in a thorough summary of the testimony, three individuals currently employed by the district as principals, who currently supervise lead educators and have served as or supervised vice principals in the past, testified that there is no difference between the duties performed in the two roles. An individual who had served as both a vice principal and a lead educator testified that the core duties she performed as a vice principal were the same as the core duties she performed as a lead educator. The petitioners also testified to their job duties when they served as vice principals, which the ALJ found are substantially similar to the job duties required of lead educators. For respondent, one principal testified that

[4] In a statement to the amendment, the Legislature found and declared that "due to the interpretation of *N.J.S.A.* 18A:28-5 by the Appellate Division in the case of *Nelson v. Board of Education of the Township of Old Bridge*, a clarification of that statute 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 period of time in that position." L. 1996, c. 58, § 1.

her vice principal focused on school culture, behavior and discipline, lunch duty, and building operations, while the lead educator focused on coaching, instruction, and professional development. However, she also testified that her vice principal sometimes evaluated and observed staff members and provide recommendations on improvements. One individual, who was formerly a vice principal and is now a lead educator, testified that although the lead educator position deals more with instructional duties, his job responsibilities and his instructional role as vice principal were similar to those of lead educator. Even the district's chief support officer at the time of the reorganization – who was involved in the decision-making process surrounding these positions, and who testified most specifically as to the differences between the positions – acknowledged that vice principals had an instructional role prior to the reorganization.[5]

Having heard the abundance of testimony, the ALJ determined that the roles of vice principal and lead educator are substantially similar, and the Commissioner accepts that conclusion. Petitioners are entitled to appointment as "lead educators" retroactive to July 1, 2016, with all salary, benefits, and emoluments of that position, subject to mitigation.[6] While the record is lacking in evidence regarding the tenure and seniority rights of individuals currently holding the position of lead educator, that does not preclude the Commissioner from awarding relief to

[5] Respondent also presented the testimony of a witness who is currently a lead educator but has never served as or supervised a vice principal, which the Commissioner does not find persuasive due to her lack of experience with the vice principal position. A second individual who formerly served as vice principal and is now a bilingual lead educator also testified regarding the differences in job duties. However, given that bilingual lead educator is a distinct job description requiring an additional certification, her testimony is not particularly revealing of the nature of the general lead educator role.

[6] The Commissioner does not find that petitioners are entitled to any of the variations of the lead educator title for district-wide positions or positions that have additional requirements based on the specialty, such as the Lead Educator, Special Educator position that requires a Teacher of Students with Disabilities certification.

petitioners. The Board is directed to review the tenure and, if applicable, seniority rights[7] of petitioners and all individuals appointed as lead educators as of the beginning of the 2016-17 school year. If a dispute arises following the Board's review, a new petition shall be filed.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: 12/17/19

Date of Mailing: 12/19/19

[7] Tenured staff members are entitled to retention following a RIF over non-tenured staff, regardless of seniority rights. *Capodilupo v. Bd. of Educ. of the Twp. of West Orange*, 218 *N.J. Super.* 510, 514. Accordingly, petitioners are entitled to lead educator positions over any staff members appointed to those positions who were not tenured as of July 1, 2016. However, the Commissioner recognizes that seniority rights may be implicated if the number of tenured staff members entitled to lead educator positions exceeds the number of positions available or as part of the Board's determination of which non-tenured staff members may need to be removed from their lead educator positions in order to appoint petitioners.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13906-16
AGENCY DKT. NO. 180-6/16

CYNTHIA ADAMS-BUFFALOE, GAY BROWN, ROBERT ATWELL, JERRY BROWN, LEON MASHORE, AND HOPE EDWARDS-PERRY,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN,

Respondent.

Robert M. Schwartz, Esq., for petitioners (Schwartz Law Group, LLC)

Cherie L. Adams, Esq., for respondent (Adams, Guiterrez & Lattiboudere, LLC)

Wayne J. Oppito, Esq., for intervenors Cameron Baynes, Johari Sykes, Jonathan Taylor and Jason Waugh

BEFORE **CARL V. BUCK III,** ALJ:

Record Closed: August 28, 2018 Decided: October 8, 2019

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Cynthia Adams-Buffaloe, Gay Brown, Robert Atwell, Jerry Brown, Leon Mashore, and Hope Edwards-Perry were tenured vice principals (VPs) employed by the State-Operated School District of the City of Camden (District or respondent). Their positions were eliminated as part of a reduction in force and district-wide reorganization in July 2016, and they were subsequently reassigned as classroom teachers. They appeal their reassignment on the grounds that based upon their status as tenured VPs they were entitled to the lead educator (LE) positions then created by the District to replace the VP role. Respondent asserts that petitioners are not entitled to the positions by virtue of tenure rights.

This litigation began as a result of the District's decision to abolish the VP positions effective July 1, 2016. On or about June 27, 2016, petitioners filed a Petition of Appeal on behalf of six individuals claiming a violation of tenure rights, that the District acted in bad faith by abolishing the VP positions, and that the District failed to comply with State regulations relative to obtaining approval to utilize unrecognized titles.

Former counsel for the District filed a Motion in Lieu of an Answer on September 6, 2016. Petitioners filed an opposition to this motion on September 23, 2016. The District withdrew its motion on January 19, 2017. An Answer to the Petition of Appeal was filed on February 3, 2017. Petitioners filed a Motion for Summary Decision on August 17, 2017. The respondent filed a Motion for Summary Decision on August 24, 2017. Petitioners filed an opposition to this motion on September 29, 2017, but did not oppose any of the facts set forth by the respondent. Respondent filed an opposition brief on October 2, 2017. Oral argument for these motions took place on October 13, 2017. A conference call took place between the parties and the judge on December 8, 2017, to discuss the status of the pending motions. The hearing commenced, without a decision on these motions, on December 12, 2017, and was completed on March 1, 2018. The parties submitted post-hearing briefs and the record closed on August 28, 2018. Extensions were requested and granted for the filing of this Initial Decision.

FACTUAL DISCUSSION

Many of the material facts are not in dispute:

1. Petitioner Cynthia Adams-Buffaloe began her employment with the District as a classroom teacher in 1988.

2. Petitioner Adams-Buffaloe was promoted to the VP position in 2008 and remained in that position until the 2015–2016 school year.

3. Petitioner Gay Brown began her employment with the District as a mathematics teacher in September 1992.

4. Petitioner Brown was subsequently promoted to the VP position and remained there through the 2015–2016 school year.

5. Petitioner Robert Atwell began his employment with the District in September 1992.

6. Petitioner Atwell was promoted to the title of VP in 2000 and remained in that position until the 2015–2016 school year.

7. Petitioner Jerry Brown began his employment with the District as a classroom teacher in March 1992.

8. Petitioner Brown was subsequently appointed to VP and remained in the role through the 2015–2016 school year.

9. Petitioner Leon Mashore was initially employed by the District as a classroom teacher in 1992.

10. Petitioner Mashore was promoted to the VP role in 1997 and remained in that position through the 2015–2016 school year.

11. Petitioner Hope Edwards-Perry began her employment with the District as a classroom teacher in 1988.

12. Petitioner Edwards-Perry was subsequently promoted to the VP position and remained there through the 2015–2016 school year.

13. The District first introduced the lead educator position in the 2014–2015 school year.

14. The VP position was abolished after the 2015–2016 school year.

15. The VP role was split into three different positions—the LE, the operations manager, and the dean of climate and culture.

16. The operations manager position addresses the daily operations of the building, manages office and security staff, and handles school budget, ordering and procurement, technology needs, teacher needs, and anything to do with operational strategy.

17. The dean of climate and culture position deals with student behavior and discipline, conducts parent conferences with regard to the District behavior policy, and has the responsibility to ensure that students are in the building and in the classroom during the school day.

18. The primary duties of an LE are instructional coaching, teacher evaluations, classroom walkthroughs, reviewing lesson plans, and proposing recommendations for teacher and instructional improvement.

19. Both the VP and LE positions require a principal certification.

20. All VPs were invited to apply for the LE position.

21. All petitioners, with the exception of petitioner Atwell, applied to become LEs.

22. No petitioner was chosen for the LE role, and all were reassigned to a classroom teaching position.

The issues in this matter arise out of the district-wide reorganization and reduction in force conducted by the respondent in 2016. That reorganization resulted in the abolishment of all VP positions and the creation of three separate roles—the operations manager, the dean of climate and culture, and the LE. When none of the petitioners were hired for the LE role and non-tenured staff were instead hired, this appeal ensued. With many of the underlying facts agreed upon by the parties, the testimony in this matter focused mainly on the scope of the duties performed by the LEs, and whether in reality this newly created position was actually the old VP position disguised under a new name.

Dr. Davida Coe-Brockington

Dr. Coe-Brockington has been employed with the Camden City Board of Education for thirty-one years and is currently a principal at the Creative Arts Morgan Village Academy. She testified that the VPs who worked with her evaluated and observed teachers, as well as conducted walkthroughs of the classrooms. The VPs also coached, meaning they met with teachers to discuss what was observed, and provided professional development to teachers. In addition, the VPs assisted with discipline, conducted parent conferences, and assisted in the overall running of the school. The LE who works with her evaluates, observes, coaches, and conducts professional development of teachers. The LE is also involved in discipline and meets with parents. Both the VPs and LEs utilized research-based strategies, such as student-data collection, to assist with instructional improvements in the school. Dr. Coe-Brockington testified that she sees no difference between the roles of the VP and the LE, and, more specifically, she utilizes the LE the same way she did the VP. She stated that only the senior LEs, who travel to multiple schools and are housed in the central

district office, differ from the VP position, but the LE placed within her specific school performs the same duties as a VP.

Evelyn Ruiz

Ms. Ruiz has been employed with the Camden City Board of Education for twenty-five years and is currently the principal of the Harry C. Sharp Family School. She has an LE assigned to her who helps with teacher evaluations, observations, classroom walkthroughs, and professional development. Ms. Ruiz testified that the LE also deals with discipline issues and parental complaints and conferences. The LE assists with attendance records, as well as monitoring of the facility and operational needs of the building. Prior to becoming a principal, Ms. Ruiz was a VP. In that role, she evaluated and coached teachers, met with parents, and handled disciplinary issues. She stated that the role of a VP and the role of an LE are the same. Specifically, there is no distinction between the duties that the LE performs and the duties that VPs performed.

Herbert Simons

Mr. Simons has been employed with Camden City public schools since 1997 and at the time of his testimony was the principal of the Riletta Twyne Cream Family School. He was previously a VP for five years, and a teacher prior to that. He testified that the LEs he worked with observed, evaluated, coached, and held professional development for teachers. The LEs were also involved with student discipline and parent conferences. Mr. Simons stated that there were no differences between the duties LEs performed and the duties VPs performed. The only differences between the two positions are the title and the job description. There was no LE at his school that year, and he therefore handled all the instructional duties, but an operations manager deals with the budget, and monitoring and scheduling of the extracurricular activities. Mr. Simons testified that he and the operations manager served as the liaison with the police and probation and child welfare.

Gay Brown

Ms. Brown has worked in the Camden City School District since 1992. She is currently employed as a teacher, but previously served as a VP in various different schools from 2009 to 2016. She was suspended for the 2014–2015 school year because the District filed a tenure charge for inefficiency, but she returned to her position as VP with back pay. As a VP, she received her duties from her principal. These duties included observation and evaluation of teachers, conducting walkthroughs, coaching and providing feedback to teachers to ensure academic improvement for students, overseeing certain departments within a school, supervising clerks, holding additional practice for high-stakes State assessments, and ensuring that teachers were adhering to the curriculum. Ms. Brown utilized the Charlotte Danielson framework for teacher evaluations. As a VP, she also handled student discipline and held parent conferences.

Ms. Brown said that while employed as a VP, she provided professional development regarding student-growth objectives and participated in a school improvement panel. She further testified that she attended the same mandatory professional development programs that LEs attended. Although she acknowledged that a rubric allowed LEs to evaluate VPs, she stated that never occurred at her school while she was a VP. Ms. Brown had applied for the role of LE but did not obtain the job. She affirmed that she filed two complaints against the District after the abolishment of the VP position—one for discrimination and one for retaliation for increment withholding.

Cynthia Adams-Buffaloe

Ms. Adams-Buffaloe has been employed with the Camden City School District for twenty-nine years. She is currently a teacher, but previously held the title of VP for eight years at Woodrow Wilson High School. As VP, she observed teachers who worked with ninth-grade students, checked lesson plans, conducted walkthroughs, coached teachers, reviewed student data and discipline data, and met with parents. More specifically, she ensured that the teachers' instruction aligned to specific

expectations the principal had and reviewed instruction to improve academic performance.

During the 2014–2015 school year, Woodrow Wilson High School had two LEs and two VPs, with each individual being assigned a specific grade level for which they were responsible. Ms. Adams-Buffaloe testified that the LEs at her school dealt with disciplinary issues for their respective grades, met with parents, and coached teachers. During the 2015–2016 school year she was the only VP, and she attended administrative-team meetings with the LEs and the principal where they discussed teacher observations, coaching, walkthroughs, and lesson-plan review, and provided feedback on lesson plans. They also discussed disciplinary issues and problematic teachers. Both LEs and VPs had lunch duty, participated in the same professional-development meetings, and were evaluated using the same rubric components. She was unaware of a pay difference between the LE and VP positions and believed the two positions to be equal. After the VP positions were abolished, she filed an age-discrimination complaint against the District. She had applied and interviewed for the LE position, but was not chosen, and was assigned to a teaching role.

Jerry Brown

Mr. Brown is currently employed as a teacher with the Camden City public schools and previously held the position of VP for eight years. As a VP, Mr. Brown provided feedback to teachers regarding what he witnessed in his evaluations, walkthroughs, and review of lesson plans. He discussed improvements in the classroom and issued letters to teachers regarding reprimand. Furthermore, he conducted professional development and provided a syllabus for this development. Mr. Brown stated that LEs performed the same duties as VPs. Both observed and evaluated teachers, handled student discipline, and dealt with parental issues. Mr. Brown testified that he has never been evaluated by an LE and only worked side by side with them. He was unaware of a pay difference between the two positions and believed the roles were equal.

Leon Mashore

Mr. Mashore was a VP for the Camden City public schools for twenty years before being assigned as a sixth-grade math teacher. He worked alongside an LE at Veterans Memorial Family School for the 2015–2016 school year. He testified that as a VP he was on the same salary guide as LEs and was never evaluated by an LE.

Hope Edwards-Perry

Ms. Edwards-Perry was previously employed as a VP with the Camden Board of Education for nineteen years. She is currently assigned as a math teacher. She testified that when she was a VP she was never evaluated by an LE, and when she worked alongside an LE they had the same responsibilities. She did not know if she was paid on the same salary guide as the LE.

Robert Atwell

Mr. Atwell was a VP with the Camden City Board of Education for sixteen years before being assigned as a classroom teacher for the 2016–2017 school year. He testified that he had never been evaluated by an LE when he was a VP. He and the LE split responsibilities in the school. Mr. Atwell did not know whether he was on the same salary guide as an LE. He applied for the LE title but did not get the job.

Pia Garbutt

Ms. Garbutt has worked with the Camden City Board of Education since 2015, first as a teacher, and then as an LE of Camden High School. As an LE, she observed teachers, provided feedback regarding instruction, held data meetings, and conducted professional development. She did not deal with any responsibilities related to operations or discipline. Ms. Garbutt had a certification of eligibility when she applied for and accepted the LE position, and received her provisional certification after August 2016.

Tracey Reed-Thompson

Ms. Thompson has been employed in the Camden City School District since 1994, first as a teacher, then a math coach, then a VP, and she is currently the principal of Yorkship Family School. During her time as a VP, she did not conduct professional development or coach teachers. She testified that the VP she worked with focused on the school culture, behavior and discipline, lunch duty, and building operations, while the LE focused on coaching and instruction, and provided professional development. However, Ms. Thompson testified that her VP did sometimes evaluate and observe specific-content-area staff members and would provide recommendations on improvements.

Charles Jennings Dawson

Mr. Dawson is an LE in the Camden City School District, but was previously employed as a teacher, school counselor, education program specialist, and VP within the District. As an LE he does not deal with discipline, parent conferences, or operations within the school, he instead only focuses on evaluations and observations of teachers. During his time as a VP, he was involved in discipline, school climate and culture, and operations. As a VP, Mr. Dawson also shared evaluation and observation duties with the principal, conducted walkthroughs, and made recommendations for instructional improvement with teachers. He testified that his instructional role as a VP was similar to his instructional role as an LE because he evaluated, observed, and coached in both positions. However, his LE position deals much more with instructional duties than his VP position did.

Anna Schwartz Shurak

Ms. Shurak has been employed with the Camden City School District since 2015 and currently serves as the chief school support officer of high schools. She testified that when she first started working in the District, the VP role was very generalized. While she stated that some VPs did have instructional duties such as walkthroughs, evaluations, and coaching, this was not a regular occurrence and only happened at

some schools where a principal decided to assign these instructional duties. If a VP had an instructional role, their personal evaluations included instruction. Ms. Shaurak further testified that the LE position was necessary to deal with instruction to ensure better educational outcomes for students. She had input on the LE job formation and job description. She acknowledged that the LE role was the only new job that required certification, whereas the operations manager and dean did not require any certification. Ms. Shurak stated that only one VP, Charles Dawson, was chosen for an LE role.

Yolanda Babilonia

Ms. Babilonia is a bilingual LE with the Camden City School District. Prior to securing an LE role, she was a fourth-grade bilingual teacher, math coach, and then a VP from 2011 to 2016. She testified that her duties as a VP included operational duties, such as breakfast, lunch and dismissal duties, creating schedules, handling student discipline, and conducting teacher evaluations and observations. She testified that she did not coach as a VP, but she did make recommendations to teachers when she observed them, and followed up on those recommendations. As an LE, she focuses solely on instruction and she coaches, observes, and evaluates teachers. She does not handle any scheduling, discipline, or operational duties.

Kristen Reid

Ms. Reid was a VP for the Camden City School District for two years at Camden High School. She testified that her duties included instructional leadership, evaluations, observations, feedback, reviewing lesson plans, parent/student conferences, discipline, and hall duty. She also oversaw the guidance, special education, and fine arts departments. She stated that she spent 80 percent of her time on instruction and observed and evaluated thirty to forty teachers. She further testified that she conducted walkthroughs, made recommendations to the principal regarding teacher renewals, and provided professional development on instructional strategies.

Ms. Reid became an LE at Camden High School for the 2015–2016 school year. Her duties as an LE included evaluations, observations, and attending administrative-

team meetings. She was assigned close to forty teachers to observe. She stated that the core duties she performed as a VP were the same core duties that LEs performed. She was reassigned to a teaching role for the 2017–2018 school year because her role as LE was not renewed due to unsatisfactory performance. Ms. Reid currently has an EEOC claim alleging racial and gender discrimination against the District.

Jason Wall

Mr. Wall has been employed with the Camden City School District for four years and is currently employed as an LE for strategic conditions and operations with the Camden School District. Prior to holding this position, Mr. Wall was a special education LE in the District. He testified that as a special education LE he supervised teachers at eight different buildings, and his duties included evaluating special education teachers to ensure that these teachers complied with students' individualized education programs, assisting with implementation of the curriculum, and coaching teachers with regard to instruction.

In his current role as an LE for strategic conditions and operations, Mr. Wall works in five high schools to ensure that the vision and mission of the school is being met through teacher instruction. Specifically, he continues to coach teachers by conducting walkthroughs, meeting with teachers to discuss his observations, and following up with them. As an LE, he does not have any managerial duties, such as lunch or dismissal duties, nor did he ever deal with any disciplinary issues. His LE position requires that he have the Charlotte Danielson Certification. When he first started in an LE role, Mr. Wall met with principals to discuss the evaluations he conducted, his observations of teachers, and his review of lesson plans. In his current role, he is not supervised nor evaluated by any school principal, rather, he is supervised through the central District office.

Andrew Travis Bell

Mr. Bell has worked in the Camden City School District since 1998 and currently holds the chief strategy officer position. He spent two and a half years working as a VP

and four years working as a principal. As a VP, he conducted some teacher evaluations, but his main role focused on operational and managerial duties, such as recess duty, lunch duty, dismissal, and discipline. In the 2014–2015 school year, he was put in charge of LEs. Mr. Bell testified that, initially, the LE role was based on evaluations conducted in accordance with the Charlotte Danielson framework. The role later evolved into responsibility for instructional development in school buildings and instituting new programs and guidelines to aid student success. LEs did not deal with student discipline nor operations of the building. Mr. Bell testified that although both the VPs and LEs evaluated students using the Charlotte Danielson framework, the roles differed in that LEs focused on instructional duties and VPs mainly focused on managerial duties, with an occasional focus on instruction. He specifically stated that the titles of VP and LE are similar, but the critical aspects of the jobs are much different. The operations manager role replaced the VP role. However, only the VP and LE roles required a certification.

LEGAL DISCUSSION

The petitioners assert their entitlement to the LE positions newly created by the District in its 2016 reorganization. Their claim arises from the tenure rights that accrued to their abolished positions as VPs. The security of tenure and the ensuing rights of teaching-staff members as a result of abolishment of positions are set forth in N.J.S.A. 18A:28-1 et seq. Tenure is a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956 (1963).

A reduction in force (RIF) can challenge the parameters of those tenure rights, as the resulting dismissals must be made on the basis of seniority as set in statute and regulations. N.J.S.A. 18A:28-10; see N.J.A.C. 6A:32-5.1. Seniority provides a way to rank tenured school-staff members so reductions in that staff can be equitable and in accordance with sound educational policies. Capodilupo v. Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div. 1987). Regulations set forth categories of prior employment to which a tenured employee may assert an entitlement if faced with a RIF. Additionally, case law recognizes that a tenured staff member is entitled to retention

over non-tenured staff, regardless of seniority rights. Id. at 514–15. To hold otherwise would defeat the purpose of tenure, which provides a measure of security to educational staff after a certain number of years of service. Ibid.

Determining which positions fall within the scope of an employee's tenure protection can be complex. A teaching-staff member has tenure in either a specifically designated position as set forth in N.J.S.A. 18A:28-5 or another position for which an appropriate certificate is required. Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 347 (App. Div. 1991). There are three types of educational certificates established by the Department: instructional, educational services, and administrative. N.J.A.C. 6A:9B-5.2 et seq. An endorsement on the certificate then specifies a category in which an individual is allowed to teach or provide a service within a public school. This matter involves tenure rights accruing to the holder of a principal certificate. Pursuant to N.J.A.C. 6A:9B-12.3(b), that certificate allows endorsements for assistant superintendent for curriculum and instruction, principal, assistant principal, vice principal, director, and supervisor. If an administrative officer position is enumerated in the tenure statute, such a position has been held to be "separately tenurable." Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997). A tenured staff member therefore may "bump" a less senior or non-tenured principal only by having served in that position. N.J.S.A. 18A:28-5(c) provides that "[f]or 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."

Each of the petitioners here were tenured VPs and do not assert their entitlement to any of the separately enumerated positions in N.J.S.A. 18:28-5. Instead, they contend that their tenure protection extends to the newly created, unrecognized LE positions. They argue that their rights are determined by Duva v. State-Operated School District of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002), http://njlaw.rutgers.edu/collections/oal/, which held that since neither "director" nor "supervisor" is among those positions enumerated in N.J.S.A. 18:25-5, a tenured supervisor was entitled to employment requiring a supervisor endorsement in preference to any non-tenured individuals. See also Sahagian v. N. Bergen Bd. of

Educ., 1989 S.L.D. 2878, 2883–84, which held that a tenured supervisor was entitled to any other supervisory position in the district over a non-tenured individual.

Building upon the principal enunciated in Duva, petitioners argue that the more recent decision in Nicholson et al. v. Asbury Park Board of Education, EDU 9228-10, Initial Decision (August 1, 2013), adopted, Comm'r (September 16, 2013), http://njlaw.rutgers.edu/collections/oal/, is directly on point with their case. In his Final Decision the Commissioner upheld the decision by an administrative law judge that tenured supervisors were entitled to the new assistant director position. The school board in Asbury Park abolished the supervisors' positions and created a new title of assistant director, but required an additional curriculum-based endorsement for the new position. Each of the petitioners who possessed both endorsements claimed a tenure right. The Commissioner reinstated the petitioners who were qualified to hold the title of assistant director, finding that as compared to the non-tenured holders of the title, they had a superior claim. Duva and its progeny therefore establish petitioners' right to claim other non-enumerated positions within the range of their administrative certificate over non-tenured individuals.

In this matter, the LE positions were approved by the executive county superintendent. N.J.A.C. 6A:9B-5.5(b)(1) provides that in order for board of education to use an unrecognized title, the board must submit a written request to the county superintendent to use the title proposed, including a detailed job description. Here, the LE title was initially approved for the 2015–2016 school year, but the title was not re-approved until the 2017–2018 school year, a year and a half after the petitioners had lost their VP positions. While approval for the position was delayed for a school year, it is clear that the executive county superintendent did not disapprove the District's creation of a new title nor contest the overall reorganization of the Camden City School District. Although petitioners contest the timing of review and ultimate approval, the record indicates that the superintendent did in fact review the LE job description and approved the new title.

The gravamen of petitioners' case is that the District violated their tenure rights when, in using its statutory authority under N.J.S.A. 18A:28-9, it abolished their VP

positions in which each of them had accrued tenure and failed to assign them to the newly created, unrecognized LE title. They argue that the role of the LEs is the same or substantially similar to the role played by VPs with respect to instruction. Although the LE position is narrower than the VP position, in that the LEs do not have all of the administrative functions previously performed by VPs, the two positions both require the same certification and same instructional job duties. Petitioners argue that the primary reason for abolishing the VP role and creating the LE role was to remove them from their administrative assignments altogether. Petitioners acknowledge that the District is entitled to dismiss staff members under N.J.S.A. 18A:28-10; however, they argue that a RIF should not be used as an end-run to abrogate their rights of tenure. See Viemeister v. Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949) ("The tenure provisions in our school laws were 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.").

While the District does not dispute that the LE position requires the same certification as the VP position did, it argues that the two positions are not interchangeable. The District points to Dennery v. Passaic County Regional High School District #1, 131 N.J. 626, 640 (1993), which held that "[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." Dennery thus establishes that even if the duties of the LE and VP positions are similar, the positions are not necessarily equivalent for tenure purposes because the scopes of the positions may be different. The District alleges that an LE's primary responsibility is to ensure that the best instructional practices are being implemented in the classroom, whereas the VP had a generalized role which focused mainly on managerial and operational duties in the school building and was limited in terms of moving student progress and instruction forward.

It is clear from the record that the LE and the VP roles are substantially similar. Both positions dealt with instruction in an attempt to improve students' academic

success. All of the petitioners, Andrew Bell, and Dr. Davida Coe-Brockington testified that both VPs and LEs evaluated and observed teachers, coached teachers, conducted classroom walkthroughs, and provided professional developmental. More importantly, the majority of these witnesses stated that there is no difference between the role of the VP and the role of the LE, as both are utilized in the same way. Respondent's reliance on Dennery is misplaced because there are no additional duties or different responsibilities with the LE role. Rather, the new role is actually narrower than the VP role and eliminates the managerial duties that the VPs performed. The duties of an LE are substantially identical to those of a VP, and therefore petitioners' tenure rights extend to this newly created position. See Dennery, 131 N.J. 626, 639–40 ("When 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. The local board must extend the teaching-staff member's tenure rights to the newly-created position.").

I therefore **CONCLUDE** that the petitioners were entitled by virtue of their tenure to the lead educator positions.

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

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

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

October 8, 2019
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 10/8/19

Date Mailed to Parties: 10/8/19

/lam

WITNESSES

For Petitioner:

Davida Coe-Brockington
Evelyn Ruiz
Herbert Simons
Gay Brown
Cynthia Adams-Buffaloe
Jerry Brown
Leon Mashore
Hope Edwards-Perry
Robert Atwell
Kristen Reid
Jason Wall
Andrew Travis Bell

For Respondent:

Pia Garbutt
Tracy Reed Thompson
Charles Dawson
Anna Shurak
Yolanda Babilonia

EXHIBITS

For Petitioner:

P-1 VP/High School/Middle School/Elementary School Job Description
P-2 Vice Principal/Principal Overview
P-3 Professional Dev. Vice Principal/Lead Educator

P-4 Principal/Assistant Principal Evaluation Rubric

P-5 Observation schedule for Gay Brown

P-6 Email from Shannon James to County Supt seeking approval for unrecognized title – 2/11/16

P-7 Approvals given by county supt. 11/5/14; 7/2/15; 6/8/16; 8/25/16;

P-8 Nonrenewal Notice of Gay Brown

P-9 Non-renewal Notice of Cynthia Adams Buffaloe

P-10 Non-renewal notice of Jerry Brown/Hope Edwards Perry/Robert Atwell/Leon Mashore

P-11 Lead Educator/Bilingual Employment Application

P-12 Lead Educator Evaluation Rubric

P-13 Lead Educator Job Description

P-14 Lead Educator Evaluation Overview

P-15 2/16 evaluation of Kristen Reid by Andrea Kerwin

P-16 2/16 evaluation of J. Brown by Anna Shurak

P-17 2/16 evaluation of Cynthia Buffaloe by Anna Shurak

P-18 2/16 evaluation of G. Brown by Anna Shurak

For Respondent:

R-1. Letter from Interim County Superintendent of Schools to Superintendent of Camden City School District regarding approval for unrecognized title 0001-2 November 5, 2014

R-2. Letter from Interim County Superintendent of Schools to Superintendent of Camden City School District regarding approval for unrecognized title 0003-5 July 2, 2015

R-3. Email from the District to the county Superintendent applying for annual approval of the positions 0006-0209 February 11, 2016

R-4. Letter from Interim Executive County Superintendent to Superintendent of Camden City School District regarding approval for unrecognized title 0210-211 April 27, 2016

R-5. Letter from Chief Talent Officer to Cynthia Adams-Buffaloe regarding abolishment 0212-213 April 29, 2016

R-6. Letter from Chief Talent Officer to Gay Brown regarding abolishment 0214-215 April 29, 2016

R-7. Letter from Chief Talent Officer to Robert Atwell regarding abolishment 0216-217 April 29, 2016

R-8. Letter from Chief Talent Officer to Jerry Brown regarding abolishment 0218-219 April 29, 2016

R-9. Letter from Chief Talent Officer to Leon Mashore regarding abolishment 0220-221 April 29, 2016

R-10. Letter from Chief Talent Officer to Hope Edwards-Perry regarding abolishment 0222-0223 April 29, 2016

R-11. Minutes of Division of Talent and Labor Relations reflecting the abolishment of the VP positions 0224-285 May 10, 2016

R-12. Letter from Interim Executive County Superintendent to Superintendent of Camden city School District regarding approved for unrecognized title 0286-287 June 8, 2016

R-13. Interview Notes for Cynthia Adams-Buffaloe 0288-300 July 15, 2016

R-14. Interview Notes for Hope Edwards-Perry 0301-317 July 15, 2016

R-15. Interview Notes for Leon Mashore 0318-329 July 15, 2016

R-16. Interview Notes for Jerry Brown 0330-336

R-17. Letter from Interim Executive County Superintendent to Superintendent of Camden city School District regarding approved for unrecognized title 0337-338 August 25, 2016

R-18. Policies 0339-345

R-19. Job Descriptions 0346-376

R-20. Lead Educator Professional Development 0377-379 October 15, 2015

R-21. Lead Educator Professional Development 0380-384 October 22, 2015

R-22. Professional Development Cream School 0385-388 2015-2016

R-23. Professional Development Sharp School 0389-395 2015

R-24. Principal Checklist for Operation Manager "On boarding" 0396-398

R-25. School Leader Professional Learning PowerPoint 0399-406 April 28, 2016

R-26. Operation Manager Training 0407-432 August 15, 2016

R-27. Operational Updates – School Leader Institute 0433-440 June 30, 2016

R-28. Operation Manager Training 0441-451 August 16, 2017

R-29. Principal and Vice Principal Policies and Procedure 0452-458

R-30. Lead Educator Evaluation Policies and Procedure 0459-479

R-31. Climate Coordinator performance rubric for Yorkship School 0480-486

R-32. Professional Development PowerPoint for School Climate and Culture Position 0487-510

R-33. Employment Application Manager School Operation 0511-516

R-34. Dean of Culture and Climate Job Description 0517-520

R-35. List reflecting number of administrators in each school 0521-523

R-36. Sign in sheet for School Leader Professional Development 0524-543 August 2017

R-37. Lead Educator Rubric 0544-0564

R-38. Email from the District to the county Superintendent applying for annual approval of job descriptions 0565-610

R-39. Letter from Interim Executive County Superintendent to Superintendent of Camden city School District December 17, 2019

R-40. Submission discussed but not received

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF TENURE HEARING	)	
	)	
between	)	
	)	
BOARD OF EDUCATION OF THE CITY OF NEWARK,	)	CONSENT AWARD
Petitioner	)	
and	)	
	)	
CAROL DOUGLAS,	)	
Respondent	)	
	)	
AGENCY DOCKET NO. 222-8/19	)	

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

APPEARANCES

FOR THE PETITIONER

Teresa L. Moore, Esq., Riker Danzig, LLP

FOR THE RESPONDENT

Nicholas Poberezhsky, Esq., Caruso Smith Picini, P.C.

BACKGROUND

In accordance with N.J.S.A. 18A:6-17.3, on August 20, 2019, the Newark Board of Education, County of Essex, State of New Jersey ("Petitioner" or "Board") determined that "a tenure charge of inefficiency against Carol Douglas ('Respondent'), a tenured teacher, shall be submitted to the Commissioner of Education." According to the Petitioner, the Respondent was evaluated pursuant to the Newark Public Schools Framework for Effective Teaching in the 2016-17, 2017-18 and 2018-19 school years and received summative evaluation ratings of Ineffective in 2016-17, Partially Effective in 2017-18, and Partially Effective in 2018-19. Consequently, the tenure charge of inefficiency against the Respondent was mandatory. N.J.S.A. 18A:6-17.3(a)(1).

By letter dated August 26, 2019, pursuant to N.J.A.C. 6A:3-5-1(b)(6), Fiona E. Cousland, Counsel for the Petitioner, submitted the following documents to Dr. Lamont Repollet, the Commissioner of Education:

- Notice of Tenure Charge of Inefficiency
- Statement of Evidence
- Certificate of Service

In her statement of position submitted to the Board in response to the charges, Respondent maintains that in 2018-19 she was not observed by multiple observers as required by N.J.A.C. 6A:10-4.4 et seq. Respondent further maintains that her school assignments were inappropriate and retaliatory. In addition, Respondent contends that the Board "failed to adhere to the student achievement requirements set forth by N.J.A.C. 6A:10-4.2 et seq., failed to adhere to the summative evaluation process under N.J.A.C. 6A:10-2.4 et seq.,

failed to establish a legally sound Corrective Action Plan ('CAP') and did not satisfy the procedural and substantive CAP requirements explicated in N.J.A.C. 6A:10-2.5 et seq."

On September 13, 2019, the Commissioner, upon review of the tenure charges, found that he "is unable to determine the evaluation process has not been followed." Accordingly, the charges were referred to the undersigned Arbitrator pursuant to N.J.S.A. 18A:6-16.

On November 20, 2019, the Newark Board of Education and Respondent, Carol Douglas, collectively, the "parties" submitted a document to the Arbitrator described as a "fully-executed Settlement Agreement in this matter," indicating that the Board and the Respondent had voluntarily resolved all disputed matters and entered into a Settlement Agreement ("Settlement"). (Attachment A). "The parties respectively acknowledge that Counsel has advised them regarding this Settlement Agreement and each is signing this Settlement freely and voluntarily, without duress, coercion or pressure from the other party."

Among the terms set forth in the Settlement is the agreement of the Respondent, Carol Douglas, "to resign from her tenured position, effective January 1, 2020...Douglas' separation from employment will be deemed a voluntary resignation in good standing." Moreover, "by entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged, Douglas hereby releases and discharges the Board of Education...with respect to all

claims or rights that she may have against the Board of Education regarding her employment with the Board."

"This Settlement Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey law."

The undersigned Arbitrator, pursuant to his authority under N.J.S.A. 18A:6-9 "to hear and make a final determination on a controversy and dispute arising under sub article B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes (C.18A:6-10 et. seq.)," having reviewed the terms of the Settlement between the Petitioner, Newark Board of Education and Respondent, Carol Douglas, as well as the Board Resolution approving the Settlement, dated 10/29/2019 (Attachment B), with respect to the Tenure Charges the Petitioner filed against the Respondent, finds that the terms and conditions of the Settlement set forth herein meets the 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).

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and memorialize its terms and conditions in a Consent Award.

December 18, 2019

Robert T. Simmelkjaer

STATE OF NEW JERSEY
COUNTY OF BERGEN

On the 18th of December 2019 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, which is his award.

Notary Public

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and memorialize its terms and conditions in a Consent Award.

December 18, 2019

Robert T. Simmelkjaer

STATE OF NEW JERSEY
COUNTY OF BERGEN

On the 18th of December 2019 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, which is his award.

Notary Public

Newark Public Schools

AGENDA ITEM

Meeting Date: 10/29/2019 - 6:00 PM

Category: General Counsel - Legal - Votes

Type: Action

Subject: 13.4 Resolution of the Board of Education of the City of Newark, County of Essex to Approve the Settlement Agreement Involving Employee No. 32960

Strategic Plans:

Enclosure:

File Attachment:

Summary: WHEREAS, the Board of Education of the City of Newark, County of Essex (the "Board") previously certified tenure charges of inefficiency against Employee No. 32960;
WHEREAS, rather than undergo the inefficiency process, Employee No. 32960 is amenable to resigning from the Board effective January 1, 2020 so long as the Board will place Employee No. 32960 on administrative leave with pay commencing October 1, 2019 until October 31, 2019 and thereafter provide only benefits to Employee No. 32960 until this teacher's date of resignation so as to afford this employee medical coverage until she resigns;
WHEREAS, the parties have preliminarily resolved all disputed matters so that Employee No. 32960 has agreed to resign effective January 1, 2020 in exchange for being placed on administrative leave with pay commencing October 1, 2019 until October 31, 2019 and thereafter receive only benefits until this teacher's date of resignation; and
WHEREAS, this settlement agreement is in the best interests of the Board and the public since it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public.

Funding :

Recommendation to the Board: NOW, THEREFORE, BE IT RESOLVED that the Board does hereby approve and accept the settlement agreement involving Employee No. 32960;
BE IT FURTHER RESOLVED that the Board does accept Employee No. 32960's resignation effective January 1, 2020;
BE IT FURTHER RESOLVED that the Board does withdraw the tenure charge of inefficiency against Employee No. 32960;
BE IT FURTHER RESOLVED that the Board will place Employee No. 32960 on administrative leave with pay commencing October 1, 2019 until October 31, 2019 but thereafter, provide only benefits to Employee No. 32960 until her date of resignation; and
BE IT FURTHER RESOLVED that Employee No. 32960's employment records will be amended accordingly.

Approvals:

Recommended By:

[redacted]

Signed By:

[redacted]

Signed By:

[redacted]

Signed By:

[redacted]

Vote Results:

Original Motion
Member **Asia J. Norton** Moved. Member **Tave Padilla** seconded to approve the **Original** motion. NOW, THEREFORE, BE IT RESOLVED that the Board does hereby approve and accept the settlement agreement involving Employee No. 32960;
BE IT FURTHER RESOLVED that the Board does accept Employee No. 32960's resignation effective January1, 2020;
BE IT FURTHER RESOLVED that the Board does withdraw the tenure charge of inefficiency against Employee No. 32960;
BE IT FURTHER RESOLVED that the Board will place Employee No. 32960 on administrative leave with pay commencing October 1, 2019 until October 31, 2019 but thereafter, provide only benefits to Employee No. 32960 until her date of resignation, and
BE IT FURTHER RESOLVED that Employee No. 32960's employment records will be amended accordingly. Upon a Roll-Call Vote being taken, the vote was: Aye: **8** Nay: **0**
The motion **Carried** 8 - 0

[illegible] Aye

[illegible] Aye

[illegible] Aye

[illegible] Aye

[illegible] Aye

[illegible] Aye

[illegible] Aye

[illegible] Aye

RIKER
DANZIG
SCHERER
HYLAND
PERRETTI

Teresa L. Moore
Counsel

Direct:
T: 973.451.8594
F: 973.451.8698
tmoore@riker.com

Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981

By email to sinmolkjaer@att.net

[illegible]

Robert Sinmolkjaer
Arbitrator
29 Chestnut Street
Millburn, New Jersey 07041

Re: In M/O Tenure Charge of Carol Douglas,
Board of Education of the City of Newark
Agency Docket No. 222-8/19

Dear Arbitrator Sinmolkjaer:

Enclosed is a copy of a fully-executed settlement agreement in this matter. Pursuant to N.J.A.C. 6A:3-5.6, we request that you approve the terms of the settlement. Its terms provide representations that are required pursuant to N.J.A.C. 6A:3-5.6(a). Paragraph 12 of the agreement states that the parties' counsel advised them of the terms of the agreement and that they signing the agreement without duress.

If you need any further information, please advise.

Very truly yours,

Teresa L. Moore

enc.

cc: [illegible] (w/enc. by email)

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for Board of Education of the City of Newark

In the Matter of	NEW JERSEY DEPARTMENT OF EDUCATION
CAROL DOUGLAS	Agency Docket No. 222-8/19
BOARD OF EDUCATION OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	**SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made by and between the Newark Board of Education (the "Board"), with an address at 765 Broad Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives (collectively) and Carol Douglas, residing at 31 Warwick Street, Orange, New Jersey 07017 ("Douglas") (collectively, the "Parties").

WHEREAS Douglas is a tenured teaching staff member employed by the Newark Board of Education; and

WHEREAS on or about August 26, 2019, the Board certified a tenure charge of inefficiency against Douglas and a copy of the Notice of Tenure Charges of Inefficiency is attached to this Settlement Agreement (the "Settlement Agreement") as Exhibit A; and

WHEREAS the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the settlement set forth herein is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Douglas hereby agrees to resign from her tenured position, effective January 1, 2020. Attached is a copy of Douglas' signed Letter of Resignation (Exhibit B). Douglas' separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the Board will only confirm Douglas' employment, position, title, salary and dates of employment.

2. Douglas also agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the Board that are still pending as of the date of this Settlement Agreement, with the exception of Workers' Compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the Board and Douglas. Should Douglas fail to submit letters of withdrawal or other stipulations of dismissal for any such pending claims or suits, this Settlement Agreement shall serve as Douglas' mutual written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

3. In exchange, Douglas will: (1) be placed on administrative leave from October 1, 2019 through December 31, 2019; (2) receive salary less applicable payroll deductions for the months of October 2019; and (3) receive group health benefits for the months of October, November, and December 2019. Other than the salary that she receives for the month of October 2019 and the health benefits she receives from October 1, 2019 through December 31, 2019, Douglas will not receive any further monies or

benefits from the Board in exchange for this Settlement Agreement. If applied for, the Board will not oppose Douglas' application for unemployment.

4. The Board also agrees not to pursue any disciplinary action against Douglas so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Settlement Agreement is voided, the Board retains the right to pursue disciplinary action against Douglas including termination of her employment with the Board.

5. As of the effective date of her resignation, all of Douglas' employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will cease and Douglas shall not be entitled to what she may be otherwise afforded under the Worker's Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

6. Douglas agrees that she will not apply for reemployment with the Board at any time in the future. Specifically, Douglas will be considered to have permanently resigned from her tenured position as a result of this Settlement Agreement. If Douglas does apply for reemployment with the School District and is approved for employment, the terms of this Settlement Agreement shall constitute valid and legal grounds for immediate termination of Douglas' employment.

7. This Settlement shall not constitute a precedent in any matters involving other employees.

8. Except as noted above, Douglas waives all claims of any nature against the Board with regard to her employment with and/or her separation from the Board including fees or other monetary relief, with the exception of workers' compensation claims.

9. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged, Douglas hereby releases and discharges the Board of Education and its members, and any all other school district officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that she has or may have against the Board of Education regarding her employment with the Board. This includes without limitation, any and all actions, claims, and liabilities of whatever kind or character in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Douglas' employment with or separation from the Board. It specifically includes, without limitation, all claims which Douglas may have regarding tenure, withholding of increment, discrimination or any other alleged federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended, the Older Workers Benefits Protection Act, Title VII of the Civil Rights Act of 1964, as amended, Sections 1981 through 1988 of Title 42 of the United States Code, the Civil Rights Act of 1991, the Equal Pay Act, the Americans with Disabilities Act, the Rehabilitation Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, as amended, the Worker Adjustment and Retraining Notification Act, the National Labor Relations Act, the Fair Credit Reporting Act, the Occupational Safety and Health Act, the Uniformed Services Employment and Reemployment Act, the Employee Polygraph Protection Act, the Immigration Reform Control Act, the retaliation provisions of the Sarbanes-Oxley Act of 2002, the Federal False Claims Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Wage and Hour Law, the New Jersey Equal Pay Law,

the New Jersey Occupational Safety and Health Law, the New Jersey Smokers' Rights Law, the New Jersey Genetic Privacy Act, the New Jersey Fair Credit Reporting Act, New Jersey Wages and Hours Law, unemployment compensation laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and any other state or federal statute or any federal, state or local law, regulation or ordinance, common law doctrine, contract or implied contract or collective bargaining contractual claim, tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wages, commissions, bonuses, punitive damages, attorneys' fees, costs, and/or future wage loss, except for workers compensation benefits and for health insurance coverage under and pursuant to COBRA. Douglas agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorneys fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

5. Notwithstanding Paragraph 4 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency, commission or person file a charge, action, complaint or lawsuit against the Released Parties or any of them, based upon any of the above-released claims in Paragraph 4, Douglas agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Douglas of the legal requirements of that Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Douglas acknowledges that she: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Douglas understands that she may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

12. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, with no duress, undue influence or pressure from the other party.

13. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

15. This Settlement Agreement is subject to final approval by the Board of Education of the City of Newark and will only become effective upon the approval of the

Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

Dated: 10/17/19

CAROL DOUGLAS

Dated: 10/17/19

NICHOLAS POBEREZHSKY, ESQ
Caruso Smith Picini PC
Attorneys for Carol Douglas

Dated: _____

SEQUINE GARCIA

Dated: _____

BRENDA C. LISS, ESQ.

CERTIFICATION

I, CAROL DOUGLAS, 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 certify that I have been advised of the Commissioner of Education's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 10/10/19

Carol Douglas
CAROL DOUGLAS

EXHIBIT B

Roger León
Superintendent
Newark Public Schools
765 Broad Street
Newark, New Jersey 07102

RE: NOTICE OF RESIGNATION

Dear Superintendent León:

I wish to inform you that I will be resigning from employment with the Newark Board of Education effective January 1, 2020.

Date: 10/17/19

Carol Douglas
CAROL DOUGLAS

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Agency Docket No.: 140-6/19

In the Matter of the TENURE Hearing between

The EAST ORANGE BOARD OF EDUCATION,
ESSEX COUNTY, NEW JERSEY

PETITIONER

and

SHARONDA ALLEN,

RESPONDENT

BEFORE: **Ira Cure, Esq.**
Arbitrator

APPEARANCES

For the Petitioner School District:
George J. Frino, Esq.
Paul Miller, Esq.
DeCotiis, FitzPatrick, Cole & Giblin, LLP

For the Respondent:
William P. Hannan, Esq.
Oxfeld Cohen, P.C.

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the East Orange Board of Education, Essex County ("Petitioner" or "Board" or "District") against Sharonda Allen ("Allen" or "Respondent") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on or about June 11, 2019. An answer was filed by Ms. Allen with the DOE on or about July 1, 2019. I was appointed to

hear this dispute on July 8, 2019. On July 29, 2019, the Respondent filed a motion to dismiss the tenure charges because of the Board's purported failure to to provide information required by *N.J.S.A.* 18a:6-17.1(b)(3). I conducted oral argument on August 22, 2019, and in an order I denied the motion on August 22, 2019 adjourning scheduled hearing dates. Hearings were rescheduled and held at the New Jersey State Board of Mediation, 2 Gateway Center, Newark New Jersey on September 24, 2019 and October 7, 2019.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The hearings were transcribed. The parties submitted briefs and the record was closed as of November 22, 2019. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

George J. Frino, Esq. and Paul Miller, Esq. of the firm of DeCotiis, FitzPatrick, Cole and Giblin, LLP represented the Board. William P. Hannan of the firm of Oxfeld Cohen, P.C. represented Ms. Allen.

THE ISSUE:

The issue for arbitral determination is:

Has the Board established that Ms. Allen engaged in misconduct alleged in the charge brought against her? If so, what shall be the penalty?

THE CHARGE

I, Dr. Kevin R. West ("Dr. West"), of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:

I am the Superintendent of Schools for the East Orange Board of Education ("Board"). The Board maintains administrative offices at 199 Fourth Avenue, East Orange, New Jersey, 07017. I am charged with the general oversight of the East Orange School District ("District") and all employees serving therein. During all times relevant herein, Sharonda Allen ("S.A.") has been a teacher within the District at East Orange Campus High School ("EOCHS") and Patrick F. Healy Middle School ("Healy Middle School"). I am familiar with all of the facts and circumstances surrounding the Sworn Tenure Charges against S.A.

Based upon the Sworn Statement of Evidence, I hereby charge S.A. with conduct unbecoming and other just cause for dismissal, including but not limited to insubordination, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10.1, et. seq.

BACKGROUND COMMON TO ALL CHARGES

Sharonda Allen ("S.A."), a tenured teacher, is responsible to conduct herself in a professional and appropriate manner, to follow the directives of her supervisors, and to comply with all District protocols and policies. S.A., however, has consistently failed to perform the foregoing duties and responsibilities, and worse, has demonstrated an unwillingness and, or perhaps an inability, to improve, correct and modify her behavior, despite multiple opportunities to do so. On multiple occasions dating back to 2015, S.A. has displayed unprofessional, inappropriate, and most recently, dangerous behavior in her interactions with students, and insubordinate behavior in her interactions with supervisors. Despite prior progressive discipline including a disciplinary-based increment withholding in 2015, and a two-week suspension in 2019, S.A. continues to act in a manner which constitutes insubordination and conduct unbecoming.

Between January 29, 2019 and January 31, 2019 Ms. Allen conducted herself in a manner that was insubordinate to her direct supervisor, Principal of EOCHS Dr. Ronald Estrict ("Dr. Estrict"), and to the Superintendent of Schools Dr. Kevin West ("Dr. West"). (See Exhibit 1). On or about January 29, 2019, in her capacity as Sophomore class advisor she appealed Dr. Estrict's denial of her request for a Sophomore class meeting. The appeal to Dr. West was denied and it was explained in writing that each grade level has one class meeting per quarter, and that the Sophomores already had theirs for the second quarter. S.A. refused to take "no" for an answer and engaged in an accusatory and confrontational back in forth with Dr. West, as follows.

On or about January 31, 2019 S.A. sent an email rebutting the denied request, stating that Dr. West's and Dr. Estrict's actions constituted "educational malpractice,

inequitable treatment", and "criminal" "retaliation". S.A. went on to question Dr. West's and Dr. Estrict's "sensibility" and accuse them of engaging in a "conspiracy to sabotage" her and the entire Sophomore class. She then threatened her superiors with litigation, and essentially attempted to blackmail them into granting her request by stating "If my request is not immediately granted, I will take this action as retaliation, and I will move this grievance to the next level, exhausting all administrative remedies".

Dr. West responded to S.A. in a professional and constructive manner, again explaining the policy permitting only one class meeting per quarter, again explaining the rationale for the denial, and informing her of the grievance procedure.

Within just over an hour, S.A. wrote back to Dr. West, copying Dr. Estrict, again accusing both of retaliation, stating that the "denial is purely retaliation for not taking the abuse of administration here at the EOCHS... retaliation against those who do not bow down to the mismanagement here at EOCHS". She went on to call Dr. Estrict "incompetent, inept, inequitable, unfair, and super unprofessional." She then argued against the reasoning of her superiors and stated that the reasons were false, thereby essentially calling her superiors liars. She again requested the Sophomore class meeting and went on to tell Dr. West "You cannot continue to support a flawed decision... if I have clearly clarified to you" the flaws in reasoning behind the denial. Finally, she accused Dr. West of being unfair, incompetent, and engaging in illegal nepotism, stating as follows:

> I would expect that a fair and competent leader would see all the facts presented... if not, I will know and be clear about the nepotism that is illegal, based on fraternal connections, is alive and. well in this School District".

Dr. West patiently responded to S.A.'s attack, explaining to S.A. that he has the authority to approve or deny any request for any meeting made by a staff member, and instructing her to "please move forward and adhere to the final decision [...] regarding this matter". Dr. West reminded S.A. that "[f]ailure to do so is grounds for insubordination and conduct unbecoming" and that there is a grievance process she must follow if she feels she is being mistreated or if she feels "there is nepotism and all of the various other allegations [she] made".

Later that afternoon, S.A. responded to Dr. West in a rambling diatribe of an email, threatening and accusing him follows:

> The behavior of you and this administration is unbecoming, unprofessional, unfair, nepotistic, disrespectful, and demeaning after you detailed the made up rules about Class meetings, and then turned around and stated that you would stand by their erroneous decision

to still deny a cycle 3 meeting, as per their own new made up rules.

If you don't understand why this is illegal, then I would refer you back to New Jersey Administrative Code Title 6:6A. You are making a threat about insubordination, while you are not even adhering to the rules that you presented. You can't say that there can be a meeting per cycle, then encourage administration to make up their own rules as they go along, retaliating against a State employee, who also lives in this city.

I am highly offended by your threats of grounds of insubordination, while you promote the mismanagement of this school. You are not utilizing your training as a leader in an equitable manner and well as functioning with nepotistic motives, which is conduct unbecoming and illegal. As a principal, you are not supposed to be an unquestioned, uncorrected dictator. You told me to inform you of any cases of inequity, but now you take sides with this corrupt behavior, even after you pointed out the so-called cycle meeting schedule. I clarified to you that the meeting would be during cycle 3, but you still lean to the wrong side and expose the nepotistic protection you are giving to this flawed administration.

Based on your own statements, you violated the protocol and procedures that you said that you stand by, which are not in writing and made up. Competent leadership requires written rules, if not, this argument would not stand up for this administration in a court of law. You are now promoting behavior that is wrong and bad for the reputation of this School District. There are safeguards in place so that this nepotistic behavior is checked in public domains and I will ensure that this incident is widely publicized and publicly responded to.

The next board of Education Meeting February 12, 2019, and please be clear that the Sophomore parents will be informed of your nepotistic conduct in this matter, and you will be put on notice of these offenses. I will again exhaust all administrative remedies in this matter, and I will be moving this matter to your unprofessional, favoritism, and cronyism.

Dr. West instructed her to "Please cease and desist with your disrespectful, combative

and confrontational behavior immediately." Finally, she did, but only until the next day (February 1, 2019) when the two met to discuss the investigatory findings and consequential discipline resulting from an incident that occurred between S.A. and a student on December 5, 2018. On that day, she threatened freshman student S.B. during an assembly at East Orange Campus High School ("EOCHS"). An investigation was conducted whereby it was confirmed that multiple witnesses, both students and teachers, reportedly observed Allen yelling verbally abusive language and threats of physical violence several times in S.B.'s face. Specifically, the teacher was in S.B.'s "personal space" yelling the following: **"Shut up", "Shut the fuck up", "I will get you jumped", "You don't know me", "I will get one of these big niggas to jump you"** and **"Watch your back at Campus".** (Exhibit 6).

As memorialized in a memo titled "Notes from meeting with Dr. Kevin West and Ms. Sharonda Allen Friday February 1, 2019 at 1:OO PM" (Exhibit 2), the meeting began with Dr. West providing a summary of the incident that took place and the decision to suspend her for two weeks. He further informed her that due to student safety concerns, she would be transferred to a different school within the District at the conclusion of her suspension. The transfer was not punishment or discipline but a precaution in response to student safety concerns, as the incident involved her threatening physical violence against a Sophomore student. Dr. West handed her a letter outlining the findings, the disciplinary action, and the notice of transfer. S.A. interrupted Dr. West to comment as follows:

1 Dr. West does not have administrative authority to provide her with the letter;

2 It was illegal for him to suspend her because the Board had not met or approved the suspenswn (sic);

3- The letter was retaliation and a witch-hunt based on the email that she sent Dr. West the day before.

S.A. refused to acknowledge receipt of the letter via signature and refused to accept the transfer because she "did not do anything wrong." She then accused Dr. West of altering the investigation report and indicated that she would reach out to the investigator herself. (Exhibit 6). She then threatened "You don't know my reach. Councilwoman [...] is sponsoring my Valentine's event. The mayor will not support this [...] They will not agree with my removal. I am sure that parents will contact you and students will protest[...] Be prepared for the amount of people at the Board meeting."

Dr. West concluded the meeting by handing Ms. Allen four (4) District policies that she had violated: Inappropriate Staff Conduct, Healthy Workplace Environment, Use of Electronic Communication, and Civility. (Exhibit 2). Finally, she was told to refrain from speaking to parents and students regarding the matter out of respect to S.B.'s rights to privacy and confidentiality.

Instead of heeding the directive of Dr. West, S.A. organized a school-wide student walk out in protest of her suspension and transfer. The walk-out was to take place during class time, thus participants would have to cut class to attend. S.A. disseminated and publicized flyers and social media posts in support of the walk-out (Exhibit 3). She communicated with students and parents via social media encouraging them to participate in the protest on her behalf and insisting that they call the mayor demanding her immediate return to EOCHS. Essentially, S.A. attempted to influence students to break school rules and cut class to riot against the administration and in support of her. She attempted to use political connections to retaliate against and undermine Dr. West in response to his imposition of discipline.

As if all the above was not enough, S.A. violated the privacy and jeopardized the safety of Sophomore student S.B. She wrote to a student via Facebook Messenger as follows:

> S.A: [Student K.N.] said that the boy told her that he lied about the incident just to get me in trouble
>
> Undisclosed Student: Who's the boy and we're gonna report this
>
> S.A: S----- B----
> Undisclosed Student:
> Bet!!! (Exhibit 4).

It is clear that S.A. 's intent in releasing the student's name was either to have S.B harassed, intimidated, or bullied into recanting his statement, or, to have him retaliated against by way of physical harm. Ultimately, the Messenger thread was screenshotted and posted on an undisclosed student's Instagram Story with the caption "Who know S----- B----?" Thereafter, S.B. feared for his safety at EOCHS to such an extent that he resorted to transferring out of EOCHS and enrolling at another high school in the District. When interviewed, his mother stated that she "feared for her son's life". Despite this fear, he and all witnesses never recanted their statements and reaffirmed that S.A. threatened and verbally abused S.B on December 5, 2018 (Exhibit 5).

The District has issued progressive discipline in response to multiple instances of misconduct over the course of the last several years. Prior to the December 2018 incident and consequential suspension, S.A. was disciplined by way of increment withholding for the 2015-2016 school year in response to at least two instances of conduct unbecoming. (Exhibit 7). On or about April 30, 2015 there was an altercation between S.A. and a female student. Furthermore, due to S.A.'s failure to properly supervise students she chaperoned on an overnight field trip in October 2014, several students engaged in prohibited activity. In response, she made disparaging and inappropriate remarks of a sexual nature in front of everyone

on the field trip, and, among other things, allegedly smelled a male student and stated that he "smelled like sex". Moreover, there were funds missing from the field trip accounting logs; S.A. was the organizer.

I hereby charge Sharonda Allen with unbecoming conduct and/or other just cause for dismissal, including insubordination, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10.1, et. seq.

CHARGE I[1]
UNBECOMING CONDUCT, INSUBORDINATION, AND OTHER JUST CAUSE

While employed as a teacher in the East Orange School District, S.A. repeatedly violated the public trust by acting insubordinately and/or engaging in conduct unbecoming. Specifically, S.A.'s inappropriate interactions with students, her displays of complete disrespect for her supervisors, her total disregard for the directives of her supervisors, and her complete ignorance of District policies and protocols are evidenced, as follows:

Count One
On or about Tuesday, January 29, 2019, at 9:49 AM, S.A. wrote an email to her supervisors including but not limited to Dr. Estrict and Dr. West that rises to a level of insubordination warranting removal.

Count Two
On or about Thursday, January 31, 2019, at 8:54 AM, S.A. wrote an email to her supervisors Dr. Estrict and Dr. West that rises to a level of insubordination warranting removal.

Count Three
On or about Thursday, January 31, 2019, at 11:44 AM, S.A. wrote an email to her supervisors Dr. Estrict and Dr. West that rises to a level of insubordination warranting removal.

Count Four
On or about Thursday, January 31, 2019, at 1:02 PM, S.A. wrote an email to her supervisors Dr. Estrict and Dr. West that rises to a level of insubordination warranting removal.

Count Five
On or about Friday, February 1, 2019 at 9:00 AM, during a meeting with

[1] Exhibits attached to the charges have not been appended, and will be discussed if relevant in the body of this Opinion and Award.

Superintendent of Schools Dr. Kevin West, S.A. behaved in a manner that constitutes insubordination, conduct unbecoming, and violates multiple Board policies

Count Six

During the period of her suspension (between February 1 and February 19, 2019) S.A. violated Board Policy by way of inciting student misconduct in the form of cutting class for a school wide protest on her behalf, i.e. a "walk-out", at EOCHS.

Count Seven

During the period of her suspension (between February 1 and February 19, 2019) S.A. violated Board Policy 3283 by way using social media to inappropriately communicate with students.

Count 8

S.A. jeopardized the safety of student S.B. by way of releasing his name to another student with the intent to have him harassed, intimidated, bullied, or worse, as retaliation for her suspension.

CONCLUSION

Each of the foregoing allegations, as well as the Sworn Statement of Evidence and all accompanying documents attached thereto, are incorporated by reference, as if fully set forth herein.

In aggregate, the foregoing actions and inactions exhibited by Sharonda Allen amount to unbecoming conduct, insubordination, and/or other just cause for dismissal. Sharonda Allen has received appropriately progressive discipline in response to numerous instances of misconduct over the course of the last several years, and dismissal via tenure charges is now the only appropriate recourse. By virtue, thereof, it is evident that S.A. has engaged in a course of misconduct extending over a period of time, such that, her pattern of misconduct, jointly and severally, constitutes unbecoming conduct and insubordination, and manifestly demonstrates her unfitness to serve in a position of educational leadership, thus warranting her dismissal.

FACTS

A. Background

Dr. Kevin West ("West") is the superintendent of schools in the District. (Tr. 13). There are four high schools within the District. (Tr. 28). The events giving rise to this proceeding occurred at Campus High School ("CHS"). (Passim). CHS is a comprehensive school with approximately 1600 students in grades nine through twelve. (Tr. 25). CHS has students that are high performing, average performing and who have challenges academically. (Tr. 26). Dr. West characterized the District as "urbanized" noting that there are concerns regarding violence among students. (Tr. 30). The CHS principal is Dr. Ronnie Estrict ("Estrict"). (Tr. 138). District policies are uploaded to the District's website. Dr. West testified that teachers are directed to the website in order to review those policies. Principals are also directed to review policies with teachers, and teachers are asked to acknowledge that they reviewed certain but not all policies. (Tr. 33, 142, 155-156).

Ms. Allen has been employed by the Board since 2003 and has been assigned to CHS since 2011. (Tr. 226). Ms. Allen has taught the following subjects at CHS: World History, Sociology, African American History, United States History and Economics. (Tr. 227). Ms. Allen has the following pedagogic certifications: Kindergarten through Elementary Certification, Kindergarten through 12 Social Studies Certification, and a Supervisor's Certification. (Tr. 227). She has generally received "effective" ratings as a teacher. (Respondent's Exs. 6-10). In addition to her teaching duties, Ms. Allen was the advisor for the class of 2021. During the relevant 2018 to 2019 school year, this meant that Ms. Allen was the advisor for the Sophomore class. (Tr. 228).

Ms. Allen's conduct while employed at CHS has been investigated on several occasions, and some of the investigations of her conduct has resulted in discipline[2]. On May 7, 2015, CHS Assistant Principal Felecia Duggins ("Duggins") issued a memorandum to Ms. Allen in which Ms. Duggins concluded that Ms. Allen used "inappropriate language, interfere[ed] in the instruction of students, and disrupt[ed] . . . the learning process." (Board Ex. 18). As a result, the East Orange Board of Education withheld Ms. Allen's salary increment for the 2015-2016 school year, and placed Ms. Allen on probation for conduct unbecoming. (Board Ex.19).

B. The December 5, 2018 incident with SB

As will be seen, the events giving rise to this proceeding are closely related to an incident that occurred on December 5, 2018. The record shows that, on December 5, 2018, Ms. Allen had an altercation with a ninth-grade student, "SB", at a school assembly. SB failed to follow Ms. Allen's directions to stop talking and was belligerent. In response, Ms. Allen in front of both student and teacher witnesses said the following: "Shut up", "Shut the fuck up", "I will get you jumped", "You don't know me", "I will get one of these big niggas to jump you" and "Watch your back at Campus." As a result of complaints from SB's mother, the Board hired a private detective to investigate the December 5, 2018 incident. (Tr. 19, 21). While the investigation was ongoing, on January 11, 2019 Dr. West met with Ms. Allen, SB and SB's mother. In a memorandum dated February 28, 2019, addressed to the Director of Labor Relations for the Board, Dr. West expressed misgivings about the way Ms. Allen conducted herself at the January 11, 2019

[2] I am specifically excluding from my analysis allegations that Ms. Allen acted inappropriately while chaperoning a student trip in October 2014. Although serious allegations of misconduct were made against Ms. Allen in connection with the trip, there is no evidence in the record that discipline was imposed, and Ms. Allen testified that she never saw the memo describing the events. (Tr. 293, Board Ex. 14).

meeting. In his memorandum, Dr. West noted that SB apologized to Ms. Allen for telling her to "get out of his face." As recounted in the memorandum, Dr. West asked Ms. Allen if she had something to say. Dr. West stated that Ms. Allen went into a discourse about how much she loves students at CHS, and how she demands respect. According to Dr. West, Ms. Allen never apologized to SB and the lack of apology infuriated SB's mother. Dr. West noted, however, that Ms. Allen attempted to hug SB's mother because they apparently knew each other outside of the school context. With respect to the attempted hug, Dr. West described SB's mother as looking at Ms. Allen like Ms. Allen "was crazy." Dr. West stated that Ms. Allen gave SB a "half-hearted apology." Ms. Allen also assured SB that he would be safe at the school. Prior to the end of the meeting, SB's mother described Ms. Allen as "ghetto," and Dr. West stated that he wrapped up the meeting by asking SB if he felt safe, and SB said that he did feel safe. (Board Ex.9).

Thereafter, on February 1, 2019, following the conclusion of the investigation, Dr. West convened a meeting with Dr. Estrict, Assistant Superintendent Dr. Deborah Harvest ("Harvest"), Ms. Greadington, the President of the East Orange Educational Association ("Association"), and Ms. Allen. At the meeting, Dr. West informed Ms. Allen that the private detective hired by the District to investigate the December 5, 2018 incident corroborated allegations made by SB and SB's mother that "Ms. Allen made several threats to a student [SB], got in the student's face, and used profanity." (Board Ex.4). (Board Ex. 4 is a copy of typewritten notes of Dr. West's impressions of Ms. Allen's behavior). As a result of the findings of the private detective, Dr. West suspended Ms. Allen for two weeks with pay[3].

[3] At the hearing in this matter, I limited questioning concerning the December 5, 2018 incident because neither Ms. Allen nor her Union grieved the suspension. I made the following statement into the record: "The incident occurred on December 5. It was described in charge specifications brought by the Board. I will accept those charges and specifications as true because it resulted in a two-week suspension for Ms.

The February 1, 2019, Notice of Suspension stated: "Your behavior demonstrated a total disregard and disrespect for the position as a teacher, the student that you made inappropriate comments to, and the school district." (Board Ex. 6). Ms. Allen did not grieve her suspension. (Tr. 317). In addition, Dr. West transferred Ms. Allen to another school[4].

Dr. West decided not to bring tenure charges against Ms. Allen as a result of the December 5, 2018 incident and chose instead to utilize progressive discipline in order to correct Ms. Allen's behavior. (Tr. 61-62). Dr. West also testified that he directed Ms. Allen to "keep the matter [of the December 5, 2018 incident] confidential." (Tr. 131). Dr. West stated:

> So the reason why I said, "Don't disclose this, " was because the boy [SB] was already feeling very unsafe, especially with the comments you saw inside of there where he stated that she said she was going to get some big N'ers in the school to take care of this kid.
>
> So he was already intimidated by that. I didn't want his name out there. I didn't want anybody discussing that because that kid even though Ms. Allen was moved out of there, the student at that point was still in the building, and he basically said there was a culture where she had these big N'ers that would go and take care of her situations for her.
>
> So this kid was almost shaking at the table when he came in with his mother to tell me about this story. That was why I left him in the building, but I removed her out of there. I didn't want this culture to be festering. And I definitely didn't want the other student body – students to attack this kid.

Allen." (Tr. 17).

[4] The transfer itself - not the suspension – was the subject of a petition filed by the Association with the New Jersey Public Employment Relations Commission ("PERC") bearing docket #: TO-2019-007. *N.J.S.A.* 34:12A-27 prohibits transfers of school employees for disciplinary reasons. PERC has jurisdiction to determine if a suspension was primarily disciplinary. On September 26, 2019 PERC, on a date in between the first and second days of hearing in this proceeding, ordered the District to return Ms. Allen to her position at CHS. PERC made no finding regarding the suspension. (Respondent's Ex. 17).

(Tr. 132-133). Dr. Estrict corroborated Dr. West's statement that the Superintendent had directed Ms. Allen to keep SB's name confidential. (Tr. 182-183). Ms. Allen admitted that Dr. West directed that she not disclose the reasons for her suspension, because Dr. West "knew it would be disruptive." (Tr. 312). Ms. Allen concluded that any difficulties she had with SB had been resolved at the January 11, 2019 meeting. (Tr. 251, 313-314).

C. Events leading to the filing of Tenure Charges

Following her suspension, one of Ms. Allen's students – KB - complained to her mother ("SH") about the suspension and transfer. SH communicated with Ms. Allen about fighting on behalf of Ms. Allen and protesting the suspension at a school board meeting. (Tr. 209). Ms. Allen also communicated with students and urged at least one student to contact KB's mother. (Tr. 44-46; 205-206; Board Ex.3). Communications among the students occurred on Instagram. In addition, a flyer was distributed in support of Ms. Allen. (Board Ex.3). There is no evidence that Ms. Allen posted this material on social media, however, Ms. Allen did take part in several Facebook Messenger conversations with students. In one statement protesting her suspension, Ms. Allen urges a student to: "Call the mayor and demand that I be put back at campus by this Tuesday!!!!" (Emphasis in the original). In yet another social media exchange with Student PS, Ms. Allen specifically identified SB. The exchange on Facebook Messenger went as follows:

> Ms. Allen: KB [a student] said that the boy told her that he lied about the incident just to get me in trouble.
>
> PS: Who's the boy and we're going to report this
>
> Ms. Allen: SB [she in fact used SB's full name]
>
> PS: Bet

(Bd. Ex. 3). Ms. Allen admitted that she utilized Facebook Messenger to identify SB because it was not publicly known that SB had lied[5] about the December 5, 2018 incident. In response to a question as to why Ms. Allen provided SB's name, Ms. Allen testified: "Because this person was upset about me being transferred out and wanted to have it reported to the authorities to make sure that school officials and everyone knew that the student was absolutely lying about the situation." (Tr. 283, 327). However, Ms. Allen is apparently relying on statements from KB who testified only that SB told her that "he felt bad that [Ms. Allen] was transferred. He didn't mean for it to be blown out of proportion, and it was a misunderstanding." (Tr. 219-220). Not that SB admitted to lying.

Following Ms. Allen's posting on Facebook Messenger, the material in Board Exhibit 3 was also posted by a student on Instagram, a more public site. This resulted in SB being approached by other students. SB's mother "furiously" informed Dr. West that SB had been approached by other students, and that SB had been identified on Instagram. (Tr. 126-127). In addition, Ms. Allen's supporter, student KB admitted that she confronted SB, and testified that other students had also confronted SB[6]. (Tr. 224). Because of his concerns for SB's safety resulting from the identification of SB's full name on social media, Dr. West transferred SB to another school. (Tr. 126-127,Board Ex.2). As a result, Dr. West recommended that tenure charges be brought against Ms. Allen. (Tr. 58-60). Dr. West testified:

> The tenure charges came up more so because of the fact - - when you look at the fact that the kid was threatened, and then his name was out there and given out to the public for

[5] Ms. Allen's statement that it was not publicly known that SB lied fails to account for the fact that the December 5, 2018 incident had been corroborated by numerous witnesses.

[6] Several days after Ms. Allen was suspended, there was a student assembly during which KB spoke vociferously in support of Ms. Allen's. KB rose up on a chair, and as a result of this conduct, KB was suspended from school for three days. (Tr. 218-219).

somebody to retaliate against this kid. This was really where the tenure charges, we felt that it was just conduct unbecoming, almost inciting a riot by asking people to come out and support her, leave school to do that.

(Tr. 59).

Dr. West concluded that Ms. Allen's communications with students and parents on social media was a violation of the District's Social Media Policy. Policy 3283 states in pertinent part:

> Social Networking websites and other Internet-Based Social Media Electronic Communications Between Teaching Staff Members and a Student
>
> a. A teaching staff member is prohibited from communicating with any student through the teaching staff member's personal social networking website or other Internet-based website. Communications on personal websites are not acceptable between a teaching staff member and a student.
>
> b. A teaching staff member shall not accept "friend" requests from any student on their personal social networking website or other Internet based social media website. Any communication sent by a student to a teaching staff member's personal social networking website or other Internet-based social media website shall not be responded to by the teaching staff member and shall be reported to the Principal or designee by the teaching staff member.
>
> c. If a teaching staff member has a student(s) as a "friend" on their personal social networking website or other Internet-based social media website they must permanently remove them from their list of contacts upon Board adoption of this Policy.
>
> d. Communication between a teaching staff member and a student through social networking websites or other Internet-based social media websites is only permitted provided the website has been approved by the Principal or designee and all communications or publications using such websites are available to every student in the class; every member of the co-curricular activity and their parents; and the Principa1 or designee.

(Department Ex. B-22, East Orange Board of Education Policy 3283-Electronic

Communications Between Teaching Staff Members and Students, Adopted October 14, 2014). Ms. Allen testified that she was not given training concerning this policy, and that she never acknowledged receiving the policy. (Tr. 290).

D. Other charges against Ms. Allen

As noted above, during the 2018-2019 school year, Ms. Allen was the Sophomore class advisor. While the investigation of the December 5, 2018 incident was ongoing, Ms. Allen had a dispute with Dr. Estrict concerning Dr. Estrict's refusal to allow Ms. Allen to conduct a meeting of the Sophomore class. Ms. Allen testified that a CHS vice-principal had given her permission to conduct that meeting. (Tr. 243-244). In a series of emails from January 29 to January 31, 2019, Ms. Allen pressed her case for an additional meeting to both Dr. Estrict and Dr. West.

As the email exchange between Ms. Allen and Dr. West and Dr. Estrict continued, Ms. Allen became increasingly angry, and in addition to other statements, Ms. Allen called Dr. West "unbecoming, unprofessional, unfair, nepotistic, disrespectful and demeaning." (Board Ex.5).

In response, Dr. West directed Ms. Allen to "cease and desist with your disrespectful, combative and confrontational behavior immediately. It is conduct unbecoming." Ms. Allen did not respond to this final email sent by Dr. West. Dr. West indicated that he would not have pursued tenure charges against Ms. Allen based on those emails alone.[7] (Tr. 59).

[7] Dr. West testified: "I have to say that [the tenure charges] came up not because of the situation with the emails, of her being disrespectful and that kind of thing, had nothing to do with it, because I left that alone." (Tr. 59).

However, the District included a recitation of this email exchange in charging Ms. Allen with unbecoming conduct.

POSITIONS OF THE PARTIES

A. The District's Position

The District contends that the only acceptable penalty for Ms. Allen's actions is termination. In reviewing the record evidence, the District concedes that a tenured public-school employee cannot be dismissed "except for inefficiency, incapacity, unbecoming conduct, or other just cause." (District's Brief at 17, citing *N.J.S.A.* 18A:6-10; *In re Young,* 202 N.J. 50, 66 (2010)).

The District maintains that Ms. Allen behaved in a manner unbecoming to her position and was insubordinate. Having reviewed the standards for finding that a teacher engaged in unbecoming conduct or was insubordinate, the District primarily relies on two cases: *In re Tenure Hearing of Roth,* No. A-5742-11T2, 2013 N.J. Super. Unpub. 2013 WL 3284128 (App. Div. July 1, 2013) and *In re Harriman,* No. A-1386-12T3, 2014 N.J. Super Unpub. 2014 WL 940943 at *1 (App. Div. Mar. 12, 2014). The Roth case concerned a verbal exchange between the teacher and a special education student in which the teacher threatened to "kick the ass" of the student. The ALJ recommended that the teacher be suspended, but the Commissioner decided to terminate the teacher's tenure. The Commissioner concluded that the mitigating factors in the record did not outweigh the gravity of the teacher's conduct. (District's Brief at 19-21).

Similarly, in *In re Harriman,* the Appellate Division determined that the

Commissioner appropriately deprived a teacher of tenure where that teacher was found to have acted inappropriately towards the executive director of the New Jersey State Interscholastic Athletic Association, defied administrative directives, and violated school policy regarding contacting parents. (District's Brief at 22-24).

The District contends that its decision to bring tenure charges against Ms. Allen was consistent with the holdings in both *In re Roth* and *In re Harriman.* The District maintains that Ms. Allen routinely and willfully disregarded the directives of her superiors.

The District notes that following the February 1, 2019 meeting during which the results of the investigation of the December 5, 2018 incident were shared with Ms. Allen, and Dr. West both suspended and transferred Ms. Allen, Dr. West instructed Ms. Allen to refrain from discussing the matter with students and parents. (District's Brief at 24, citing District's Ex. B-4, Tr. 131-133, 182-183). The District notes that despite these warnings, Ms. Allen communicated with both parents and students through social media to organize a protest on her behalf. The District argues that this communication violated the District's Social Media Policy. The District posits that it could not function effectively if teachers routinely protested every personnel decision outside of the formal grievance procedure.

The District argues that Ms. Allen's most egregious conduct concerned her violation of Dr. West's directive not to discuss the December 5, 2018 incident and her disclosure of SB's name on social media. The District contends that Ms. Allen jeopardized the safety of SB. The District notes that once SB's name was disseminated on social media, SB reported to the District that he felt unsafe and had been approached by other students. The fact that other students had approached SB was in part confirmed by the testimony of student KB. This prompted SB's mother to demand that SB be transferred

from CHS.

The District points out that it applied progressive discipline to Ms. Allen and maintains that despite Dr. West's efforts to curb and correct Ms. Allen's behavior, the District had no choice but to bring tenure charges against Ms. Allen.

The District also points to Ms. Allen's emails regarding Dr. Estrict's decision to deny Ms. Allen's request to conduct a Sophomore class meeting. The District quotes Ms. Allen's emails and concedes that by themselves they do not constitute sufficient grounds for termination. The District argues, however, that these emails demonstrate Ms. Allen's lack of respect for her superiors.

The District also cites Ms. Allen's overall disciplinary record as justifying her dismissal.

B. Respondent's Position

Ms. Allen contends that the District has not met its burden of proof in order to justify sustaining the tenure charges against her. (Respondent's Brief at 37-38, citing *In re Fulcomer,* 93 N.J. Super. 404 (App. Div. 1967); *IMO the Tenure Hearing Between the South Hackensack Board of Education and Christopher Masullo,* Dkt. No 1-17 (April 8, 2017)).

1. Counts 1-4

Initially, the Respondent analyzes Counts 1-4 of the charge concerning the emails sent by Ms. Allen to Drs. West and Estrick regarding her request that she be permitted to have a meeting with the Sophomore class. Ms. Allen contends that she presented compelling reasons for requesting a second meeting and characterizes at least her initial email as having "clearly explained her reasons for wanting the meeting." (Respondent's

Brief at 39). The Respondent argues that she had a first amendment right to criticize the decisions of the administration. (Respondent's Brief at 39, citing *Green Township Education Association v. Rowe,* 382 N.J. Super. 525, 534 (App. Div. 2000)).

The Respondent notes that Dr. West informed the Respondent that she could file a grievance and that, once Dr. West directed her to "cease and desist," the Respondent complied with Dr. West's directive. Therefore, the Respondent contends, that there was no insubordination, because the Respondent obeyed Dr. West's directive and did not schedule the Sophomore class meeting.

Further, the Respondent states that Dr. West recognized that the emails underlying Counts 1-4 could not form the basis of a tenure charge. The Respondent asks that these four counts be dismissed.

2. Count 5

The Respondent next argues that the Board has failed to prove the allegations of Count 5. Count 5 concerns Ms. Allen's behavior at the February 1, 2019 meeting and alleges that Ms. Allen engaged in "in a manner that constitutes insubordination, conduct unbecoming, and violate[d] multiple Board policies." The Respondent argues that the Board policies that were purportedly violated were never specified.

The Respondent analyzes the memorandum prepared by Dr. West following the February 1, 2019 meeting. The Respondent argues that Dr. West seemed most aggrieved by the fact that Ms. Allen interrupted him while he was talking. The Respondent posits that this cannot be unexpected in the context of a labor-management meeting, where Ms. Allen was facing the possibility of discipline,

The Respondent also notes that Dr. West was concerned that Ms. Allen was

upset that he was going to transfer Ms. Allen away from CHS. The Respondent notes, however, that Ms. Allen's position was vindicated by PERC. PERC found that Ms. Allen was improperly transferred from CHS[8]. (Respondent's Ex. 17).

The Respondent also takes issue with Dr. West's challenge of Ms. Allen's assertion that the issues concerning the December 5, 2018 incident were resolved at the January 11, 2019 meeting which was attended by SB and SB's mother. The Respondent characterizes Ms. Allen's position as "not unreasonable." (Respondent's Brief at 42). Other items contained in Dr. West's notes state that Ms. Allen refused to sign an acknowledgement of receipt of a letter of discipline, and that she predicted parents would support her at an upcoming meeting of the Board. The Respondent characterizes Ms. Allen's actions and statements as permissible behavior.

The Respondent also points out that, at the end of the February 1, 2019 meeting, Dr. West states in his notes that he provided Ms. Allen with the following Board Policies: 1) 3281 Inappropriate Staff Conduct; 2) 3351 Healthy Workplace Environment; 3) Use of Electronic Communication and Recording Devices; and 4) Civility Policy. The Respondent notes that Dr. West did not provide Ms. Allen with a copy of the Social Media policy.

The Respondent also argues that Dr. West did not order Ms. Allen to refrain from talking to students and parents about her suspension and transfer, but only "requested" that Ms. Allen refrain from such discussions. Therefore, the Respondent contends Ms. Allen was not insubordinate nor had she engaged in conduct unbecoming.

3. Count 6

[8] As noted above, PERC made no finding concerning the propriety of Ms. Allen's suspension.

The Respondent next argues that the Board presented no competent evidence that Ms. Allen incited student misconduct in the form of encouraging students to cut class in order to participate in a school-wide student walkout. The Respondent argues that none of the social media postings introduced into evidence nor any testimony contained references to cutting class or urging students to participate in a walkout.

4. Count 7

The Respondent contends that Count 7 concerning communications on social media should also be dismissed. The Respondent maintains that Ms. Allen was never trained on Policy 3283 governing social media. The Respondent points out that Dr. Estrict testified that certain policies are deemed so important that teachers are asked to sign acknowledgements of receipt. (Respondent's Brief at 45, citing Tr. 156). The Respondent notes that there is no evidence that Ms. Allen ever signed for Policy 3283.

While conceding that Board policies are available on the District's website, the Respondent notes that there are hundreds of policies on the website and maintains that it is unreasonable for the District to expect that teachers would be familiar with all of the policies uploaded to the website without specific training. The Respondent reasons that an employer cannot demonstrate that it had just cause to discipline an employee for violating a policy unless it can also establish that the employee had knowledge of the policy. (Respondent's Brief at 39, citing Elkouri and Elkouri, *How Arbitration Works,* 7th Ed. at 15-70)).

The Respondent also contends that Dr. West and Dr. Estrict misidentified the platforms utilized on the Social Media postings contained in Board Exhibit 3. The Respondent notes that Ms. Allen was never interviewed about the screen shots posted

on social media. Although Ms. Allen admits that she identified SB in the Facebook Messenger conversation, the Respondent denies that she had anything to do with the Instagram posting.

Regarding the content of the social media posts, the Respondent contends that there is nothing inappropriate in her urging students to support her cause by calling the mayor. The Respondent contends that Ms. Allen was not suggesting that students engage in wrongful conduct, and that, at most, she referred students to KB's mother.

5. Count 8

The Respondent recognizes that Count 8, in which she is accused of "jeopardiz[ing] the safety of student SB by way of releasing his name to another student with the intent to have him harassed, intimidated, bullied, or worse, as retaliation for her suspension" is the most serious charge against her. The Respondent admits that she gave SB's name to Student PS, but did so only after PS expressed a desire to report that SB lied to school administrators concerning the December 5, 2018 incident.

The Respondent notes that the hearing in this proceeding was the first time that she had the opportunity to explain what happened, because neither Dr. West, Dr. Estrict or other investigators ever interviewed her about that social media posting. The Respondent contends that Dr. West and Dr. Estrict ascribed speculative meanings to particular words in the social media postings, and that it was inappropriate for these administrators to impute violent tendencies to Student PS.

The Respondent describes her identification of SB as a "momentary lack of judgment" but contends that there is no evidence that she wanted to have SB

"harassed, intimidated, bullied or worse." Ms. Allen states that during her conversation with Student PS she told Student PS that she heard from Student K "that the boy told her that he lied about the incident just to get me in trouble." (Respondent's Brief at 51). The Respondent vigorously argues that she disclosed SB's name to Student PS in order to allow the students supporting her to report the information she had received that SB lied about the December 5, 2018 incident. The Respondent argues that there is no credible evidence that SB was confronted by any students after SB's name was posted. Respondent's Brief at 53).

The Respondent characterizes the evidence that SB reported being harassed to his mother, who in turn reported it to Dr. West as "double hearsay." The Respondent insists that it was necessary to have SB's lie reported. The Respondent characterizes her efforts to explain the December 5, 2018 incident to the administration as falling on deaf ears. The Respondent also notes, that at the time of her suspension and transfer, she was directed not to report to any "District facility." She therefore posits that as such she had no way of directly reporting the fact that SB's prior statements were inaccurate.

The Respondent also maintains that she was not aware of and did not encourage PS to post SB's name on Instagram. Ms. Allen contends that the first time that she became aware that SB's name had been posted on Instagram was when she was served with the tenure charges. Therefore, Ms. Allen maintains, it was impossible for her to report to anyone that SB's name was publicly posted. The Respondent also notes that neither SB nor SB's mother testified.

Finally, the Respondent argues that the Board did not merely allege that Ms. Allen acted improperly by releasing SB's name, but that she did so with the intent to have SB

harassed, intimidated or bullied. The Respondent argues that in order for this charge to be sustained very element of the charge must be proven, and therefore Count 8 should be dismissed.

6. Discussion of Penalty

The Respondent contends that she has been a "very successful educator inside and outside the classroom." (Respondent's Brief at 53). The Respondent notes that I had the opportunity to observe Ms. Allen's passion and expertise for improving the lives of her students.

The Respondent points to the allegations of Counts 1-4 concerning Ms. Allen's efforts to schedule a class meeting as evidence of her passion. The Respondent also points to the devotion of students to Ms. Allen, such as KB who were devastated by the decision to transfer and suspend Ms. Allen.

The Respondent concedes that Ms. Allen has been previously disciplined, and that the allegations contained in Count 8 are the most serious. However, the Respondent reiterates her contention that there was no evidence that she ever intended to harass or otherwise harm SB.

Finally, the Respondent maintains that, if I find there is just cause for discipline, the penalty should not be removal. The Respondent notes that if Ms. Allen is removed from tenured employment it could be devastating to her career.

DISCUSSION

A. The Legal Standard

The Education Tenure Act governing teacher tenure provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this 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.

N.J.S.A. 18a:6-10.

Tenure is a "statutory right that may not be forfeited or waived." *Spiewak v. Rutherford Bd. of Educ.,* 90 N.J. 63, 77 (1982). Tenure is designed to protect employees from dismissal "for unfounded, flimsy or political reasons". *Wright v. Bd. of Educ. Of E. Orange,* 99 N.J. 112, 118 quoting *Zimmerman v. Newark Bd. of Educ.,* 38 N.J. 65, 72 (1962). Although an employee's lack of fitness may be "demonstrated by a series of incidents" it is well established that a single "flagrant" act may be sufficient to remove a tenured teacher from his or her position. *In re Tenure Hearing of Harriman,* No. EDU 3510-12 (Initial Decision Aug. 31, 2102), *adopted,* No. 408-12 (Comm'r Oct. 12, 2012) citing, *Redcay v. State Bd. of Educ.,* 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326, 327 (E. and A. 1944).

In order to find that an employee engaged in conduct which merits removal, that

employee is "entitled to an evaluation of the conduct in terms of its relationship to the nature of the office itself, and in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question." *Sch. Dist. Of Parsippany-Troy Hills v. Hess,* 97 N.J.A.R. 2D (EDU) 34, 45 (citations omitted). Charges of unbecoming conduct are determined on a "case-by-case basis." *Santiago v. Bd. of Educ. Of Elizabeth,* No. EDU 7135-98 (Initial Decision Aug. 16, 2000) (slip op. at 4), *aff'd sub nom. In re Tenure Hearing of Santiago,* No. 330-00 (Comm'r Oct. 2, 200d), *aff'd o.b.,* No. 54-00 (State Bd. Mar 9, 2001).

In *In re Tenure Hearing of Fulcomer,* 93 N.J. Super. 404 (Super. Ct. App. Div. 1967), the Court established a number of factors that should be considered when deciding whether a teacher should be dismissed for unbecoming conduct. Those factors include: 1) the nature and gravity of the offenses under all the circumstances involved; 2) the teacher's attitude – i.e. whether the acts were premeditated, cruel, or done with intent to punish; 3) any evidence as to provocation, extenuation or aggravation. In *Fulcomer,* the Court recognized that there may be circumstances which should be considered which may mitigate any penalty to be imposed on a respondent teacher. These factors include: 1) the teacher's ability, record and length of service[9]; 2) the teacher's disciplinary record; and 3) the "impact of the penalty on the [teacher's] career, including the difficulty which would confront him as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in the State."

[9] *Fulcomer* involved allegations of corporal punishment. The Court noted that the Respondent's "teaching record was good and his teaching ability unquestioned. [The Respondent] had not been disciplined in any manner by the Board prior to the date of the incidents" in question.

B. The *Fulcomer* Factors Applied to Ms. Allen

The allegations against Ms. Allen reflect discrete areas of behavior and will be discussed *seriatim*.

1. Counts 1-4

Counts 1-4 concern the series of increasingly vituperative emails that Ms. Allen sent to both Dr. Estrict and Dr. West following Dr. Estrict's denial of Ms. Allen's request to have a Sophomore class meeting. Taken as a group, the emails can only be characterized as intemperate. Nevertheless, I conclude these Counts have not been sustained.

First and most importantly, Dr. West himself testified that he would not have brought tenure charges against Ms. Allen based on these emails alone. Second, as the Respondent argues, the emails exemplify Ms. Allen's passion for her students and her role as Sophomore class advisor. Third, while Ms. Allen could have used less strident language in responding to Dr. West and Dr. Estrict, she was clearly arguing in good faith for her students. Finally, when Dr. West directed Ms. Allen to "cease and desist" she did so. To give Ms. Allen the benefit of the doubt, I will not sustain the tenure charges contained in Counts 1-4 of the Charge.

2. Count 5

Count 5 states:

> On or about Friday, February 1, 2019 at 9:00 AM, during a meeting with Superintendent of Schools Dr. Kevin West, S.A. behaved in a manner that constitutes insubordination, conduct unbecoming, and violates multiple Board policies.

This count arises from Ms. Allen's behavior at the February 1, 2019 meeting with Dr. West where Dr. West informed Ms. Allen that she would be both suspended and

transferred. While Ms. Allen's behavior again may have been intemperate, I conclude that Ms. Allen's behavior did not rise to the level of conduct unbecoming or insubordination.

As the Respondent notes, this conversation took place in the context of a labor management meeting in which Ms. Allen was facing significant discipline. Arbitrators "are reluctant" to uphold discipline for improper behavior in this type of setting, because it unduly interferes with the employee's ability to defend herself. *See,* Elkouri and Elkouri, *How Arbitration Works,* 8th Ed. at 5-74.

In addition, as the Respondent contends, much of Dr. West's dissatisfaction arose from the fact that Ms. Allen was protesting her removal form CHS. As noted above, Ms. Allen's position was correct, and the District violated *N.J.S.A.* 34:12A-27 when it transferred Ms. Allen for disciplinary reasons.

Also, to the extent that Dr. West concluded that Ms. Allen violated his orders directing Ms. Allen not to speak about this incident the Respondent is correct in arguing that it interferes with her right to mount a defense. However, Ms. Allen's violation of Dr. West's direction not to disclose SB's name will be discussed below.

Accordingly, for the foregoing reasons, Count 5 is dismissed.

3. Count 6

Count 6 provides:

> During the period of her suspension (between February 1 and February 19, 2019) S.A. violated Board Policy by way of inciting student misconduct in the form of cutting class for a school wide protest on her behalf, i.e. a "walk-out", at [CHS]

Count 6 alleges that Ms. Allen attempted to incite student misconduct by

encouraging students to cut class. While there is much evidence in the record to show that Ms. Allen was in contact with both students and parents during her suspension, and that she urged students and parents to protest at Board meetings and to contact the Mayor of East Orange, there is nothing in the record that supports the conclusion that Ms. Allen urged students to cut class or to walk out.

It is true that at a meeting of the Sophomore class held after Ms. Allen was suspended, KB stood on chair and demanded that Ms. Allen be returned to CHS. KB testified that this was a spontaneous gesture on her part. (Tr. 218-219).

Accordingly, there is no evidence that Ms. Allen encouraged a student walkout or any other form of student misbehavior. Therefore Count 6 is dismissed.

4. Count 7

Count 7 provides:

> During the period of her suspension (between February 1 and February 19, 2019) S.A. violated Board Policy 3283 by way of using social media to inappropriately communicate with students.

Count 7 alleges that Ms. Allen violated the Board's policies governing social media. Board Policy 3283 contains clear and precise directions to teachers that they are not to "accept 'friend' requests from any student on their personal social networking website or other Internet based social media website." There is no doubt that Ms. Allen's communications with PS and other students on Facebook Messenger violated this common-sense policy. It also exemplifies poor judgment on Ms. Allen' part to actively seek student support.

However, there is no evidence that the District ever provided Ms. Allen with the contents of this policy, beyond referring her to the District's website which contains

voluminous policy provisions. Even when Dr. West concluded the February 1, 2019 meeting and handed certain policies to Ms. Allen, Board Policy 3283 was not among them.

It is a fundamental principal of just cause that before discipline may be imposed, the employee should be aware both of the rule and the penalties that may be imposed. J. Grenig & R. Scanza; *Fundamentals of Labor Arbitration,* § 7.03, citing *Grief Bros. Cooperage Corp.* 42 LA 555 (1964). There is no evidence that Ms. Allen was ever informed about the contents of Board Policy 3283, and therefore no evidence that Ms. Allen was instructed regarding restrictions on social media contacts. Accordingly, Count 7 must be dismissed.

5. Count 8

Count 8 provides:

> S.A. jeopardized the safety of student S.B. by way of releasing his name to another student with the intent to have him harassed, intimidated, bullied, or worse, as retaliation for her suspension.

Both the District and the Respondent acknowledge this is the most significant charge in this proceeding. There is no dispute that Ms. Allen clearly identified the full name of SB to Student PS. While this identification purportedly occurred on Facebook Messenger which is supposed to be for private communications, Student PS or some other student then identified SB on the more widely disseminated Instagram platform where other students could learn SB's full name. The result of identifying SB is that SB's mother became fearful for SB's safety and requested that SB be SB's transferred from CHS to another school.

The Respondent describes her identification of SB as a "momentary lack of

judgment" and, in part, justifies her disclosure of SB's name as necessary so that students could report the fact that SB lied about the events of December 5, 2018 resulting in Ms. Allen's suspension and transfer. I find this testimony to be incredible.

As noted above, I ruled in this proceeding that both sides were going to have to abide by the District's decision to suspend Ms. Allen for two weeks. That meant that both the District and the Respondent were precluded from relitigating the December 5, 2018 incident. For tactical reasons, both parties attempted to evade that ruling. However, both sides are precluded from asserting that the events of December 5, 2019 did not occur as set forth in the Charge. It strains credibility for Ms. Allen to now assert that she disclosed SB's name because SB admitted to another student that he was lying about the December 5, 2018 incident in which Ms. Allen was found to have uttered profanity and threats to SB. Ms. Allen was intimately involved in the December 5, 2018 incident and its contours were confirmed by both student and teacher witnesses.

If Ms. Allen wanted to make an argument that SB lied, she should have grieved her two-week suspension in February of 2019, and not provide a post-hoc rationalization for disclosing SB's name in this proceeding. The most that Ms. Allen can glean from the record is KB's testimony that SB told her that: "he felt bad that [Ms. Allen] was transferred. He didn't mean for it to be blown out of proportion, and it was a misunderstanding." (Tr. 219-220). There is no evidence that SB admitted that he lied to get Ms. Allen in trouble or that he had any motivation to do so.

The Respondent also argues that there is no evidence that Ms. Allen intended to harass, intimidate or bully SB, and that there was no evidence that SB suffered any consequences as a result of his name being disclosed. However, KB testified that prior

to the posting both she and at least one other student that she knew about approached SB. It is also clear that, as soon as SB's mother learned that SB's name appeared on social media that she contacted Dr. West and arranged for SB's transfer from CHS. I conclude that by disclosing SB's name, Ms. Allen intended to put undue pressure on SB, a ninth-grade student and to have SB intimidated.

In addition, Ms. Allen clearly violated Dr. West's injunction not to discuss this case with parents or students and was thus insubordinate. I am sympathetic to Ms. Allen's efforts to rally students and parents on her behalf, and I dismissed Counts 5 and 6 because the allegations in those Counts amounted to undue interference with Ms. Allen's speech and due process rights. Nevertheless, involving students in her defense showed poor judgment. Once Ms. Allen disclosed SB's name in defiance of Dr. West's order, Ms. Allen crossed a line and is guilty of the allegation of insubordination and conduct unbecoming.

Accordingly, I sustain Count 8.

6. The Penalty

Having concluded that the District has met its burden in proving the allegations contained in Count 8, I next must determine the appropriate penalty. In this case, the District seeks the ultimate penalty of dismissal. Even where disciplinary charges are sustained, Arbitrators are empowered to impose a range of penalties. *See, e.g.; IMO the Tenure Hearing Between the South Hackensack Board of Education and Christopher Masullo,* Dkt. No. 1-17 (April 8, 2017). The record must be analyzed to determine if there are enough mitigating factors to reduce the ultimate penalty of dismissal. *Id.*

In weighing the overall record, I am forced to conclude that Ms. Allen should be terminated. I recognize that Ms. Allen is an effective teacher who, in the course of her career, has provided great service to the District, her students and her community, and who has inspired a lot of passion and loyalty. Nevertheless, there are aspects of her record that are extraordinarily troubling.

She has a record of previous discipline for using "inappropriate language, interfering in the instruction of students, and disrupting. . . the learning process." (Board Ex. 18). This discipline administered in 2015 resulted in the loss of a salary increment and placement on probation. As a result of the December 5, 2018 incident, Ms. Allen was suspended for two weeks for using truly horrific language in speaking to SB. Dr. West consciously applied the principles of progressive discipline in Ms. Allen's case.

Unlike the Respondent in *Masullo, supra*, I do not find that Ms. Allen has expressed any remorse for her actions. As noted above, Ms. Allen testified that she was justified in disclosing SB's name so that students could report SB to school authorities for lying. Ms. Allen apparently was not concerned for SB's safety, nor did she feel obligated to follow Dr. West's direction not to identify SB. Nor at any time did Ms. Allen acknowledge her own responsibility for her actions.

In addition, although I have dismissed Charges 1-4 concerning emails sent by Ms. Allen to Dr. West and Dr. Estrict, the contents of those emails were clearly intemperate and do not support a reduction in the penalty of dismissal.

I am also mindful of the fact that if Ms. Allen is to be terminated, there is a very strong likelihood that her license to teach within the state of New Jersey will be endangered. Nevertheless, in light of all the circumstances of this case and Ms. Allen's

overall disciplinary record, it is my view that she can no longer be an effective teacher in the East Orange School District.

Based on the above, I render the following:

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ") hereby issues and AWARDS as follows:

For the reasons set forth in this Decision and Award, the Arbitrator finds

1. **The EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY, NEW JERSEY has not proven by a preponderance of the evidence the allegations contained in Counts 1, 2, 3, 4, 5, 6, and 7 of the Charges preferred against the Respondent Sharonda Allen;**

2. **The EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY, NEW JERSEY has proven by a preponderance of the evidence the allegations contained in Count 8 of the Charges preferred against Respondent Sharonda Allen and has proven that the Respondent has engaged in conduct unbecoming of a teacher, and was insubordinate;**

3. **The penalty of dismissal is upheld.**

Dated: December 27, 2019

Ira Cure

State Of New York)
)
County of Kings)

On this 27th day of December 2019 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.

Notary Public

PIYUSH B. SONI
Notary Public, State of New York
No. 01SO6038647
Qualified in Kings County
Commission Expires March 20, 2022

PURSUANT TO THE REFERRAL BY THE
COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE CHARGES

ENGLEWOOD BOARD OF EDUCATION Petitioner vs. JOSEPH ARMENTAL Respondent	: BEFORE THE COMMISSIONER OF : EDUCATION OF NEW JERSEY : AGENCY DKT. NO. 25-1/18

ENGLEWOOD BOARD OF EDUCATION Petitioner vs. LUIS SANCHEZ Respondent	: BEFORE THE COMMISSIONER OF : EDUCATION OF NEW JERSEY : AGENCY DKT. NO. 26-1/18

ENGLEWOOD BOARD OF EDUCATION Petitioner vs. VENUS ROSE Respondent	: BEFORE THE COMMISSIONER OF : EDUCATION OF NEW JERSEY : AGENCY DKT. NO. 27-1/18

ENGLEWOOD BOARD OF EDUCATION Petitioner vs. NICOLE CARTWRIGHT Respondent	: BEFORE THE COMMISSIONER OF : EDUCATION OF NEW JERSEY : AGENCY DKT. NO. 28-1/18

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

DECISION ON MOTIONS TO DISMISS

APPEARANCES:

On behalf of Joseph Armental
Andrew L. Schwartz, Esquire
Robert M. Schwartz, Esquire
Schwartz Law Group, LLC

On behalf of Luis Sanchez, Venus Rose and Nicole Cartwright
Sheldon H. Pincus, Esquire

On behalf of Englewood Board of Education
Dennis McKeever, Esquire
Marcie L. Mackolin, Esquire
Joseph F. Mackolin, Esquire
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC

SUMMARY OF PROCEDURAL HISTORY BEFORE EVIDENTIARY HEARINGS

On February 16, 2017, the Englewood Board of Education ("Board", "Petitioner", or "District") approved a Resolution placing ten (10) employees, including Respondents herein on administrative leave until the completion of an internal investigation regarding, *inter alia* transcript irregularities in the School Student Information System. Prior to July 1, 2016, the Board utilized the Power School Student Information System. As of July 1, 2016, the Board migrated data to a new system, Genesis Student Information System.[1] (B-11)

After the investigation, on September 20, 2017, the Board filed a consolidated set of Tenure Charges against eight (8) employees, including Respondents. The Commissioner of Education ("Commissioner") dismissed the charges, Agency Docket Number 216-

[1] Ten (10) Board Exhibits were admitted into Evidence. They are not numbered in sequence. Testimony is identified by the Hearing date, followed by page/line.

9/17, declaring them "procedurally defective", sealing all records on November 9, 2017 because identifying student information was included in support of the charges. The dismissal was without prejudice to refile.

On January 29, 2018, Petitioner filed separate charges against each individual named in Exhibit B-11 who remained in its employ, including Guidance Counselors, Nicole Cartwright ("Cartwright"), Venus Rose ("Rose") and Louis Sanchez ("Sanchez"), along with Vice Principal Joseph Armental ("Armental")

The charges against certificated Guidance Counselor Sanchez consist of one hundred and forty-two (142) separate paragraphs (47 pages). (Agency Docket No. 26-1/18) The charges against certificated Guidance Counselor Rose consist of one hundred and sixteen (116) separate paragraphs (38 pages). (Agency Docket No. 27-1/18) The charges against certificated Guidance Counselor Cartwright consist of one hundred and fifty-one (151) separate paragraphs (52 pages) (Agency Docket No. 28-1/18) Tenure charges against Armental, a certificated staff member holding the title of Assistant Principal at Dwight Morrow High School ("DMHS") consist of one hundred and forty (140) separate paragraphs (49 pages). (Agency Docket No. 25-1/18)

On January 29, 2018, the District also filed separate charges against Noel Gordon, Director of Guidance, Testing and Evaluation. Those charges, Agency Docket Number 24-1/18 were dismissed on August 13, 2018, by Arbitrator Joseph Licata for failing to comply with specific requirements of *N.J.A.C. 6A:3-5.1(b)(1)* and failing to adhere to the Commissioner's prior directives. Again, the dismissal was without prejudice to refile.

On January 25, 2019, the Board refiled Tenure Charges against Dr.

The Tenure Charges against all four (4) Respondents assert unbecoming conduct, incompetence, and other just cause for a series of alleged actions violating the Professional Conduct of a Public School Administrator and detrimentally affecting public respect for the District. Each Respondent filed a Motion to Dismiss all charges before Arbitrator Joseph Licata, Esq.[3]

On August 1, 2018, Arbitrator Licata denied each Motion to Dismiss, with the following clarification,

> "This matter shall proceed to a hearing on the charges of incompetency, unbecoming conduct and/or other just cause to determine whether (1) the Board has demonstrated that Respondent engaged in willful, knowing and/or fraudulent activities which had a deleterious impact on students and/or the school district as a whole; and (2) if so, whether the penalty of removal from employment is appropriate under the factors traditionally relied upon, i.e., the gravity of the offense, prior record of employment, including discipline, if any and a consideration of any other relevant aggravating or mitigating factor."

COLLATERAL MATTERS

A. *Conscientious Employment Protection Act, N.J.C.A. 34:19-1 et seq.* ("CEPA")

In September 2018 Guidance Counselors Rose, Sanchez and Cartwright filed separate civil actions, later consolidated, in Bergen County Superior Court alleging, *inter alia*, actions by Superintendent Robert L. Kravitz ("Superintendent" or "Kravitz") and the Board violated the *Conscientious Employment Protection Act*

Gordon, Agency Docket No. 25-1/19. On July 15,2019, the Undersigned granted Dr. Gordon's Motion to Dismiss.

[3] In March 2018, the Board changed its legal representation.

("CEPA") as articulated in *N.J.S.A. 34:19-1 et seq.*

In August 2018, Respondent Joseph Armental, along with other administrators effected by the Board's February 16, 2017 Resolution, B-11, also filed civil actions in Bergen County against the Board and Kravitz asserting, *inter alia*, a violation of CEPA.

The record in the instant consolidated matter is silent as to the status of these civil actions. Their existence, however, hindered attempts by the undersigned and Arbitrator Licata to resolve the Tenure Charges.

B. *Reduction in Force Effecting Joseph Armental.*

During the course of the tenure proceedings, by Resolution, on May 3, 2018, the Board abolished Joseph Armental's position of vice principal, effective July 1, 2018, "for reasons of economy or because a reduction in the number of pupils or of change in the administrative or supervisory organization of the district or other good cause...," *N.J.S.A.18A: 28-9. Reduction of force; power to reduce and reasons for reduction.*

Thereafter, Armental filed a timely Petition of Appeal with the Commissioner of Education questioning the reduction in force. Armental maintains tenure and seniority rights as a certificated Teacher of Math.[3]

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[3] There is no reference in this record as to the present status of this proceeding.

EVIDENTIARY HEARINGS

On May 7, 2019, the Hearing on the charges filed by the Englewood Board of Education against Respondents Armental, Sanchez, Rose and Cartwright commenced.[5] Between May 7, 2019 and June 12, 2019, twelve (12) hearing days were completed, the first eleven (11) of which were primarily focused on the direct (1½ days) and cross examination of the Superintendent.

In recommending the charges, Kravitz revealed his reliance upon an audit of student records of the Dwight Morrow High School graduating classes of 2015-2017 conducted by Pitbull Secure Technologies ("PST"), said audit approved by Board Resolution on December 15, 2016. (B-6) And, on February 16, 2017, within the same Resolution placing Respondents on administrative leave, Jamie Ciofalo, author of the PST report, was appointed Acting Director of Guidance. (B-11)

On day twelve (12) of the Hearing, June 12, 2019, the District offered Business Administrator/Board Secretary, Cheryl Balletto. On July 9, 2019, prior to the next scheduled day of hearing, the District held a special meeting to evaluate the tenure charges, supporting evidence, and Board Counsel's considered synopsis of the testimony provided thus far.

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5. Upon his request, the consolidated charges were removed from Arbitrator Licata. These matters were then transferred by the Bureau of Controversies and Disputes to the undersigned Arbitrator for hearing and decision.

Thereafter, on August 15, 2019, Petitioner adopted a Resolution withdrawing all pending tenure charges against Respondents, restoring their employment with a make whole remedy.

Upon notification of the Board's intention to withdraw all charges, the parties conferred. Five conference calls with the undersigned were also conducted to ensure any executed withdrawal complied with standards articulated by the State Board of Education *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions (SLD)* 842, 846. These standards have been codified in the New Jersey Administrative Code,*Controversies and Disputes, N.J.A.C. 6A:3-5.6 Withdrawal, settlement, or mooting of tenure charges.* Subsection (a)(3) expresses, "Consent of both the charged and charging parties," is required for this arbitrator to approve any withdrawal.

During the conference call of September 27, 2019, Respondents' counsel disclosed their clients would not "consent" to any withdrawal unless a certification executed by Kravitz contained language objected to by Petitioner. Consequently, on October 2, 2019, after conferring with the Office of the Commissioner, the undersigned informed the necessity of continuing the hearing.

The Hearing resumed on November 6, 2019 with the cross examination of Business Administrator/Board Secretary, Cheryl Balletto ("Balleto"). In reply to a query by Counsel to Guidance

Counselors Sanchez, Rose and Cartwright, she disclosed the present "cost" to the Board of the litigation was, "roughly up to $3 million." (November 6, 2019 5/21)

Upon conclusion of Balletto's testimony, determining not to introduce any additional witnesses, the Board rested. After impassioned argument, ten (10) Board exhibits were admitted.

Oral Motions to Dismiss

Prior to offering Respondents witnesses, their counsel requested the opportunity to present, orally, Motions to Dismiss. The statute, *Teacher Effectiveness and Accountability for the Children of New Jersey ("TEACHNJ") Act, P.L. 2012, c.26, N.J.S.A.*, delineates procedures regarding tenure hearings conducted by an arbitrator. *N.J.S.A.18A:6-17.1(c)* mandates," the arbitrator shall determine the case under the American Arbitration Association labor arbitration rules." *Rule 25, Order of Proceedings* of these rules provides, in pertinent part, "The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute...."

In consideration of this Rule, the undersigned granted Respondents' Counsels request to proffer Motions to Dismiss all tenure charges filed against their respective clients. The arguments presented were thoughtful, impassioned and comprehensive. Relating the tenure charges to the hearing record, both counsel asserted the Board failed in any way, to establish,

by a preponderance of the credible evidence, the bona fides of each charge. Counsel for the Guidance Counselors concluded, "This cries for dismissal, and I respectfully request that you do just that." (November 6, 2019, 88/12 to 14)

Respondents' Counsel were given leave to provide a written supplement to their oral argument; Board's counsel was granted leave to receive all position papers and the certified transcript prior to submitting Petitioner's reply. On November 22, 2019, by letter, Board's counsel set forth its response to the Motions to Dismiss. Therein, he conveyed,

> "The Board rested its case on November 6, 2019 after 13 days of hearing. The Board relies upon the proofs that were adduced during the hearing and already provided to yourself and the Respondents. The Respondents offered numerous reasons for the filing of the Motions to Dismiss in this matter; while the Board does not agree with those reasons as offered, it does not oppose the Motions and agrees that the tenure charges should be dismissed."

ANALYSIS

Prior to the enactment of TEACHNJ, tenure revocation proceedings were often lengthy and costly for all concerned. In the early 1990s, this arbitrator had the privilege of serving as an Administrative Law Judge/Temporarily Assigned and witnessed the effect of the lengthy process on a District, staff members, and their representatives.

The legislative intent of TEACHNJ for a cost efficient proceeding with due process protections was not met herein. The Board's February 16, 2017 Resolution, B-11, placing ten (10)

employees on administrative leave, assigning new administrators, contracting for six (6) Acting High School Counselors, and authorizing a post PST review by its author, initiated a tsunami of collateral harm to its employees placed on paid administrative leave, to the District's reputation, and to many of its high school students. The tenure charges and Board Resolutions were published by the media, ushering unwanted and, based upon the record evidence, unfounded negative notoriety upon Respondents.

After twelve (12) hearing days, the District was well served by its counsel who informed this record does not support a finding the District meet its burden to establish any of the tenure charges referred to the Commissioner.[6]

Accordingly, the Motions to Dismiss all tenure charges filed by the Englewood Board of Education against Respondents Joseph Armental, Louis Sanchez, Venus Rose and Nicole Cartwright, are, hereby, ***granted***.

AWARD

1. The Englewood Board of Education has not met is burden of proving the Tenure Charges against Joseph Armental as identified in Agency Docket No. 25-1/18.

2. Respondent Joseph Armental is entitled to a make whole remedy including reinstatement, back pay, and all other contractual and statutory entitlements.

3. The Englewood Board of Education has not met is burden of proving the Tenure Charges against Luis Sanchez as identified in

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[6] Arbitrator TeachNJ Decisions are posted online by the New Jersey Department of Education. In light of my Analysis, the charges have not been copied within this Decision.

Agency Docket No. 26-1/18.

4. Respondent Luis Sanchez is entitled to a make whole remedy including reinstatement, back pay, and all other contractual and statutory entitlements.

5. The Englewood Board of Education has not met is burden of proving the Tenure Charges against Venus Rose as identified in Agency Docket No. 27-1/18.

6. Respondent Venus Rose is entitled to a make whole remedy including reinstatement, back pay, and all other contractual and statutory entitlements.

7. The Englewood Board of Education has not met is burden of proving the Tenure Charges against Nicole Cartwright as identified in Agency Docket No. 28-1/18.

8. Respondent Nicole Cartwright is entitled to a make whole remedy including reinstatement, back pay, and all other contractual and statutory entitlements.

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: 12/30/19

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

COUNTY OF CAMDEN :

STATE OF NEW JERSEY :

I CERTIFY that on 12-30-19 CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person :

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

DATED: 12-30-19

Lynda A Hillpot
NOTARY PUBLIC

Lynda A Hillpot
Notary Public
New Jersey
My Commission Expires 7-2-24
No. 50108025

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Helen Tavakolzadeh:

IRVINGTON BOARD OF EDUCATION

Petitioner,

- and -

HELEN TAVAKOLZADEH

Respondent.

Agency Dkt No. 226-8/19

CORRECTED
DECISION APPROVING
SETTLEMENT AGREEMENT

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Respondent:
Colin M. Lynch, Esq.
Craig Long, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

For the Petitioner:
Ronald Hunt, Esq.
Hunt, Hamlin & Ridley

On August 29, the Irvington Board of Education [the "Petitioner"] filed tenure charges of inefficiency with the State of New Jersey Department of Education against Helen Tavakolzadeh [the "Respondent"], a teacher employed by the

Petitioner. On September 6, 2019, Respondent answered the charges and filed a Motion to Dismiss and/or for Summary Judgement. On October 8, 2019, Petitioner filed a response to that Motion. On October 28, 2019, the charges were referred to me by the Director of the Bureau of Controversies and Disputes, Department of Education, for a hearing and decision.

On November 11, 2019, I held a pre-hearing conference at which representatives of the Irvington Board of Education and Ms. Tavakolzadeh met with the arbitrator. At that time, the parties entered into settlement discussions and thereafter reached a Settlement Agreement resolving the charges brought against Ms. Tavakolzadeh. The terms of settlement were approved by both Respondent and Petitioner by December 19, 2019.

The terms of settlement provide that Petitioner agrees to withdraw and rescind the tenure charges, against Respondent and Respondent shall resign effective March 1, 2020. Respondent shall be paid her salary from September 1, 2019 through February 28, 2020 and will forfeit any sick or personal leave days. Respondent will be responsible for 100 percent of the cost of her health insurance premium for January 1 through February 28, 2020 and agrees to resign immediately in the event she becomes employed and eligible for full medical benefits prior to February 28, 2020. In that event, the Board's obligation to pay her salary and provide health benefits shall end.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent. The settlement will allow both parties to move forward without using valuable educational time as well as the avoidance of protracted and costly proceedings at the public's expense. The Respondent's determination to tender her resignation in exchange for a monetary settlement will allow the Board to continue to provide a thorough and efficient education to the Board's students. I believe that the settlement terms properly balance all of the parties' interests and provide a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding.

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: December 23, 2019
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth }ss:

On this 23rd day of December, 2019, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Gretchen L Boone

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

353-19

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of

LAURA AMICO

and

SCHOOL DISTRICT OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY

Agency Dkt No. 264-9/19

Walt De Treux, Esq., Arbitrator

Award Date: December 19, 2019

Appearances: For the School District – Stephen R. Fogarty, Esq., *FOGARTY & HARA*
For Respondent – Alberto J. Leonardo, Esq., *ZAZALLI FAGELLA*

Introduction and Statement of Relevant Facts

Respondent Laura Amico is employed as a teacher with the School District of the Borough of Cliffside Park (Bergen County). On September 30, 2019, the School District certified tenure charges against Respondent to the Commissioner of Education. On October 18, 2019, the Commissioner referred the charges to arbitration. A hearing was scheduled for November 27, 2019. Prior to hearing, the parties tentatively resolved their dispute. On December 16, 2019, the parties forwarded to the Arbitrator the relevant settlement documents (attached) for approval.

Award

I have reviewed the settlement documents and find that the settlement serves the best interest of the parties and public. Accordingly, the settlement is APPROVED.

WALT De TREUX

SETTLEMENT AGREEMENT

This **SETTLEMENT AGREEMENT** is made and entered into this 11th day of December, 2019, by and between the **CLIFFSIDE PARK BOARD OF EDUCATION**, with offices located at 525 Palisade Avenue, Cliffside Park, New Jersey, 07010 ("Board") and **LAURA AMICO** ("Amico").

WITNESSETH:

WHEREAS, the Board currently employs Amico as a teacher and has done so since September 2, 2003; and

WHEREAS, certain employment issues have arisen between the Board and Amico, resulting in tenure charges against Amico filed with the New Jersey Commissioner of Education by the Board on September 27, 2019; and

WHEREAS, the parties have determined it is in their mutual interests to conclude the employment relationship; and

WHEREAS, Amico has requested a leave of absence with pay for the period beginning September 26, 2019 and ending at the close of business on April 30, 2020; and

WHEREAS, Amico has indicated a willingness to resign from all employment with the Board effective at the close of business on

April 30, 2020, upon satisfaction of certain terms and conditions to be stipulated in this Settlement Agreement ("Agreement"); and

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promise, and in exchange for the consideration more particularly set forth below, it is hereby agreed:

1. No Admission. This Agreement is the compromise of disputed claims and shall never be treated as an admission of liability or wrongdoing by either party for any purpose. All parties shall bear their own attorneys' fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement, except that nothing in this Agreement or the documents referenced herein shall preclude either party from seeking attorneys' fees and costs in an action to enforce performance of any term of this Agreement should there be a default in performance.

2. Resignation. In return for full compliance with this Agreement and subject to formal Board approval and ratification of the Agreement, Amico agrees to sign an irrevocable letter of resignation from all employment with the Board, to be effective at the close of business on April 30, 2020, which shall be in the form attached hereto as **Exhibit 1.** The Board shall, by Resolution, accept Amico's resignation at its next regularly scheduled meeting

on December 11, 2019. Said resignation is effective only upon the full terms and conditions of the Agreement being accepted by Resolution of the Board, and is only then binding upon the parties and irrevocable and is not subject to modification or rescission. Amico agrees that, upon the execution of this Agreement and as a result of her resignation, she shall forfeit all tenure and seniority rights she has to any position with the Board, up until the date of this Agreement.

3. Settlement Terms. In consideration for Amico's resignation as set forth in paragraph 2 of this Agreement and the waiver and release as set forth in paragraph 6 of this Agreement, the Board, by and through this Agreement, shall pay Amico for the period from September 26, 2019 through the close of business on April 30, 2020 her annual prorated salary in the amount of Eighty Thousand, One Hundred Fifty-One Dollars and Fifty Cents ($80,151.50). The total payments shall be less the mandatory taxes, pension, health benefit payment, and/or any other deductions required by her employment with the Board.

It is expressly understood that any personal leave, sick leave, pay for accumulated sick and personal leave and any other financial remuneration to which Amico is otherwise entitled under the Collective Negotiations Agreement shall be subsumed during her

leave of absence, and she shall not be entitled to the cash equivalent. No further leaves shall accrue during her leave of absence. Amico shall not be entitled to any other financial remuneration except as specifically set forth in this paragraph.

The Board further agrees that in consideration for Amico's irrevocable resignation as set forth in paragraph 2 of this Agreement and the waiver and release as set forth in paragraph 6 of this Agreement, the Board shall act promptly to withdraw the tenure charges. Amico acknowledges that pursuant to N.J.A.C. 6A:3-5.6, the tenure charges may be withdrawn or settled only with approval of the arbitrator or the Commissioner of Education in accordance with the applicable legal standards.

In consideration for the Board granting Amico a paid personal leave of absence from September 26, 2019 through the close of business on April 30, 2020, in the amount of Eighty Thousand One Hundred Fifty-One Dollars and Fifty Cents ($80,151.50) less the mandatory taxes, pension, health benefit payment, and/or any other deductions required by her employment with the Board, Amico agrees to withdraw with prejudice the Unfair Practice Charge that was filed against the Board by the Cliffside Park Education Association on her behalf with Public Employment Relations Commission on August 13, 2018, bearing Docket No. CO-2019-050 pursuant to Paragraph 3,

"Settlement Terms," and Paragraph 7, "Mutual Releases" of this Agreement.

The Board shall pay Amico her back pay in full and begin paying her salary as specified in this Agreement in the next payroll period following approval of this Agreement by the arbitrator or the Commissioner of Education. The Board shall make all deferred summer salary payments to Amico.

4. Leave of Absence. Amico shall submit a request for a personal leave of absence from September 26, 2019 through the close of business on April 30, 2020, which is attached hereto as **Exhibit 2.** Amico shall not have any professional responsibilities as a staff member during her paid leave of absence.

5. Mutual Limited Contact Clause. The parties mutually agree that both parties will have limited contact with each other. Effective immediately Amico agrees that her presence on any of the Board's campuses shall be in accordance with the District's Visitors Policy, except to attend school events which are open to the public or to use District facilities, such as sports fields or running tracks that are accessible for public use.

6. Mutual Releases. Amico hereby releases and waives any and all claims, presently known to her or that could be known to

her, which she has or could have against the Board, its individual members, officers, employees, administrators, agents, servants, and representatives, including but not limited to claims for discrimination, contract, tort, constitutional violation, and/or attorneys' fees. Amico shall execute a General Release in favor of the Board, its individual members, officers, employees, administrators, agents, servants, and representatives, releasing them from any and all claims, liabilities, or expenses to which they may be subject arising from any claims or rights of Amico which are presently known or could be known to her. This General Release shall encompass but not be limited to the Unfair Practice Charge filed against the Board by the Cliffside Park Education Association on behalf of Amico with the Public Employment Relations Commission on August 13, 2018, bearing Docket No. CO-2019-050 which Amico shall withdraw with prejudice. The form of the General Release Amico shall execute is attached hereto as **Exhibit 3**. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

The Board and its individual members, officers, employees, administrators, agents, servants and representatives, hereby release and waive any and all claims and rights which the Board

may have against Amico for claims resulting from anything which are known or could be known to the Board at the present time. The form of the Release that the Board shall execute is attached hereto as **Exhibit 4**.

7. Medical Insurance. Amico shall continue to be eligible to receive health benefits or any applicable health care waiver available to any other employee on an annual basis pursuant to the parties' applicable collective negotiations agreement subject to the appropriate payments toward the annual premiums required as an employee of the Board through the close of business on April 30, 2020.

Nothing contained within this Agreement shall alter Amico's rights to continuation of health insurance through Federal law—i.e., the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA")—upon separation from employment with the Board as of the date which coincides with the date that Amico no longer receives health insurance as provided by the Board.

8. No Interference. Each party shall be free from interference, direct or indirect, by the other and neither shall disparage the other party, nor shall they discuss with, disclose to, or communicate with anyone the terms of this Agreement, except their attorneys or accountants who shall hold such communication

as confidential, or as may be required by law. The Board shall be required to adopt a public resolution approving this Agreement and each of the documents which are incorporated by reference in said Agreement.

9. Reliance. This Agreement constitutes the entire understanding of the parties with respect to the subject matter hereof, and there are no representations, warranties, covenants, or undertakings other than those expressly set forth herein. Each party acknowledges that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the parties.

10. Full Understanding. The parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion, or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions and understand them clearly; that the provisions embodied in this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final

satisfaction of all claims and demands which have been raised or which could have been raised in any litigation.

11. Opportunity to Consult with Counsel. Both parties acknowledge that they have consulted with an attorney of their own choosing prior to signing this Agreement and that they sign this Agreement as their own voluntary act and deed and fully understand the duties and obligations enumerated herein.

12. Severability. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

13. Materiality, Modifications, and/or Waivers. All terms of this Agreement are deemed to be material. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable only if made in writing and executed with the same formality as this Agreement. The failure of any party to insist upon the strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature or of a continuation of an existing default.

14. Governing Law. This Agreement shall be subject to the laws of the State of New Jersey, without regard to its choice-of-law principles.

15. Ratification. This Agreement is subject to ratification by the Board and is without prejudice to any party if the terms are not agreed upon. It shall become effective only upon the ratification by and approval of the Board.

16. Section Headings. Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

17. Counterparts. This Agreement may be signed in counterparts which, taken together, shall constitute but a single document when executed by all parties. This Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

18. Knowing and Voluntary Acknowledgement. Amico specifically agrees and acknowledges that: (A) Amico has read this Agreement in its entirety and understands all of its terms; (B) Amico has been advised of and has availed herself of her right to consult with her attorneys prior to executing this Agreement; (C) Amico knowingly, freely, and voluntarily assents to all of its

terms and conditions including, without limitation, the release contained at **Exhibit 3**; (D) Amico is executing this Agreement, including the release, in exchange for good and valuable consideration in addition to anything of value to which she is otherwise entitled; and that (E) Amico is not waiving or releasing any rights or claims that may arise after her execution of this Agreement.

19. Notice of Time to Consider Agreement. Amico is advised that, prior to waiving claims she may have under the Age Discrimination in Employment Act, she may take up to 21 calendar days to consider this Agreement before signing. In the event this Agreement is signed prior to the expiration of 21 days, Amico acknowledges that she has voluntarily and knowingly agreed to waive any entitlement to take 21 days to consider this Agreement for the purpose of expediting the settlement and that she has had a reasonable period of time within which to consider the Agreement.

20. Notice of Time for Revocation; Effective Date. Amico understands that she may revoke this Agreement at any time during the seven (7) calendar days following the day she executes this Agreement. Revocation may be made by delivering a written notice of revocation by mail or hand delivery to: Cliffside Park Board of Education, Attn: Mr. Teddy Tarabokija, Board President, 525

Palisade Avenue, Cliffside Park, New Jersey 07010. This Agreement shall become effective on the day after the 7-day Revocation Period has expired ("Effective Date"), unless timely notice of Amico's revocation has been delivered to the Board.

IN WITNESS WHEREOF, the parties set their hands and seals to this Agreement effective on the day and year first written above.

WITNESS:

LOUIS ALFANO
Business Administrator/
Board Secretary

DATED:

CLIFFSIDE PARK BOARD OF EDUCATION

BY: _____
TEDDY TARABOKIJA
Board President

DATED:

WITNESS:

Albert J. Leonardo, Esq.

DATED: 12/9/19

BY: _____
LAURA AMICO

DATED: 12/9/19

EXHIBIT 1

Ms. Laura Amico
7411 Boulevard East #405
North Bergen, New Jersey, 07047

December 9, 2019

Mr. Teddy Tarabokija
President
Cliffside Park Board of Education
525 Palisade Avenue
Cliffside Park, New Jersey, 07010

Re: Letter of Resignation

Dear Mr. Tarabokija:

I hereby submit my irrevocable resignation from all employment with the Cliffside Park Board of Education effective at the close of business on April 30, 2020, subject to the terms of the Settlement Agreement executed simultaneously herewith and which are incorporated herein by reference.

Sincerely,

Laura Amico

EXHIBIT 2

Ms. Laura Amico
7411 Boulevard East #405
North Bergen, New Jersey, 07047

December 9, 2019

Mr. Teddy Tarabokija
President
Cliffside Park Board of Education
525 Palisade Avenue
Cliffside Park, New Jersey, 07010

Re: Request for Personal Leave

Dear Mr. Tarabokija:

I am requesting a leave of absence for personal reasons, with pay but less any mandatory taxes, pension, health benefit payment, and/or any other deductions required from September 26, 2019 through the close of business on April 30, 2020. During the period of my personal leave of absence with pay, any personal leave, sick leave, vacation leave, pay for accumulated sick and personal leave, and any other financial remuneration to which I am otherwise entitled under the terms of my employment agreement shall be subsumed and shall not accrue, nor shall I be entitled to their cash equivalent.

Sincerely,

Laura A. Amico

Laura Amico

EXHIBIT 3

RELEASE

This Release, dated December 9, 2019, is given

BY the Releasor(s)

LAURA AMICO

referred to as "I" or "Amico,"

TO CLIFFSIDE PARK BOARD OF EDUCATION and its members, officers, employees, administrators, agents, and servants,

referred to as "You" or the "Board."

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims of which I now know or could have known, including those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

> I knowingly and voluntarily release, waive, acquit, disclaim, and forever discharge the Board from any and all claims of which I now know or could have known, and from any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies, or any other proceedings with any administrative agency or any court or any other forum, under any federal, state, or local laws or regulations, including but not limited to claims arising under the Americans with Disabilities Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967 as

amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, New Jersey Wage and Hours law, New Jersey Statutes Title 18A, Education, and/or any other federal, state, or local employment, human rights, civil rights, wage hour, tenure, pension, or labor law, rule, statute, regulation, constitution, or ordinance, and/or public policy, contract or tort law, or any claim of retaliation under such law, or any claim of breach of any contract, collective negotiations agreement or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, constructive discharge, common-law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel, or any action similar thereto against the Board including any claim for attorneys' fees, that I, my heirs, executors, administrators, successors, and assigns now have, ever had, or may hereafter have of which I now know or could have known based upon any conduct arising out of my employment with the Board. Specifically exempted from this Release are any claims for health insurance continuation coverage under and pursuant to the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), the New Jersey Workers Compensation Act, any claim to unemployment benefits to which a party may be entitled and any claim to statutory indemnity from the Board pursuant to N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1. This paragraph is not intended and shall not preclude me from instituting proceedings seeking to enforce the terms of this Release.

Further, I hereby represent that I shall promptly withdraw, with prejudice, the Unfair Practice Charge, Docket No. CO-2019-050, that was filed against the Board on my behalf by the Cliffside Park Education Association with the Public Employment Relations Commission on August 13, 2018 by the Cliffside Park Education Association.

2. **Consideration.** The Consideration for this Release is specifically set forth in the Settlement Agreement to which this Release is attached.

3. **Who Is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and for the benefit of all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation, its proper corporate officers sign and its corporate seal is affixed.

Laura J. Amico
LAURA AMICO

Signed and Sworn before me
on this 9 day of
December, 2019

(seal)
NOTARY PUBLIC Albert J. Leonardo, Esq. (1021582011)
Attorney-At-Law
State of NJ

Prepared by:

/s/ Stephen R. Fogarty
Stephen R. Fogarty, Esq.

EXHIBIT 4

RELEASE

This Release, dated December ____, 2019, is given

BY the Releasor(s)

CLIFFSIDE PARK BOARD OF EDUCATION

referred to as "I" or "Board",

TO

LAURA AMICO

referred to as "You" or "Amico".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you for claims resulting from anything which are known or could have been known to the Board or the Superintendent of Schools at the present time, including those not mentioned in this Release.

2. **Consideration.** In consideration for this Release, Amico has tendered her resignation from all employment with the Board effective at the close of business on April 30, 2020, thereby forfeiting her tenure and seniority rights up until the date of this Agreement, and she has executed a Release in favor of the Board, its members, officers, employees, administrators, agents and servants releasing and giving up any and all claims and rights which she has against them based upon any conduct arising out of Amico's employment with the Board.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

LOUIS ALFANO
Business Administrator/Board Secretary

TEDDY TARABOKIJA
Board President

STATE OF NEW JERSEY,
SS:
COUNTY OF BERGEN

I CERTIFY that on December 11, 2019

LOUIS ALFANO

personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the School Business Administrator/Board Secretary of the Cliffside Park Board of Education, the body corporate named in this document;

(b) this person is the attesting witness to the signing of this document by the proper Board officer who is **Teddy Tarabokija**, the President of the body corporate;

(c) this document was signed and delivered by the Board of Education as its voluntary act duly authorized by a proper resolution of the Board of Education;

(d) this person knows the proper seal of the corporation which was affixed to this document; and

(e) this person signed this proof to attest to the truth of these facts.

LOUIS ALFANO

Signed and Sworn before me on this 12 day of December, 2019.

Margaret M. DiNucci

(seal)
NOTARY PUBLIC

MARGARET M. DINUCCI
Notary Public, State of New Jersey
I.D. No. 2372347
Qualified in Bergen County
Commission Expires April 14, 2023

Prepared by:
/s/ Stephen R. Fogarty
Stephen R. Fogarty, Esq.

RESOLUTION

BE IT RESOLVED by the Cliffside Park Board of Education (hereinafter referred to as the "Board") as follows:

1. The Board hereby approves the request for a leave of absence with pay by Employee number 4624 from September 26, 2019 through the close of business on April 30, 2020.

2. Said employee's resignation, effective at the close of business on April 30, 2020, is hereby approved and accepted.

3. The terms, stipulation and conditions of the Settlement Agreement, dated December 11, 2019, annexed to this Resolution, are hereby adopted and approved by the Board of Education. The Board President and School Business Administrator/Board Secretary are hereby authorized and directed to execute the attached Settlement Agreement, and any other documents necessary to effectuate same.

ROLL CALL VOTE:

AYES: 7

NAYS: 0

ABSTENTIONS: 0

CERTIFICATION

I hereby certify that the within Resolution is adopted by the Cliffside Park Board of Education by a majority vote at its duly authorized meeting on December 11, 2019.

LOUIS ALFANO
Business Administrator/ Board Secretary

DATED: December 11, 2019